



**IN THE LABOUR COURT OF SOUTH AFRICA
DURBAN**

Case no: D788/2021

Not Reportable

In the matter between:

ZAKHELE MHLONGO

Applicant

and

AMAJUBA DISTRICT MUNICIPALITY

First Respondent

HER WORSHIP THE MAYOR: CLLR V.V. BAM

Second Respondent

Heard: 20 July 2022

Delivered: 15 August 2022

JUDGMENT

ALLEN-YAMAN AJ

Introduction

- [1] The applicant seeks a declaratory order to the effect that that he is the first respondent's duly appointed Municipal Manager, together with ancillary relief associated therewith. The application is opposed by the respondents, the second respondent having deposed to the answering affidavit in opposition thereto.

Background

- [2] Save for one aspect of the applicant's claim, the facts of the application are common cause.
- [3] On 28 December 2020 the first respondent's Council resolved to embark upon a process of recruitment to fill the post of its Municipal Manager. An advertisement to this effect was published in a national newspaper on 31 January 2021 with the closing date for applications having been 19 February 2021.
- [4] Five candidates were shortlisted by the first respondent's Selection Panel, amongst whom the applicant was included. An interview process ensued, and the applicant was the highest ranked candidate, with a score of 91%. As the highest-ranking candidate, he was recommended for appointment, subject only to his successful completion of the Competency Assessments which were then yet to be undertaken.
- [5] By 27 October 2021 the applicant's Competency Assessment had been completed and a report had been submitted to the first respondent evincing that he was possessed of the requisite competencies for appointment to the post of Municipal Manager. A process of calculating the appropriate salary package which would be payable to the applicant in accordance with the applicable prescripts was undertaken and a resolution of the first respondent's Council was duly passed to the effect that,

*'Council approved the appointment of the highest scoring recommended candidate Mr Z N Mhlongo to the position of Municipal Manager on the correct salary package offer with effect from 1 November 2021.'*¹

- [6] Although the resolution in terms of which the first respondent's Council approved the applicant's appointment on 28 October 2021 did not form part of the application papers in these proceedings, both its existence and its ambit were common cause. In accordance with such resolution taken, the first respondent's erstwhile Mayor, Councillor Dr M G Ngubane, signed an offer of appointment directed to the applicant the same day on which the resolution was taken, the relevant portions of which read as follows,

'Offer for the Appointment of the Municipal Manager (MM)

In reference to your appointment for the aforementioned position by the Council Resolution C109:28/10/2021, I have the pleasure in informing you that you have been appointed to the position of the Municipal Manager (MM) Amajuba District Municipality.

You shall enter into a Fixed-Term Employment Contract commencing from 1 November 2021 and ending one year after next Local Government Elections scheduled on 1 November 2021 and shall be expected to sign an Employment Contract, a Performance Agreement and Disclosure of financial interests.

...

Please confirm acceptance of this offer by signing in the space provided below.

*Kindly allow me to congratulate you on your appointment.*²

- [7] The aforementioned letter was transmitted to the applicant on 1 November 2021 under cover of an email in which the applicant was asked to indicate when he could commence his duties.³ The applicant signed acceptance of the offer on 2 November 2021 and returned a copy thereof to the first respondent.

¹ Founding affidavit, annexure ZNM12

² Founding affidavit, annexure ZNM8

³ Founding affidavit, annexure ZNM9

- [8] Later that same day he transmitted a further email to the first respondent in which he indicated that the earliest he could assume his duties would be on 1 December 2021, as a result of the need on his part to work a one month notice period with what was then his current employer. There is no evidence before me which demonstrates that the first respondent was not amenable to the applicant commencing work on that date.
- [9] The respondents deny that the applicant did in fact commence employment with the first respondent on 1 December 2021 in circumstances in which the applicant alleges that he did so, and accordingly deny that he performed his duties as the first respondent's Municipal Manager until 6 December 2021. This particular issue will be addressed hereunder.
- [10] On 2 December 2021 the first respondent's Speaker, Councillor R B Ndim, called a Special Council Meeting, which was scheduled to take place on 6 December 2021.⁴ A progress report on the appointment of the Municipal Manager was included in the agenda which was transmitted to the first respondent's Council Members. Such progress report reflected that the intended purpose of bringing the matter to the first respondent's Council was to authorise the second respondent to approve the finalisation of the appointment process as required by legislation, being, *inter alia*, to authorise the second respondent to enter into a Fixed-Term Employment Contract with the applicant, terminating on 1 November 2022 together with a Performance Agreement. The recommendation sought was that Council resolve to authorise the second respondent to approve these final documents for the appointment of the applicant.
- [11] The first respondent's Council, however, did not pass such a resolution. Instead, on 6 December 2021, the first respondent's Council took, amongst others, the following decisions,

⁴ Founding affidavit, annexure ZNM12

- 7.1.2 Council resolved that Her Worship The Mayor must not approve the final documents for appointment of the Municipal Manager in order to finalise the appointment process as required by legislation.
- 7.1.3 Council noted that there is no contract of employment between Mr Z N Mhlongo and ADM Council;
- 7.1.4 Council noted that Cogta KZN has not provided concurrence for the appointment of Municipal Manager;
- 7.1.5 Council approved that an investigation must be conducted regarding the appointment of Municipal Manager;
- 7.1.6 Council approved that Mr Z N Mhlongo must step aside from Amajuba District Municipality during the period of investigation.⁵

[12] The applicant was notified of the aforementioned resolution the following day by way of a letter addressed to him by the second respondent in which he was informed of the resolutions which had been taken by the first respondent's Council.⁶

[13] Efforts on the part of the applicant to resolve the matter amicably with the respondents failed and he ultimately approached this court for, amongst other things, an order declaring him to be the duly appointed Municipal Manager of the first respondent.

[14] Pursuant to having launched this application at the beginning of this year, and prior to it having been enrolled for hearing, the first respondent advertised for applicants to fill the post of its Municipal Manager. The applicant sought, and on 3 June 2022 was granted, an interdict by which the first respondent was prevented from proceeding with that process pending the outcome of this application.

Analysis

⁵ Answering affidavit, annexure VVB3

⁶ Founding affidavit, annexure ZNM1

[15] The relief sought by the applicant is predicated upon his assertion that he has, 'a *prima facie* right to remain in [his] position as Municipal Manager until such time as [he] has been lawfully removed from that position.'

[16] The respondents' opposition to the relief sought by the applicant is multi-faceted and somewhat contradictory. The allegations made by the respondents, not pleaded in the alternative, upon which their opposition is founded may be summarised as follows:

1. The applicant did not accept the first respondent's original offer of appointment but, instead, conveyed a counter-offer to it in relation to the date on which the applicant's employment was to commence. In circumstances in which the applicant's counter-offer was not accepted by the first respondent, no contract was formed between the applicant and the first respondent.
2. The first respondent and the applicant did not conclude a contract which accorded with the requirements stipulated in section 57 of the Municipal Systems Act, 2000 ('the Systems Act') and accordingly the applicant's appointment was null and void, by virtue of the provisions of section 54A of the Systems Act.
3. The applicant, having alleged that he was an employee of the first respondent, ought to have approached the Bargaining Council to have vindicated his alleged right not to have been unfairly dismissed in terms of the provisions of the LRA.

[17] The offer of appointment given to the applicant by the first respondent on 1 November 2021 reflected that the commencement date of the contract was also to be 1 November 2021. Contemporaneously with having transmitted the offer of appointment to the applicant, he was requested to advise the first respondent when he would be able to assume duties.

[18] The applicant, by scoring out the word 'decline', where the other option given to him *ex facie* the offer of appointment itself was 'accept', and by appending his

signature to the offer of appointment, evinced his unequivocal acceptance of the first respondent's offer.

- [19] An offer of appointment was accordingly made to the applicant which he accepted. Contrary to the statements made by the respondents that the applicant's acceptance constituted a counter-offer in relation to the date on which his employment would commence, the applicant's response was not a counter-offer. Having unconditionally accepted the first respondent's offer of appointment, and only in response to an enquiry directed to him by the first respondent regarding when he would be able to commence work, did the applicant indicate that he would be able to commence duties on 1 December 2021, then having been required to work a one month's notice period with his then current employer.
- [20] The offer of appointment contained all the material terms required to be agreed to and the issue of the date on which the applicant could commence duties was, in the circumstances, no more than a practical issue which was required to be dealt with.
- [21] If, however, the date on which the applicant was to commence duties could somehow be construed as having constituted a material term of the contract, and the indication by the applicant in response to the first respondent's query, that he could commence duties on 1 December 2021 be construed as a counter-offer, then I find that the first respondent nonetheless accepted such offer by having accepted him into its service on 1 December 2021.
- [22] The respondents have sought to raise a dispute in the affidavits in this application regarding the issue of whether the applicant in fact commenced working for the first respondent on 1 December 2021. The applicant alleged that he had done so until he was instructed to 'step aside' and, in substantiation of his assertions, provided some particularity as to the functions undertaken by him during that period of time. The respondents, by way of bare denial of the applicant's allegations in the answering affidavit deposed to by the second respondent, denied that he had done so.

[23] As a dispute of fact does not arise out of a bare denial, a finding could justifiably be made in favour of the applicant's version without further consideration of the issue.⁷ I have nonetheless considered the matter and prefer the applicant's version.

[24] The second respondent prepared a report in terms of section 30(5)(c) of the Municipal Structures Act, 1998, in terms of which she reported on the 'Progress for the Appointment of the Municipal Manager. The report itself is undated, however, must have been prepared by not later than 2 December 2021 for the reason that it was appended to the Notice of the Special Council Meeting which was to take place on 6 December 2021, which Notice was dated 2 December 2021. At paragraph 3.13 of the report the second respondent advised the first respondent,

*'Council approved that Mr ZN Mhlongo shall enter into a Fixed-Term Employment Contract ending one year after the next Local Government Elections held on 1 November 2021 and shall be expected to sign an Employment Contract, a Performance Agreement and Disclosure of Financial Interests. These documents together with the final letter of appointment need to be signed by the current Mayor now since the Municipal Manager joined ADM on 01 December 2021.'*⁸

[25] The second respondent did not dispute that she herself had prepared the report in question, and nor did she endeavour to explain the contradiction between the express statement made by her in the report that the applicant had taken up the post on 1 December 2021 and the allegations made by her in her answering affidavit that he had not done so.

[26] Accordingly, by 1 December 2021 not only was the applicant in possession of a contract of employment, but he had also commenced working for the first respondent, thereby placing himself squarely within the definition of an employee contained in section 213 of the LRA.

⁷ *Soffiantini v Mould* 1951 (3) SA 307 (O) at 308

⁸ Founding affidavit, annexure ZNM12

[27] Echoing the facts which served before the Labour Appeal Court in Wyeth SA (Pty) Ltd v Mangele and Others [2005] ZALAC 1, there is no doubt that the parties had concluded a contract of employment which the first respondent subsequently reneged.⁹ The Labour Appeal Court quoted¹⁰ and endorsed the decision of the English Employment Appeal Tribunal in Sarker v South Tees Acute Hospitals NHS Trust [1997] IRLR 328, which had found,

*'... The respondents' argument that this was an agreement to enter into a contract of employment on 1 October 1995 is not a persuasive one: no further contract between the parties was required. As and when the appellant turned up for work on 1 October, she would have been performing the contract already entered into, not making a fresh offer which the respondents would then accept by allocating her work and paying her. The mere fact that the duties would only be performed on a date subsequent to this contract having been entered into cannot take it outside the concept of a contract of employment. If it were otherwise, a very large number of contracts would not be contracts of employment, even though they were entered into perhaps only one day before the individual began actually performing his or her duties for the employer.'*¹¹

[28] The respondents' first ground of opposition accordingly cannot succeed.

[29] The second of the respondents' defences is premised upon their reliance on sections 54A and 57 of the Municipal Systems Act, 2000, as amended, ('the Systems Act') the subsections of which so relied upon being the following,

'54A Appointment of municipal managers and acting municipal managers

...

(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipality and that person in consequence of that decision, is null and void if –

⁹ At paragraph 15

¹⁰ At paragraph 46

¹¹ At paragraph 46

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act.'

57 Employment contracts for municipal managers and managers directly accountable to municipal managers

- (1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only –
 - (a) in terms of a written employment contract with the municipality complying with the provisions of this section; and
 - (b) subject to a separate performance agreement concluded annually as provided for in subsection (2).
- ...
- (3) The employment contract referred to in subsection (1)(a) must –
 - (a) include details of duties, remuneration, benefits and other terms and conditions of employment as agreed to by the parties, subject to consistency with –
 - (i) this Act;
 - (ii) any regulations as may be prescribed that are applicable to municipal managers or managers directly accountable to municipal managers; and
 - (iii) any applicable labour legislation; and
 - (b) be signed by both parties before the commencement of service.
- ...
- (6) The employment contract for a municipal manager must –
 - (a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year of the election of the next council of the municipality;
 - (b) include a provision for cancellation of the contract, in the case of non-compliance with the employment contract or, where applicable, the performance agreement;
 - (c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and

- (d) *reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.'*

[30] On the strength of the aforementioned subsections the respondents allege that as no contract of employment in compliance with the prescripts of subsections 57(3) and (6) was entered into between the parties prior to the commencement of the applicant's service, his appointment is in contravention of the Systems Act, in consequence of which the contract between the applicant and the first respondent is null and void by virtue of the provisions of subsection 54A(3)(b).

[31] The purpose of the introduction of section 54A was considered in Mawonga and Another v Walter Sisulu Municipality and Others [2020] ZASCA 125, wherein the Supreme Court of Appeal confirmed,

*'... that section 54A was introduced to curb the prevailing mismanagement of Municipalities.'*¹²

[32] This accorded with the observations made by the Constitutional Court in South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs [2017] ZACC 7, being that the amendments were enacted to

*'... address what was perceived to be an alarming increase of maladministration within municipalities. The Amendment Act introduced measures to ensure that professional qualifications, experience and competence were the overarching criteria governing the appointment of municipal managers or managers directly accountable to municipal managers in local government, as opposed to party political affiliation.'*¹³

[33] Moreover, in Mawonga the Supreme Court of Appeal referred to, and did not disturb, the findings of the Eastern Cape High Court which had previously considered the ambit and effect of section 54A in Xuma v Engcobo Local Municipality and Others [2017] ZAECMHC 35,

¹² At paragraph 21

¹³ At paragraph 4

*'It is clear that the legislature went into extensive detail in dealing with the appointment of a municipal manager. ... This makes it clear beyond doubt that non-compliance is not to be tolerated and that the appointment of a municipal manager is to meet the stringent requirements of this section in all circumstances. Even where the municipality has satisfied itself that it has complied with the detailed provisions of this section, subsection (7) provides that the municipality must, within 14 days, inform the MEC on the process it followed to comply with this section and the outcome thereof. The MEC must submit a copy of the information he or she received from the municipality to the Minister. This is obviously intended to enable both the MEC and the Minister to effectively play a supervisory role that will ensure that all the provisions of this section have been complied with to the letter. If there has been non-compliance it comes to the attention of the MEC and the Minister through the reporting mechanism for corrective measures to be taken.'*¹⁴

- [34] The respondents' defence must fail for the reason that they have erroneously interpreted the meaning and effect of subsection 54A(3)(b) of the Systems Act. On a simple reading of the text, two distinct concepts are identifiable; the decision to appoint, and the contract of employment. The nullification contemplated in subsection 54A(3) is effected only in circumstances in which:
1. the decision to appoint (and hence the purported contract arising from such decision) has been taken in favour of the appointment of one who is not qualified to hold the position (s54A(3)(a)); or
 2. the decision to appoint (and hence the purported contract arising from such decision) has been taken in favour of the appointment of one whose appointment would otherwise be in contravention of the Act itself (s54A(3)(b)).
- [35] As a decision to appoint must self-evidently precede a contract of employment duly entered into, section 54A was clearly never intended to vitiate a contract of employment entered into in circumstances in which the decision to appoint was taken to appoint a person (a) who has the prescribed skills, expertise, competencies or qualifications, and (b) whose appointment was made in compliance with the Systems Act. Conversely stated, section 54A(3) has the

¹⁴ At paragraphs 12 and 13

effect of nullifying a decision taken, and hence a contract entered into as a result of such decision, where the decision itself is taken to appoint a person who is not suitably qualified, or the process which led to the decision was not in compliance with the requirements of section 54A itself.

[36] There is no dispute between the parties that the process which had led to the selection of the applicant to be appointed to the position was entirely in compliance with the Systems Act, that the applicant was the most suitable candidate for appointment, and that he was duly recommended for appointment by a properly constituted Selection Panel. In the result, there is no suggestion that the decision taken by the first respondent's Council on 28 October 2021 to appoint the applicant with effect from 1 November 2021 was not in compliance with the Systems Act. Accordingly section 54A(3) does not operate to nullify his appointment.

[37] The only issue which then remains is what effect, if any, the failure of the parties to have concluded a contract of employment which meets the requirements of subsections 57(3) and (6) might be, it being apparent that the contract of employment relied upon by the applicant does not comply strictly therewith as certain of the terms which were required to be included therein were not.

[38] It is clear, from the wording of the offer of appointment which was given to the applicant that the first respondent anticipated furnishing the applicant with a further contract of employment, presumably intended to be one which would be in complete compliance with subsections 57(3) and (6). This was in accordance with the resolution taken by the first respondent's Council on 28 October 2021.

[39] The only reason for the failure on the parties to have entered into such a contract of employment was due to the fact that the first respondent's newly appointed Council resolved not to do so on 6 December 2021.

[40] It was not permissible for it to have so resolved in view of the previous resolution which had been taken by the first respondent's Council to the contrary, which resolution had been neither rescinded nor otherwise set aside. In Manana v King Sabata Dalindyebo Municipality [2010] ZASCA 144 the Supreme Court of Appeal articulated the position of municipal officials regarding resolutions taken as follows,

*'And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.'*¹⁵

[41] The respondents' assertion that the first respondent was not bound to adhere to the decisions taken by its previous Council were premised on their reliance on a Circular which had been issued by COGTA KZN dated 4 October 2021,¹⁶ the subject matter of which had been, 'Transitional Measures: Pre and Post 2021 Local Government Elections.' Referring to a paragraph therein which read,

'Speakers and Mayors are encouraged to ensure that the recruitment of Municipal Managers and Managers reporting directly to Municipal Managers is, where feasible, left for the newly elected Councils to manage'

the respondents advanced the argument that this entitled them, in effect, to disregard the resolution previously taken to appoint the applicant to the post of Municipal Manager. Quite clearly, the respondents were incorrect in having adopted such an approach.

[42] The respondents' failure to have done all things necessary to enable the applicant to sign the documents which the parties envisaged were to be signed at the time of contracting did not, as the respondents have claimed, vitiate the applicant's employment in terms of section 54A of the Systems Act. Their

¹⁵ At paragraph 22

¹⁶ Answering affidavit, annexure VVB4

failure did, however, give rise to the applicant's right to approach this court to compel them to do so.

[43] Finally, the respondent's argument that the applicant ought to have sought relief under the dismissal dispute resolution mechanisms provided for in the LRA is negated somewhat by its allegations that it has never employed him. On its own version, never having employed the applicant it could never have dismissed him.

[44] More importantly, however, is the manner in which the respondents saw fit to exclude the applicant from his position as Municipal Manager. The second respondent's letter addressed to him on 7 December 2021 by no means evinces a permanent termination of the relationship between the applicant and the first respondent. Having advised the applicant in that letter that the first respondent's Council had approved an investigation regarding 'the appointment of Municipal Manager' the second respondent advised him further that,

- '4. Council approved that you must step aside from Amajuba District Municipality during the period of the investigation and
5. You will be advised of further developments regarding the investigation.'¹⁷

[45] On the strength of that letter, the applicant was understandably left in a state of limbo having been neither expressly suspended, nor expressly dismissed.

[46] He could, conceivably, have concluded that the first respondent's conduct constituted an act of repudiation, accepted the first respondent's repudiation, cancelled the contract by resigning, and referred a dispute to the Bargaining Council in terms of section 186(1)(e) of the LRA, but he was no means obliged to have done so in circumstances in which he had an alternative cause of action.

¹⁷ Founding affidavit, annexure ZNM1

[47] The applicant's alternative cause of action was one for specific performance of his contract of employment; being that he entered into a contract of employment with the first respondent and that the first respondent had, by its conduct, refused to honour its obligations in terms thereof. He requires this court to compel it to do so.

[48] In light of the above, the first respondent has failed to demonstrate any basis in either fact or law why it should not be obliged to comply with its contractual obligations towards the applicant. In the circumstances, the applicant's claim succeeds.

Costs

[49] I can conceive of no reason as a matter of either law or fairness why I should not exercise my discretion in favour of granting the applicant his costs in this matter, as well as the costs which were previously reserved.

[50] Notwithstanding that there is to be an ongoing employment relationship between the parties, this will be of very short duration as the applicant's contract will expire at the beginning of November this year.

[51] I have considered the respondents' conduct, in acting as it did when it requested the applicant to 'step aside', in opposing the relief sought by him, and in advertising the applicant's post whilst this application was pending.

[52] In instructing the applicant to 'step aside' the respondents were wholly indifferent to the fact that the applicant had resigned from secure employment to take up the post in question. In acting as it did, the respondents deprived the applicant of his income, with the concomitant hardship that such deprivation naturally entails. At that time, the applicant was left in a state of indefinite uncertainty, having been told to await the outcome 'an investigation report.' Needless to say, no such investigation report was forthcoming. The first respondent then saw fit simply to readvertise his position, whilst this application was pending, which advertisement the applicant was obliged to interdict.

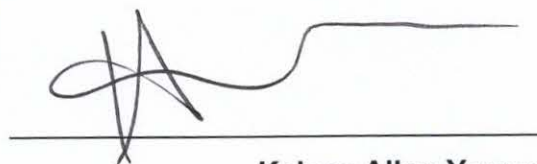
[53] In opposing this application, distinct from the grounds of the opposition advanced, the respondents sought to cast blame on the applicant for the predicament in which he found himself, by asserting that he was the author of his own misfortune on the basis that he had not ensured that a contract in compliance with section 57 was signed by the parties before he took up the position.

[54] In the circumstances, I intend to order that the first respondent pay the applicant his costs, including those costs which were reserved for determination of the main hearing of the matter on 3 June 2022.

Order

1. It is declared that the applicant is the duly appointed Municipal Manager of the first respondent.
2. The resolution taken by the first respondent on 6 December 2021 in terms of which the first respondent resolved that the applicant should 'step aside' is reviewed and set aside.
3. The respondents are interdicted from unlawfully preventing the applicant from executing his duties as the first respondent's Municipal Manager.
4. The respondents are directed to allow the applicant to resume his duties as the first respondent's Municipal Manager forthwith.
5. The respondents are directed to do all things necessary to ensure that the MEC for COGTA:KZN issues a letter concurring to the appointment of the applicant as the first respondent's Municipal Manager including but not limited to signing and submitting a Screening Report of the applicant to the MEC.

6. The respondents are directed to do all things necessary to ensure that an employment contract, in compliance with the Municipal Systems Act, 2000, for a fixed term commencing on 1 November 2021 and terminating on 1 November 2022, incorporating terms and conditions not less favourable to the applicant than those contained in the first respondent's offer of appointment dated 28 October 2021 and accepted by the applicant on 2 November 2021 is prepared, signed by the second respondent, and provided to the applicant for his signature within seven days of the date of this order.
7. The first respondent is directed to pay the applicant the remuneration payable to him in accordance with the first respondent's offer of appointment dated 28 October 2021 and accepted by the applicant on 2 November 2021, from 1 December 2021 to date, within 30 (thirty) days of the date of this order.
8. The first respondent is directed to pay the applicant's costs, including those costs which were reserved on 3 June 2022.



Kelsey Allen-Yaman

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Mr S Mhlanga, Mhlanga Inc

RESPONDENT: Mr A Ramdaw, Roy Ramdaw and Associates Inc