IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

LAC case no: CA14/2019

Labour Court case no: C180/2019

In the matter between:

THE BITOU MUNICIPALITY	**Appellant**
and	
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVT.	**First Respondent**
THE SPEAKER: BITOU MUNICIPALITY	**Second Respondent**
THE EXECUTIVE MAYOR: BITOU MUNICIPALITY	**Third Respondent**
LONWABO MNINAWA RONALD NGOQO	**Fourth Respondent**
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Fifth Respondent**
PLETTENBERG BAY RATEPAYERS AND RESIDENTS ASSOCIATION	**Sixth Respondent**

Heard: 16 September 2020

Delivered: The date shall be deemed to be that on which the judgment is e-mailed to the parties.

Coram: Davis JA, Coppin JA and Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

[1] This is an appeal, with the necessary leave, against the judgment of the Labour Court (Nieuwoudt AJ) in favour of the respondents, and in terms of which the following was declared invalid and set aside: (a) a settlement agreement concluded between the appellant and the fourth respondent in terms of which they purport to settle the dispute concerning the appellant's dismissal of the fourth respondent as its municipal manager; and (b) the decision of the appellant to reappoint the fourth respondent to that same position in terms of section 56(1) of the Local Government: Municipal Systems Act[1] ("the Systems Act") and Appointment Regulations.[2]

[2] There are three major issues for determination in this appeal. Firstly, the *locus standi* (i.e. standing) of the first respondent in this appeal in the bringing of the application in the court a quo; secondly, whether the first respondent was entitled to bring that application without first complying with the provisions of section 45 of the Intergovernmental Framework Act[3] ("IGFRA"); and, thirdly, the legality of the settlement agreement and the appellant's re-appointment of the fourth respondent.

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[1] Act 32 of 2000.
[2] Regulations on the Appointment and Conditions of Employment of Senior Managers - (GN 21 published in GG 37245, 17 January 2014) ("Appointment Regulations")
[3] Act 13 of 2005.

[3] The first respondent cross-appealed the order of the court a quo in respect of the following: (a) its refusal to strike out matter from the appellant's answering affidavit in the application brought in that court; and (b) the fact that the court a quo did not hold the fourth respondent personally jointly and severally liable with the appellant for the first respondent's costs in that court.

[4] The fourth respondent did not oppose the relief sought by the first respondent in the court a quo and abided by that court's decision. However, heads of argument were filed on its behalf shortly before the hearing of the matter in this Court. The fourth respondent's counsel argued that he was entitled to make submissions on appeal notwithstanding his stance on the matter in the court a quo. The submissions were in material respects the same as those of the appellant. In light of the cross-appeal of the first respondent relating to the issue of costs, the fourth respondent's counsel was only allowed to make submissions on that issue.

[5] The Plettenberg Bay Ratepayers' and Residents' Association applied to be joined as a respondent, alternatively to be permitted to make submissions in this Court as an *amicus*. Its application for joinder was not opposed and both the appellant and the fourth respondent gave notice of their respective intention to abide by the decision of this Court on the matter. In light of their apparent substantial interest in the matter,[4] the Ratepayers' Association was granted leave to join as an interested party in these proceedings. They are cited as the sixth respondent.

[6] This judgment deals, firstly, with the background facts, which are essentially common cause, secondly, with the question of the first respondent's standing, thirdly, with the question of compliance with IGFRA, fourthly, with the legality of the appellant's re-employment of the fourth respondent, penultimately, with the first of respondent's cross-appeal, and lastly, and very briefly, with the costs and the relief.

Background facts

[4] See, inter alia, *Merafong City Local Municipality v SA Municipal Workers Union & another* (2016) 37 ILJ 1857 (LAC) ("*Merafong City (LAC)*")

[7] The fourth respondent was first appointed as the municipal manager at the appellant on 1 March 2008. On 5 September 2011, he was charged with misconduct relating to the purchase of a certain property. Having been found guilty of certain of those charges in a disciplinary hearing chaired by a retired judge, Judge Combrinck, he was dismissed by the appellant on 7 February 2012.

[8] By March 2012, the fourth respondent had sought and obtained employment at the Sundays River Municipality, even though he had referred an unfair dismissal dispute, in respect of his dismissal by the appellant, to the South African Local Government Bargaining Council ("the SALGBC"). Following an arbitration before a Commissioner in that forum, an award was handed down on 22 October 2012 in which the fourth respondent's dismissal was found to be substantially and procedurally unfair and directing the appellant to reinstate the fourth respondent and pay him back-pay.

[9] During December 2012, the appellant brought an application in the Labour Court to review and set aside that award. On 12 February 2014, the review application was heard in the Labour Court by Lallie J, who handed down an order on 24 October 2014 reviewing and setting aside the SALGBC award and remitting the matter back to that forum for a hearing *de novo* before a different arbitrator.

[10] On 14 November 2014, the fourth respondent, opting not to pursue the arbitration route, brought an application in the Labour Court for leave to appeal Lallie J's order. He reserved his right to supplement that application upon receipt of reasons from the judge.

[11] From about mid-November 2014 to about February 2015, the appellant and fourth respondent attempted to negotiate a settlement of the dismissal dispute. After the fourth respondent, upon enquiry by his attorneys, was referred by the appellant's then attorney of record to the judgment of Lallie J, he filed a supplementary notice of application for leave to appeal in the Labour Court on 22 or 23 March 2017 (i.e. some two years later), and it was not accompanied

by an application for condonation. However, the appellant and fourth respondent continued with attempts to settle the dismissal dispute.

[12] As part of an opinion the appellant obtained from its attorneys as to how it was to react to the fourth respondent's supplementary notice, the appellant was advised, in essence, that the application for leave to appeal would be refused because of the fourth respondent's delay; and that if the fourth respondent chose to pursue the arbitration as ordered by Lallie J, the prospects of success of that arbitration could only be determined at that point, in order to decide whether to oppose, or settle the matter.

[13] By November 2018 the fourth respondent had not prosecuted the application for leave to appeal any further. At the time of argument in this Court, on 16 September 2020, almost six years had passed since that application was brought by the appellant.

[14] During November 2018 the then incumbent municipal manager of the appellant gave notice of his intention to resign. The executive mayor, on behalf of the appellant, then sought candidates to fill the vacancy of municipal manager. The fourth respondent was also approached on 5 November 2018 and he indicated his availability and willingness to be seconded to the appellant. He was then requested to furnish a settlement agreement (i.e. the 2013 proposal) that had to be signed by one Counsellor Booysen of the appellant. It was never signed by Counsellor Booysen and was seemingly never signed by the fourth respondent.

[15] The Executive Mayor also contacted the office of the National Minister to enquire about the possible secondment of the fourth respondent to the appellant. Upon receiving feedback, to the effect that the fourth respondent was available and that he met the competence requirements, the executive mayor requested the fourth respondent's secondment.

[16] On 11 November 2018, the then incumbent municipal manager of the appellant tendered his resignation. Having accepted the notice, the appellant proceeded to advertise the post of municipal manager and requested applications for the same to be submitted by 10 December 2018.

[17] The then incumbent municipal manager was released from his office with effect from 23 November 2018 and a director from within the appellant was appointed to that position in an acting capacity for a maximum period of three months, pending a permanent appointment to that position.

[18] The fourth respondent applied for the position on 10 December 2018. He, inter alia, indicated in his application that he had been dismissed by the appellant for "misrepresentation" and that the matter was before this court. He also stated that he had left the appellant "for better prospects".

[19] Apparently settlement negotiations between the executive mayor and fourth respondent continued. On 11 January 2019, the fourth respondent's attorneys sent a new settlement proposal to the executive mayor and the acting municipal manager (i.e. "the 2019 settlement proposal"). It was initially framed as a settlement agreement to be concluded under the auspices of the SALGBC and also contained a note that the parties had to consider whether to make it an order of the Labour Court, although it had been drafted on the basis that it would be made an arbitration award.

[20] On 10 January 2019, a shortlist of candidates for the post was sent to COGTA (i.e. the Department of Corporative Government and Traditional Affairs). As COGTA was aware of the fourth respondent's dismissal, it cautioned against his re-appointment in light of the ban that applied to such dismissals. Notwithstanding, the fourth respondent was interviewed where he, inter alia, confirmed that he had preferred to approach this court concerning his dismissal.

[21] On 31 January 2019, the appellant's attorneys furnished it with an opinion advising, inter alia, (a) that in order to remove the bar to the fourth respondent's re-employment the settlement had to contain a provision setting aside his dismissal; (b) that the parties should consider making the settlement agreement an order of the Labour Court and in terms of it abandon Lallie J's judgment; alternatively, (c) make it an order of the SALGBC; and (d) that the fourth respondent could not be re-employed unless the bar to his re-employment had been removed.

[22] The appellant obtained an opinion on the matter on an urgent basis from senior counsel. On 18 February 2019, the Council of the appellant passed a resolution, essentially, mandating the executive mayor, Mr Lobese, to: (a) conclude a settlement agreement with the fourth respondent; (b) make an offer of employment to the fourth respondent if he had accepted the full and final settlement; (c) negotiate an employment contract with the fourth respondent; (d) submit a written report regarding the appointment of the fourth respondent to the first respondent (i.e. the MEC); and (e) obtain the "concurrence" of the first respondent regarding the appointment.

[23] The settlement agreement was signed on 21 February 2019. The executive mayor, acting on behalf of the appellant, sent the report, as envisaged in section 54A(7) of the Systems Act, to the first respondent.

[24] After an exchange of correspondence between the State Attorney, acting on behalf of the first respondent, and the appellant's attorneys, the first respondent caused a further letter to be sent to the appellant in which he alleged that there were shortcomings in the report and requested further documentation from the appellant. Upon receipt of the documentation, the first respondent, through the State Attorney, informed the appellant that the appointment of the fourth respondent was irregular and that he would be bringing urgent court proceedings to set it aside, unless the fourth respondent voluntarily vacated the position at the appellant by 17h00 on 12 March 2019.

[25] After another exchange of correspondence, the first respondent brought the application on 18 March 2019 to set aside the settlement agreement, as well as the appointment of the fourth respondent. Seemingly unperturbed, the appellant and the fourth respondent proceeded to formalise the latter's appointment. On 25 March 2019, a written contract of employment was concluded between them.

Proceedings in the court a quo

[26] As mentioned at the outset, the appellant was the only party which opposed the relief sought by the first respondent. The matter was heard on 8 and 9 July 2019 and the impugned order of Nieuwoudt AJ was handed down on 13 August 2019.

[27] Having found that it had jurisdiction to review and pronounce on the lawfulness of the settlement agreement and the fourth respondent's appointment, the court a quo went on to make various findings, including those regarding the first respondent's standing to bring the application. I shall deal with the relevant findings later in this judgment.

[28] The court a quo made the following order: "**1.** The settlement agreement entered into between the [appellant] and the fourth respondent on or about 21 February 2019 is reviewed and set aside. **2.** The appointment of the fourth respondent by the [appellant] on or about 21 February 2019 is reviewed and set aside. **3.** The further application to strike out by the [appellant] is refused.**4.** The [appellant] is ordered to pay the [the first respondent's] costs, inclusive of costs of two counsel, save for the costs occasioned by the portions of the papers of the [first respondent] that had been struck out and the responses thereto."

The first respondent's standing

[29] The court a quo held that the first respondent had *locus standi* to bring the application because of his obligations in terms of section 54A of the Systems Act and the Appointment Regulations. The first respondent had averred that in bringing the application he was acting in terms of his "monitoring and support function contained in sections 154 and 155 of the Constitution of the Republic of South Africa, 1996 (Constitution) and compliance duties contained in section 54A of the Systems Act".

[30] The court a quo concluded that what had to be decided was whether the first respondent "was entitled and obliged to act in terms of the provisions of s 54A(8) of the Systems Act…despite the fact that it had become invalid prior to the institution of the proceedings." The section provided that if a person was appointed in contravention of section 54A the MEC for local government had, within a stipulated time, to take appropriate steps to get the municipal council to comply with the section. The steps included approaching a court for a declaration on the validity of the appointment, and for other relief.

[31] The court a quo rejected the argument made on behalf of the appellant that in those circumstances the first respondent had no *locus standi*. It upheld the argument made on behalf of the first respondent that if he did not have standing in those circumstances, i. e. was unable to exercise the rights and obligations that he had under the Systems Act, it would be tantamount to making the declaration of invalidity of that section retrospective. The court a quo accordingly found that the first respondent (i.e. the applicant in that court) had the necessary standing to bring the application.

[32] Section 54A also, *inter alia,* required the Municipal Council in respect of the appointment of a municipal manager, to inform the MEC for Local Government of the appointment process[5] and of the outcome of that process (as prescribed). The MEC, in turn, was obliged to provide the Minister responsible for Local Government with that information[6].

[33] In terms of section 54A(9), if the MEC failed to take the steps as contemplated in section 54A(8) the Minister was empowered to do so.

[34] It was clearly implied in section 54A(8) that the MEC had a duty to satisfy himself/herself that the appointment process and outcome was in compliance with the Systems Act. The MEC and the Minister's determination of compliance was not confined to a consideration of information provided by the Municipal Council, because the information may not have disclosed, for example, that certain information had not been taken into account, or that the information was not canvassed with the appointee and investigated and properly taken into account when the appointment was made.[7]

[35] In *South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs*[8] ("SAMWU") the Constitutional Court had declared the legislation that introduced, inter alia, section 54A into the Systems Act, namely, the Local Government: Municipal Systems Amendment Act[9] ("the

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[5] See, inter alia, section 54A(2A)(b) and section 54A(7).
[6] Section 54A(7)(c).
[7] See: *Merafong City* (LAC).
[8] 2017 (5) BCLR 641 (CC) (9 March 2017) ("*SAMWU*").
[9] Act 7 of 2011.

Amendment Act") invalid, but suspended the declaration of invalidity for a period of 24 months. And even though it omitted to state expressly in the order that the declaration operated prospectively, effectively, the judgment of the majority made that ruling[10]. Khampepe J, writing for the majority, stated:

> "A great host of decisions and actions have been taken across all five provinces under the Amendment Act. To allow the invalidity to operate retrospectively would plainly cause disruption to the orderly and effective administration of municipalities. This would be untenable. For these reasons, the declaration of invalidity must operate prospectively."[11] (emphasis added)

[36] The Amendment Act also introduced section 57A into the Systems Act, which is discussed later. It is noteworthy that the Amendment Act was not declared invalid because of the substantive contents of sections 54A or 57A, but because the wrong procedure had been followed with its enactment.

[37] In light of that declaration of invalidity the appellant had argued in the court a quo that the first respondent could not rely on section 54A as a basis for his standing in bringing the application, because the period of suspension of the declaration came to an end on 9 March 2019, and the first respondent only brought the application thereafter, on 18 March 2019, by when, according to this argument, the first respondent no longer had the necessary standing. The same argument was made on behalf of the appellant on appeal.

[38] It was submitted on behalf of both, the first respondent and the sixth respondent, that the court a quo was correct in its finding and that the argument of the appellant, which was essentially to the effect that the declaration of invalidity operated retrospectively, was untenable.

[39] In this Court, the appellant's counsel in argument clearly accepted that for the duration of the period of suspension of the declaration the provisions of section 54A of the Systems Act were valid and enforceable, and that the first respondent was obliged to comply with them. As the appointment of the fourth

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[10] Ibid paras 85 and 86.
[11] Ibid para 86.

respondent by the appellant occurred within this period, i.e on 21 February 2019, it was subject to those provisions.

[40] The rationale for suspending the declaration of invalidity and ordering that it shall operate prospectively, is to promote justice and equity,[12] which includes the avoidance of "the dislocation and inconvenience of undoing transactions, decisions or actions taken under (the invalidated) statute".[13]

[41] It is clear from the common cause facts that, upon being made aware of the appointment, the first respondent engaged the appellant concerning its regularity and legality, as he was entitled to in terms of section 54A(8) of the Systems Act. It could clearly not be reasonably expected of him to immediately rush to court. That would have been the ultimate step in a process.

[42] To effectively rule, as the appellant would have it, that when the suspensive period came to an end the first respondent was barred from taking the ultimate step of issuing court process, appears to be inconsistent with the very rationale for the suspension and prospectivity of the declaration. That would plainly be disruptive of the process which had been embarked upon by the first respondent when he was clearly obliged to do so in terms of the applicable legal regime at the time.[14] It is clearly not in the interest of justice and equity to allow such disruption or dislocation.

[43] Nevertheless, the first respondent, as MEC, also has a monitoring and oversight role regarding the employment, discipline and re-employment (i.e. in municipalities) of senior managers, including municipal managers, in terms of the Appointment and Disciplinary Regulations[15] that were promulgated in terms of section 120 of the Systems Act. Since these regulations were not affected by

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[12] See S 172(1)(b)(i) and (ii) of the Constitution (1996); *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others (MEC for Local Government and Traditional Affairs–Kwazulu –Natal and others intervening: SA Property Owners Association and Another as amici curiae)* 2010 (9) BCLR 859 (CC) paras 73 and 85; *Cross-Border Transport Agency v Central African Road Services (Pty) Ltd and Another (Road Freight Association as amicus curiae)* 2015 (7) BCLR 761 (CC) paras 21-22.

[13] See *SAMWU* (above) para 85; *S v Zuma* 1995 (2) SA 642 (CC) para 43; *Minister of Police v Kunjana* 2016 (2) SACR 473 (CC) para 35.

[14] See *SAMWU* (above) para 86.

[15] Local Government: Disciplinary Regulations for Senior Managers (2010) GN 344, GG 34213, 21 April 2011 ("Disciplinary Regulations").

the declaration of invalidity in *SAMWU*, they were valid and applicable at the time of the fourth respondent's dismissal and his re-employment by the appellant.

[44] Moreover, in light of the circumstances of this case as well as the approach to standing under the Constitution, it can hardly be contended, in a matter of obvious public interest, such as the present, that the first respondent has no *locus standi* to challenge the appointment of a public servant by a public body, i.e the appellant. The adoption of a formalistic and technical approach to standing, as contended for by the appellant, is not appropriate in this matter.

[45] In *Merafong City (LAC)*,[16] this Court, in dealing with the issue of standing in the context of the appointment of a municipal manager, rejected the narrow, formalistic approach to the issue, and instead, applied the broad flexible approach to standing adopted by the Constitutional Court in, inter alia, *Ferreira v Levin NO and Others: Vryenhoek v Powell and Others ("Ferreira")*[17] and followed by the High Court in *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape and Others*[18], to the appointment of a municipal manager, which is, quintessentially, a public interest matter. In terms of the latter approach emphasis is placed on the court's discretion to determine whether there is sufficient interest in light of the circumstances.

[46] The "*narrow, formalistic approach*" is inappropriate in matters with a public interest element, or in matters of a constitutional (including administrative law) nature. In *Ferreira* O'Regan J gave the reason, as follows:

> 'Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both a victim of the harm and the

[16] *Merafong City (LAC)* (see above).
[17] 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) para 163.
[18] 1998 (4) SA 908 (Tk).

> beneficiary of the relief. In litigation of a public character, however that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition the harm alleged may often be quite diffuse or amorphous."[19]

[47] This matter is not one of private litigation. It clearly has a public law character. The application was brought by the first respondent in the public interest, namely, for the setting aside of the appointment, by a state organ (i.e. the appellant), of the municipal manager, a public office-bearer.

Compliance with IGFRA

[48] Section 45(1) of IGFRA provides: "No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this chapter were unsuccessful."

[49] In dealing with the argument made on behalf of the appellant in the court a quo, namely, that the first respondent was not entitled to approach that court because he did not first comply with section 45(1) of IGFRA, the court a quo, relying on what was held by the High Court in *City of Cape Town v Premier, Western Cape and Others,*[20] concluded that it had a discretion to entertain the matter even though the parties did not make every reasonable effort to settle the dispute before, and that taking into account the facts, the urgent court application brought by the first respondent was justified. The court a quo also took into account the provisions of section 39(1)*(a)* of IGFRA, to the effect that the chapter referred to in section 45(1) of that Act does not apply to disputes in respect of which other national legislation provides resolution mechanisms, or procedures.

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[19] See at para 229.
[20] 2008 (6) SA 345 (C) para 17.

[50] During argument in the appeal hearing, in this Court, the appellant repeated the stance it took in the court a quo, though with less conviction.

[51] Section 39(1)*(a)* of IGFRA provides the complete answer. It can hardly be contended that section 54A of the Systems Act is not "other national legislation" that provided resolution mechanisms and procedures, as envisaged in section 39(1)*(a)*. The court a quo's conclusion, that the first respondent did not have to first comply with section 45(1) of IGFRA, is thus unassailable.

The legality of the fourth respondent's re-appointment

[52] The first respondent contended, essentially, that the appellant and the fourth respondent could not, effectively, set aside the fourth respondent's dismissal without the court's sanction, or a ruling by the SALGBC. According to this argument, what the appellant and fourth respondent did in order to try and secure the fourth respondent's re-appointment as municipal manager at the appellant, was tantamount to an abandonment (albeit purported) of the judgment of Lallie J, which had the effect of reviving the fourth respondent's dismissal by the appellant (i.e. following the disciplinary hearing chaired by retired Judge Combrinck) and of the findings and sanction of Judge Combrinck. According to this argument, as the judgment of Lallie J was one *in rem*, and as the appellant was bound by those findings and sanction, that was not legally permissible. The re-employment of the fourth respondent was also in breach of the ban contemplated in the Appointment Regulations.

[53] In support of this argument counsel for the first respondent had relied in the court a quo on the decisions of the Labour Court in *Saldana Bay Municipality v SA Municipal Workers Union on behalf of Wilschut & others, ("Saldana"),*[21] and of this Court in *Hendricks v Overstrand Municipality & another ("Overstrand"),*[22] and submitted that those decisions supported the principle that municipalities were constrained to approach courts in respect of disputes relating to the dismissal of municipal officials.

[21] (2016) 37 ILJ 1003 (LC).
[22] (2015) 36 ILJ 163 (LAC).

[54] The court a quo held that the judgments in *Saldana* and *Overstrand* were not authority for the point advanced on behalf of the first respondent; that even though a judgment of the Labour Court in an ordinary dismissal dispute is not a judgment *in rem,* the position was different in the case of the dismissal of a municipal manager. The court a quo reasoned that there was a difference between the dismissal of a private-sector employee and a public-sector employee, such as a municipal manager. The latter had important statutory obligations and occupied an important position in the municipality. Not only was such an official's dismissal recorded in a register kept by the National Department of Cooperative Government and Traditional Affairs, but, moreover, if he was dismissed for specified misconduct, he could not be re-employed as a senior manager by any municipality for a specified period.

[55] According to the court a quo, the dismissal of a municipal manager was "akin to the expulsion of a member from a profession", which was considered to be an example of a judgment *in rem* in *Tshabalala v Johannesburg City Council.*[23]

[56] In response to an argument made on behalf of the appellant in the court a quo, namely, that the court's involvement in the case of the dismissal could not be a requirement, because it would mean that parties to a dismissal dispute could never settle such a dispute before a Bargaining Council even if the employer had been advised that it had no prospect of success - the court a quo, in effect, held that that would indeed be the case where the judgment was one *in rem*, such as where it pertained to the dismissal of a municipal manager.

[57] The court a quo concluded on that point: "... The review judgment was a judgment *in rem* and accordingly [the appellant] and the fourth respondent were not competent to enter into a settlement agreement in terms whereof [the appellant] abandoned the judgment. As a matter of law, the parties were required to approach the court and request it to approve the settlement agreement... Accordingly the settlement agreement falls to be set aside."

[58] In addition, the court a quo found that it was not competent for the appellant to appoint the fourth respondent because it was a condition of the appointment,

[23] 1962 (4) SA 367 (T) at 308H-309A.

according to the resolution of the appellant of 18 February 2019, that a settlement of the dismissal dispute be concluded and that the condition had not been fulfilled.

[59] In this Court, it was submitted on behalf of the appellant that the court a quo had erred in concluding that the judgment of Lallie J was a judgment *in rem*, because the judgment was, firstly, wholly unconcerned with the fairness or validity of the fourth respondent's dismissal and only dealt with the validity of the arbitration award and that "by conflating the municipality's dismissal decision with an arbitration award" the court a quo had "injected an unwarranted requirement for the settlement of the dismissal dispute involving a municipal manager"; and, secondly, the court a quo sought to "elevate the dismissal decision itself so as to remove it from the types of dispute, or claim, the Council may settle under section 109(2) of the Systems Act", whereas there was no judgment pronouncing on the procedural and substantive fairness of the fourth respondent's dismissal.

[60] Section 109(2) of the Systems Act reads: "a municipality may compromise or compound any action, claim all proceedings and may submit for arbitration any matter other than a matter involving a decision on its status, powers, or duties, or the validity of its actions or by-laws."

[61] According to the appellant's argument, the mere fact that in terms of regulation 18 (7) of the Appointment Regulations municipalities were required to submit a record of staff members dismissed for misconduct to the first respondent and to the national Minister, did not change the judgment of Lallie J into one *in rem*. Thus, according to this argument, the legislative scheme which implemented the statutory ban against re-employment (including the keeping of a record) did not require the court to sanction a settlement agreement.

[62] In addition, the appellant, referring to a decision of the Labour Court[24] and of this Court[25], where it was effectively held that a decision concerning the fairness of a dismissal was a judgment *in personam*, submitted that neither the status

[24] *Maartens & others v SA National Parks* (2004) 25 ILJ 2222 (LC)
[25] *Imperial Cargo (Pty) Ltd v SA Transport Allied Workers Union* (JA79/2013) [2015] ZALAC 81 (5 March 2015)

of a municipal manager in local government legislation, nor the fact that the dismissal of such an official is recorded, provides a sound basis "to elevate the decision of Lallie J to a judgment *in rem*".

[63] On behalf of the first respondent, it was essentially argued that the fourth respondent's dismissal could not be abandoned, or effectively set aside, without the sanction of the court and/ or that of the SALGBC, and that, the dismissal stood.[26]

[64] The argument on behalf of the sixth respondent was essentially in support of the thrust of the first respondent's argument on the issue, namely, that there was an effective ban in place on the re-employment of the fourth respondent, and that the appellant and the fourth respondent could not, without the intervention of the courts (or at least the SALGBC), set aside the dismissal and neutralise the ban.

[65] Whereas the first respondent relied mainly on Regulation 18(1) of the Appointment Regulations, the sixth respondent relied on the ban contemplated in section 57A(3) of the Systems Act, which provided in essence that a staff member dismissed for financial misconduct as defined in section 171 of the MFMA, or for corruption or fraud, could not be re-employed by a municipality for a period of 10 years.

[66] The sixth respondent also addressed the issue of waiver that had been raised by the appellant. The appellant's argument on that point was basically that by entering into the settlement agreement with the fourth respondent it had effectively waived the dismissal of the fourth respondent and the ban on his re-employment. The sixth respondent submitted that this argument was fallacious as it ignored the purpose and object of the ban contained in section 57A(3), which was to deprive the relevant parties, i.e. the municipality and the dismissed employee, of the discretion to waive the dismissal for financial misconduct. It further submitted that such a "contrivance" was not permissible

[26] Reference was made to, inter alia, by the SCA in *Pepcor Retirement Fund v Financial services Board* 2003 (6) SA 38 (SCA) para 10; and in *Ntshangase v MEC: Finance, KwaZulu Natal & Another* [2009] 12 BLLR 1170 (SCA) paras 13 and 17; and by the Constitutional court in *Merafong City v Anglogold Ashanti* Ltd 2017 (2) SA 211 (CC) paras 41-42 ("*Anglogold*").

in terms of section 57(A)(3), as its object would be effectively negated if such waiver was permitted.

Discussion

[67] In the light of the submissions made on appeal, it is necessary to commence the synthesis with a consideration of the nature of a judgment (or ruling) *in rem*. This will then be followed by a consideration of the arguments of the appellant and the first respondent concerning the nature of the judgment of Lallie J, the implications of Regulation 18 of the Appointment Regulations, the implications of the Disciplinary Regulations, including their validity and applicability. Thereafter, the submissions of the sixth respondent concerning the applicability and validity of section 57A(3) in light of the decision in *SAMWU*, and the issue of waiver shall be evaluated.

In rem

[68] In *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*[27] the Constitutional Court described a judgment *in rem* as one that "determines the object of status of a person of thing… [It] has a public character that transcends the interests of only the litigating parties…."[28] The Constitutional Court also pointed out that "our law already recognizes that judgments *in rem* are not subject to mere settlement…"[29] It referred with approval, inter alia, to what the Supreme Court of Appeal found, in the context of intellectual property law, in the *Marine Technologies* case, namely, that the judgment appealed against in that matter was one *in rem* "in that it [affected] a public register" and that notwithstanding the settlement in the matter, Marine was constrained to proceed with the appeal.[30]

[69] Regulation 18 of the Appointment Regulations envisages a ban on the re-employment by a municipality, within a specified period, of a person who was dismissed as a senior manager (including municipal manager) for specified

[27] 2019 (5) SA 1 (CC) paras 2-3.
[28] Para 2.
[29] Para 3.
[30] Para 3.

kinds of misconduct.[31] Municipalities are obliged to keep records of such employees[32] and to submit those records to the relevant MEC responsible for local government and to the national Minister responsible for local government.[33] The dismissal by a municipality of such persons for the kinds of misconduct specified in those regulations and the litigation between them in that regard, by virtue of those regulations, transcends the interests of those parties and even binds other South African municipalities that were not party to the litigation.

[70] Consequently, it is not far-fetched or specious to regard judgments, rulings or findings pertaining to such dismissals as being *in rem*, and as not being susceptible to mere settlement by the litigating parties without the intervention of the court, or the CCMA or bargaining council. Such dismissals are the exception to the general rule, namely, that ordinarily orders in respect of dismissals are *in personam,* in that they only apply to the litigating parties and do not transcend the interests of those parties.

[71] It is also significant that the Disciplinary Regulations oblige a municipal council ("municipality"), intending to discipline a municipal manager, to first appoint an independent investigator to investigate the charges of misconduct,[34] and obliges the municipality to, by way of resolution, institute disciplinary proceedings against that person if, according to the investigator's report, there is evidence to support the charge(s) of misconduct.[35]

[72] The municipality is also obliged (in such resolution) to appoint an independent, external presiding officer, who must conduct the hearing and who may determine the hearing procedure.[36] If the municipality does appoint such a presiding officer it is bound by his, or her, decision[37] and must implement the sanction imposed by the presiding officer[38] and report the outcome to the MEC

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[31] Reg. 18(1) read with Reg.18(4) and Schedule 2 of the Appointment Regulations.
[32] Reg. 18(6).
[33] Reg. 18(7).
[34] Reg.3(4) read with Reg. 5 of the Disciplinary Regulations.
[35] Reg.5.
[36] Reg.5.
[37] Reg. 12(3).
[38] Reg. 12(3).

responsible for local government in the relevant province.[39] If the municipal manager is found guilty of financial misconduct, the municipality must also report the outcome of the disciplinary hearing to the MEC responsible for finance in the relevant province and to the Auditor-General.[40]

[73] In respect of pre-dismissal arbitrations involving the municipal manager, regulation 11 of the Disciplinary Regulations allows the municipal council, instead of appointing an external, independent presiding officer, to request the CCMA to conduct an arbitration into allegations of misconduct (i.e. as contemplated in section 188A of the Labour Relations Act[41]). However, even in that instance, and of major significance to the issue under consideration here, the regulation provides that the decision of the CCMA arbitrator shall be final and binding "and only be subject to review by the Labour Court."[42]

Power to settle

[74] In light of those regulations section 109(2) of the Systems Act, which empowers municipalities to enter into settlements, cannot be interpreted in isolation, without taking into account the objects and purposes of the regulations which have been referred to above. Unless that is so, the very (laudable) objects of those regulations could easily be undermined and even be effectively negated.

[75] The regulations do not deprive municipalities of their power to compromise or compound any action, claim or proceeding involving the dismissal of its employees, but obliges the municipality in the case, at least, of the dismissal and re-appointment of a senior officer, such as municipal manager, to have recourse to the courts, or the CCMA (or, clearly, the relevant bargaining council). That is in order to ensure that the objectives of those regulations are not undermined or negated.

[76] It is uncontested that the fourth respondent was a municipal manager at the time of his dismissal, and what is also clear is that the Disciplinary Regulations

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[39] Reg. 19(1) read with Reg. 12(3)(b).
[40] Reg. 12(3)(c).
[41] Act 66 of 1995.
[42] Reg. 11(2).

applied to his discipline for misconduct. The appellant opted, as it was empowered to in terms of the Disciplinary Regulations, to appoint an external, independent presiding officer, Judge Combrinck, and it was bound by his decision that the fourth respondent was guilty of misconduct, and by the sanction of dismissal imposed by him. If the municipality and the fourth respondent could undo all of this on their own by virtue of a mere settlement, they could effectively undermine or negate the regulations (and the other applicable legal provisions, which are considered below).

[77] The appellant and fourth respondent were constrained to approach the court, or the SALGBC, if they wished to set aside the decision of Judge Combrinck.

[78] The judgment of Lallie J is *in rem* as it relates to the dismissal of a municipal manager, to whom the appointment and disciplinary regulations applied. It ordered the setting aside of the SALGBC's award, in terms of which it was found that the fourth respondent had been unfairly dismissed, and it restored the status quo as at the time of the fourth respondent's dismissal by the appellant (i.e. acting upon Judge Combrinck's findings and sanction). The SALGBC process was to begin afresh. The judgment thus also affected the fourth respondent's employment status.

[79] Even though the fourth respondent filed an application for leave to appeal against the order or judgment of Lallie J, that process was never further prosecuted, and consequently lapsed (long before the purported settlement).

[80] At the time of the settlement and re-employment of the fourth respondent by the appellant, the order of Lallie J was still effective, and the dismissal of the fourth respondent by Judge Combrinck, which the appellant was obliged to accept and implement, still stood.[43] And, as stated above, none of that could be undone by a mere settlement entered into between the appellant and fourth respondent. They could not, as it were, resort to "self-help". They were constrained by law to approach the court or, at least the SALGBC.[44]

[43] Compare, inter alia, *Anglogold* (above) paras 41-42.
[44] Ibid.

[81] It is also significant that even though the appellant and the fourth respondent agreed in terms of their settlement that the dismissal of the fourth respondent was unfair, the appellant did not (and could not without the intervention of an adjudicative body, such as the court or the SALGBC) set aside the dismissal, but, instead, (albeit purportedly) entered into a new employment agreement with the fourth respondent on 21 February 2019 in respect of the same position that the fourth respondent was previously dismissed from.

[82] Since the dismissal stood as aforesaid, and with it, the prohibition contemplated in the regulations, the settlement and purported re-appointment of the fourth respondent was unlawful and invalid and was properly set aside by the court a quo.

Validity of the Regulations

[83] There was some argument about whether the regulations were valid and effective at the time of the (purported) settlement and re-employment of the fourth respondent by the appellant. The argument was nothing more than a diversion. They were valid at all material times. The Disciplinary Regulations were made by the responsible Minister on 21 April 2011, before the Amendment Act was assented to[45], in terms of section 120 of the Systems Act and the Appointment Regulations were made by the responsible Minister in terms of section 120, read with section 72 of the Systems Act. The Appointment Regulations do not (expressly) refer to sections 54A, 56A or 57A and other provisions of the Systems Act, and although it deals in Regulation 18 and Schedule 2 with matters, which in terms section 57A of the Systems Act, require prescription by regulation, the bulk of its provisions pertain to other aspects of the employment of senior managers which are not envisaged in section 57A, or in section 54A, of the Systems Act. Further, none of the Regulations were mentioned in *SAMWU* as having been affected by the declaration of invalidity of the Amendment Act.

Financial Misconduct

[45] The Amendment Act (Act 7 of 2011) was assented to on 2 July 2011 and commenced on 5 July 2011.

[84] There was also argument about whether Judge Combrinck had found the fourth respondent guilty of "financial misconduct," as contemplated in Schedule 2 of the Appointment regulations[46]. It is to this issue that we now turn, because it is relevant to the period of the ban on fourth respondent's re-employment by a municipality.

[85] "[F]inancial misconduct" is but one of the categories of misconduct to which the ban contemplated in Regulation 18 (1) of the Appointment Regulations applies. Together with misconduct of corruption and fraud, it is the most serious category. It carries a ban of 10 years. Another category of misconduct which is mentioned in that regulation, is misconduct involving elements of dishonesty and negligence which carries a ban of five years. There are also other categories of misconduct in respect of which shorter periods of prohibition apply. The shortest period being two years.

[86] The first category is described more fully as – financial misconduct contemplated in section 171 of the Municipal Finance Management Act[47] ("MFMA"), corruption and fraud. Section 171 of the MFMA deals with financial misconduct by municipal officials. Section 171(1) provides that an accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently – (a) contravenes a provision of the MFMA; (b) fails, as accounting officer, to comply with a duty imposed on him (or her) by the MFMA; (c) makes or permits, or instructs another official of the municipality to make an unauthorised, irregular, or fruitless and wasteful expenditure, or; (d) provides incorrect or misleading information in any document, which in terms of the MFMA must: (i) be submitted to the mayor or council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or (ii) must be made public.

[87] In Regulation 1 of the Disciplinary Regulations "financial misconduct" is defined as any misappropriation, mismanagement, waste or theft of finances of a

[46] In Schedule 2 Column 3 specifies the period of the prohibition, and column 2 specifies the category of misconduct.
[47] Act 56 of 2003.

municipality and also includes any form of financial misconduct contemplated in section 171 of the MFMA.

[88] The main emphasis of the appellant's argument, to the effect that the fourth respondent was not found guilty of "financial misconduct", was that the actual term does not appear in the charges of misconduct or in the findings of Judge Combrinck. However, that seems to be a misconception, because, while an express statement to that effect may have been helpful, its absence does not mean that the fourth respondent was not found to have committed "financial misconduct". One must not be misled by the absence of the use of that very term, but ought to consider objectively the nature of the misconduct the fourth respondent was found to have committed, which is apparent from the charges, the evidence and the findings of the presiding officer.

[89] The fourth respondent was charged with, inter alia, transgressing Regulation 61 (1) in terms of which an accounting officer of a municipality is obliged to act with fidelity, honesty, integrity and in the best interest of the municipality in managing its affairs and seek, within the sphere of his influence as accounting officer, to prevent any prejudice to the financial interests of the municipality.

[90] The charges clearly concern financial misconduct. The fourth respondent's alleged misconduct related to the purchase of a certain property by the appellant, in which he was involved. He was found to have known of far lesser valuations of that property than the price which he was prepared to pay for it (i.e. he was prepared to pay much more for the property than what it was valued at). Judge Combrinck, inter alia, found in that regard that the fourth respondent did not act with fidelity, honesty and integrity and had mismanaged the funds made available for the purchase of the property. Such conduct clearly falls within the definition of "financial misconduct" which, in terms of the Appointment Regulations, attracted a re-employment ban of 10 years, which would only expire in February 2022.

Breach of the ban on re-employment

[91] The appointment of the fourth respondent was thus also in breach of the ban in the Appointment Regulations, and the order of the court a quo setting aside his appointment was also justifiable for that reason.

[92] As pointed out earlier, the ban against re-employment contained in section 57A (3) of the Systems Act is very similar to that contemplated in Regulation 18(1) of the Appointment Regulations. The financial misconduct contemplated in that section is also the same as that contemplated in the said regulation.

[93] Arguably, Regulation 18(1) was promulgated by the Minister in fulfilment of the injunction in section 57A(2), which required the Minister to prescribe different periods of expiry, as contemplated in subsection (1), and which, in turn, provided that any staff member dismissed for misconduct may only be re-employed by a municipality after the expiry of a prescribed period. But section 57A(3) is not dependent on Regulation 18. It is self-standing. The section provides: "notwithstanding subsections (1) and (2), a staff member dismissed for financial misconduct contemplated in section 171 of the [MFMA], corruption or fraud may not be re-employed in any municipality for a period of 10 years."

[94] As with Regulation 18(1), the language of section 57A(3) is absolute and unqualified – if a staff member contemplated in that section is dismissed for the reasons contemplated there, the ban is automatically triggered. The ban in this matter was triggered when the appellant was dismissed by the fourth respondent for conduct that objectively meets the definitional criteria of "financial misconduct".

[95] If section 57A(3) of the Systems Act was valid and applicable at the time of the (purported) settlement and re-employment of the fourth respondent then they were also invalid for being in breach of the ban contemplated in that section.

[96] As mentioned when dealing with the issue of standing of the first respondent, even though section 57A(3) of the Systems Act was part of the suit of provisions affected by the declaration of invalidity of the Amendment Act in *SAMWU*, its invalidity was effectively suspended for a period of 24 months that was to expire on 9 March 2019. Section 57A(3) was thus valid and applicable at the time of the resolution of the appellant on 18 February 2019 authorising the settlement

and re-employment of the fourth respondent, and the (purported) conclusion of the settlement agreement and re-employment of the fourth respondent on 21 February 2019. The formal employment agreement, even though signed on 25 March 2019, being based on invalidity and illegality, was thus also invalid.

Appellant's alternative argument regarding the ban

[97] In the alternative, and on the supposition that the section and/or the Appointment Regulations were found to have been valid and applicable at the material times, the appellant relied on Regulation 18(2) of the Admission Regulations, arguing, in essence, that the ban was not applicable to a senior manager who had "lodged a dispute in terms of the applicable legislation".

[98] Not only is the appellant's reliance on Regulation 18(2) misplaced, but it is also based on a misinterpretation of that regulation. Regulation 18(2) cannot be construed out of context and without reference to the other (relevant) Appointment and Disciplinary Regulations. Properly construed, it does not mean that a senior manager, to whom the ban would otherwise apply, can, as it were, neutralise it, by merely lodging a dispute, irrespective of its merits, and doing nothing further to have it finally resolved. That would negate the object and purpose of the ban. It is certainly required of such a person to do everything possible to further prosecute that process to its finality and in his or her favour.

[99] In this instance, it is clear that this never happened. The fourth respondent deliberately chose not to follow the process envisaged in the order of Lallie J and, either deliberately, or through gross neglect, failed to prosecute the application for leave to appeal that order to finality. Instead, he effectively and unequivocally, abandoned that process, which (in any event), had also lapsed by the effluxion of time. Together with the appellant, the fourth respondent purported to overcome the ban by means of the settlement, but they did not (and could not on their own) set aside the dismissal, which stood.

[100] Lastly, the appellant did not have the power to waive the dismissal. Its power in that regard, like its power to settle, as contemplated in terms of section 109(2) of the Systems Act, is subject to the legislative provisions referred to above, that effectively constrain it to seek the intervention of the court, or more

appropriately in this matter, the SALGBC, where the dismissal dispute was to be dealt with afresh, according to the judgment of Lallie J.

Cross-Appeal

[101] Turning to the first respondent's cross-appeal, essentially, two issues were raised there, namely, the striking out of irrelevant matter from the answering affidavit filed by the appellant in the court a quo, and in respect of which no order was made, and secondly, the cost award made by that court, and particularly in terms of which it did not hold the third and fourth respondents personally, jointly liable with the appellant.

[102] In respect of the first issue, the argument on behalf of the first respondent was essentially that the court a quo erred in refusing to strike out paragraphs from the appellant's answering affidavit dealing with the merits of the fourth respondent's dismissal and in terms of which the appellant appeared to rationalise the settlement agreement. According to the first respondent's argument those averments were irrelevant, because the fourth respondent's re-employment could not be lawfully effected through a settlement agreement which was not authorised by the court and the settlement was *per se* invalid.

[103] The application to strike out matter seems to me to have been misconceived. I am not convinced that the court erred in refusing that application. The court a quo had a discretion in that regard and was not obliged in terms of the applicable rules to strike out the matter.[48] In any event, the irrelevance of the matter was not established. "Irrelevant matter" are averments, or allegations that do not apply to the matter at hand and do not contribute in one way or the other to a decision of the matter at hand.[49]

[104] In dealing with the merits of the application of the first respondent, the court a quo was not distracted and focussed on the real issues, namely, those pertaining to the legality of the fourth respondent's re-employment by the appellant. It concluded that the fourth respondent's dismissal could not be

[48] See: inter alia, *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G.
[49] See, inter alia, *Steyn v Schabort* En Andere NNO 1979 (1) SA 694 (O) at 698A.

undone by the appellant and fourth respondent in a mere settlement and employment agreement without judicial intervention.

[105] In respect of the second issue, unless it is shown that the court a quo erred in the exercise of its discretion in making the costs order, this point is effectively stillborn. It is trite that a court has a wide discretion with regard to the award of costs. The court a quo did indeed consider the first respondent's submissions regarding costs, including the request that the third and fourth respondent's be held personally liable for the costs, jointly with the appellant. It is mentioned in the judgment that "the prayer was moderated to only the third respondent", referring to the Executive Mayor of the appellant and apparently alluding to the fact that the personal costs order was no longer being sought against the fourth respondent and was only directed at the Executive Mayor, i.e. the third respondent in that court (and in this court). In any event, the court a quo adequately motivated why such a cost order was inappropriate.

[106] Besides the fact that it had not been shown that the court a quo had exercised its discretion wrongly, the first respondent's counsel, in his argument in reply, seemingly, abandoned this aspect of the cross-appeal. He indicated that the first respondent was no longer seeking a personal costs order against the fourth respondent. Consequently, the cross-appeal cannot succeed.

Costs and other relief

[107] Taking into account all the relevant facts and circumstances, including the fact that argument on the cross-appeal occupied this Court very briefly and took up a small part of the record, a separate cost order in respect of the cross-appeal is not proposed.

[108] In the result, it is ordered that:

1. The appeal is dismissed.

2. The appellant is to pay the costs on appeal of the first and sixth respondents, which shall include the costs of two counsel and senior counsel, where the same have been employed; and

2. The appellant is to pay the costs on appeal of the first and sixth respondents, which shall include the costs of two counsel and senior counsel, where the same have been employed; and

3. The cross-appeal is dismissed.

P Coppin

Judge of the Labour Appeal Court

Davis JA and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES

FOR THE APPELLANT:	A De Vos SC and L Ferreira
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