THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 984/21

In the matter between:

ZANDISILE NXANO First Applicant

SIMILO DAYI Second Applicant

and

ENOCH MGIJIMA LOCAL MUNICIPALITY First Respondent

NC ZONDANI Second Respondent

Heard: **31 August 2021 (via virtual proceedings)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21September 2021.**

Summary: **Urgent application – applicants impugns the termination of the employment on the basis of the court order that declared their appointments in terms of section 56 of Systems Act null and void – the fixed term contracts that preceded the impugned appointments had expired – any form of employment relationship that followed**

the expiry of the fixed terms contracts is a nullity – no enforceable rights survived on the basis of the pleaded case.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicants (Messrs Nxano and Dayi) were employed by the first respondent (Enoch Mgijima Municipality), an employment that was terminated consequent to the judgment and order of the High Court[1] that was delivered on12 May 2020, which declares their appointments null and void. That led the applicants to approach this Court on urgent basis for seeking an order in the following terms:

> '1. Dispensing with the form and service provided for in the rules of this court and disposing of this application an urgent in terms of Rule 8;
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> 2. Declaring that the decision to terminate the employment contracts of the 1st and 2nd Applicant is in breach of the1st and 2nd applicants' employment contracts and therefore unlawful;
>
> 3. Declaring that the dismissal of the 1st and 2nd applicants is in breach of their (applicants) employment contracts; and
>
> 4. Ordering that the 1st and 2nd applicants be permitted to return to work per employment contracts.'

[2] At issue, other than the urgency of the matter, is essentially whether the decision to terminate the applicants' employment on the basis of the High Court decision constitutes breach of contract; alternatively, whether it should be reviewed and set aside on the basis of irrationality. The application is hinged on section 77(3)[2] read with section 77A(e)[3] of the Basic Conditions of

[1] The High Court of South Africa, Eastern Cape Division, Grahamstown (High Court).
[2] Section 77(3) provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
[3] Section 77A(e) empowers the Labour Court to make a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation.

Employment Act[4] (BCEA); section 158(1)(iv),[5] and 158(1)(h)[6] of the Labour Relations Act[7] (LRA). The applicants disavow any reliance on fairness or otherwise of the termination of their employment with Enoch Mgijima Municipality.

[3] The respondents are vehemently opposing the application and *in limine* impugn urgency. I wish to dispose of the issue of urgency without further ado.

Urgency

[4] This matter was originally enrolled for hearing on the urgent roll on 20 August 2021 but did not proceed. It would seem that by agreement between the parties it was postponed to 31 August 2021 and proceeded accordingly.

[5] The respondents' main challenge in this regard is that urgency is self-created as the applicants were informed as early as 22 June 2021 that the High Court judgement would be effected with immediate effect. Still the applicants wasted almost two months before approaching this Court despite a threat to do so per the letter from their attorneys of record, dated 23 June 2021.

[6] I agree with the respondents that the reasons given for the delay are unreasonable. It is disingenuous of the applicants to hide behind the fact that their work cell phones were soft locked following the termination of their employment as a reason for poor communication between them and their attorneys of record. In general, soft locking a cell phone would not prevent access to the contact list in the cell phone or even receiving calls. Even COVID-19 pandemic and National Lockdown (Lockdown) in terms of the Disaster Management Act[8] cannot excuse the delay as consultations with their attorneys could have taken place through virtual platforms. In any event, it was incumbent

[4] Act 75 of 1997, as amended.
[5] Section 158(1)(a)(iv) provides that the Labour Court may make any appropriate order, including a declaratory order.
[6] Section 158(1)(h) provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.
[7] Act 66 of 1995, as amended.
[8] Act 57 of 2002.

upon the applicants to take all necessary measures to keep in touch with their legal representatives.

[7] Nonetheless, I have also considered whether the applicants have a substantial redress at the hearing in due course. As mentioned above, the applicants contend that the basis for the termination of their employment with Enoch Mgijima Municipality was irrational, invalid and unlawful. In *Apleni v President of the Republic of South Africa and Another, referred to by the applicants,*[9] the court opined that, in instances where allegations relate to abuse of power public officials which may impact upon the rule of law, the relief sought should, as a rule, be urgently considered. As observed also in the authorities referred to in *South African Broadcasting Corporation (Soc) Ltd v Keevy and Others,*[10] albeit in review applications, a delay which is merely a procedural obstacle should be deal with judiciously so that it does not preclude the Court from dealing with the merits where a probe turns on the lawfulness of the exercise of public power.

[8] I am accordingly satisfied that the matter must be dealt with on the merits and by way of urgency.

Merits

[9] It is common cause that the applicants employment commenced with the then Tsolwana Local Municipality (Tsolwana Municipality) which was disestablished in terms of the Local Government: Municipal Structures[11] read with the Provincial No. 182 of 2016 published in provincial gazette no. 3717 dated 8 August 2016. Tsolwana Municipality amalgamated with two other local municipalities to form Enoch Mgijima Municipality, the newly established municipality. The employees of Tsolwana Municipality were transferred to Enoch Mgijima Municipality in terms of section 197 of the LRA.

[10] Mr Nxano was appointed by Tsolwana Municipality as Manager: Community Services on a three year fixed term contract with effect from 1 October 2011 to

[9] [2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP) at para 10.
[10] [2020] ZALCJHB 31; [2020] 6 BLLR 607 (LC) at para 97.
[11] Act 117 of 1998, as amended.

30 September 2014. It is not in dispute that this contract was renewed for a period of 5 years. Clauses 2.3 and 2.4 thereof, *inter alia*, provide that:

> '2.3 Notwithstanding the fact that there are no expectations on the part of either party that this agreement shall be renewed after termination date, the parties shall be entitled to renegotiate a new contract for a further specified period on mutually agreeable terms, within six (6) but not later than three (3) months prior to the expiry of this contract.
>
> 2.4 If either party does not wish to renew the contract, written notice of the intention not to renew must be given at least three calendar months prior to the termination of contract.
>
> 2.4.1 If upon termination of the contract of employment, the employer does not wish to enter into a new fixed term contract for a further fixed period of at least five years the employer will either:
>
> 2.4.2. Offer an appropriate alternative position on the staff complement, to be decided by the employer in consultation with the employee, with due and reasonable consideration of seniority, experience skill profile of the employee and obligations of the employer, or
>
> 2.4.3 Pay ex gratia termination gratuity equal to not less than 1.25 x employee's gross salary and benefits at the date of termination…
>
> 2.4.4 In the event the employee not accepting the appropriate alternative offer of employment as mentioned above for any reason the employees shall not be entitled to the gratuity mentioned above.'

[11] It is common cause that Mr Nxano's fixed term contract was transferred to Enoch Mgijima Municipality with effect from 8 August 2016. What is in dispute though, is whether it was further extended post 30 September 2017. Mr Nxano asserts that he continued occupying his position in terms of the fixed term contract while being appointed as an Acting Director: Technical Services. Enoch Mgijima Municipality, on the other hand, contends that Mr Nxano's fixed contract terminated by the effluxion of time on 30 September 2017, a fact he was duly notified of by its erstwhile Municipal Manager.

[12] Notwithstanding the expiry Mr Nxano's fixed term contract, he continued to be in the employ of Enoch Mgijima Municipality, acting as Acting Director: Technical Services, a section 56 position in terms of the Local Government: Municipal Systems Act[12] (Systems Act). That acting appointment was extended for three months and later for an indefinite period, subject to the filling of that position, in terms of the resolutions of the Municipal Council. He continued to hold that position up until he was appointed to the position of General Manager: Tarkastad and Hofmeyr on 22 June 2019, an appointment that has been declared null and void by the High Court.

[13] On the other hand, Mr Dayi's circumstances are slightly different. He was employed by Tsolwana Local Municipality as Municipal Manager on a five year fixed term contract with effect from 1 July 2011 to 30 June 2016. This contract contains similar terms as quoted above in clause 2.3 and 2.4 thereof. On 26 August 2016, he was appointed as an Acting Manager Intergraded Planning and Economic Development. Just like in the case of Mr Nxano, his acting appointment was extended, initially for three months and thereafter for an indefinite period, subject to the filling of that position.

[14] On 12 September 2018, Mr Dayi was appointed as General Manager: Intergraded Planning and Economic Development, following a recruitment process, an appointment that has been declared null and void by the High Court.

[15] The applicants sought leave to appeal the High Court judgment and order in terms of section 17(2)(a) and (b) the Superior Court Act[13]. Both applications were unsuccessful. Likewise, the request for variation in terms of section 17(2)(f) the Superior Court was refused and that order was delivered on 27 May 2021. The applicants launched this application on 16 August 2021.

[16] The high watermark of the applicants' case is the impugn on the rationality of Enoch Mgijima Municipality's decision to terminate their employment on the basis High Court judgment by Jolwana J which ordered that:

[12] Act 32 of 2000, as amended.
[13] Act 10 of 2013.

‘1. The applicant's application for the condonation of any late filing of the applications against the respondents be and is hereby granted.

2. The appointment of the respondents to the various positions consequent upon the unlawful creation of the staff establishment be and is hereby declared to be in contravention of section 65(3) and (4) of the Local Government: Municipal Systems Act 32 of 2000, and are accordingly null and void.

3. The appointment of the first and second respondents as the first applicant's general for Molteno and Sterkstroom and General Manager for Tarkastad and Hofmeyer and respectively hereby declared to be in contravention of section 56(2) of the Local Government: Municipal Systems Act and are according null and void.

4. The appointment of third and fourth respondents as the first applicant's general manager for integrated planning and economic development and general manager for public safety respectively be and is hereby reviewed and set aside.

5. The respondents are to pay costs of this application.’

[17] The applicants contend that the High Court order did not terminate their employment and as such, they ought to revert back to the positions they held prior to being appointed to the impugned positions. To fortify this contention, I was referred to a number of authorities and, pertinently, the decision in *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others.*[14] In that case, likewise, the Court had to consider the legal effect of an order setting aside Motsoeneng’s appointment as the Chief Operations Officer (COO) of SABC. The enquiry turned on his employment status. Since there were no facts pleaded on the status of Mr Motsoeneng’s fixed term contract prior to his appointment as the COO, the Court assumed, without so deciding, that he should be treated as having been a permanent employee at the time he was

[14] [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC).

appointed as COO. For that reason, the setting aside of his appointment as COO was found not to have terminated his employment relationship with the SABC.

[18] While it is well accepted that a court order setting aside or declaring null and void an appointment to a particular position may not necessarily terminate the employment relationship, each case is to be determined on its own facts. The recent authorities referred to by the applicants are indicative of the fact that this Court has never been reticent to pronounce as such when properly clothed with the jurisdiction based on the pleaded facts.[15]

[19] It, therefore, behoves me to interrogate the employment status of each applicant. It is the applicant's own version that Mr Nxano's the fixed term contract that was transferred to Enoch Mgijima Municipality was for a period of five years. The applicants insist that Mr Nxano's fixed term contract was renewed by conduct of the parties simply because he continued to be in the employ of Enoch Mgijima Municipality up until he was appointed to the impugned position that was set aside by the High Court. That fixed term contract, they contend, survived the High Court order and is that position Mr Nxano now seeks to revert to.

[20] Yet clause 2.3 of that fixed term contract insinuate that, upon expiry of its term, a new contract had to be negotiated on mutually agreeable terms between the parties. The effect of such a clause is patently articulated in the authorities referred to by the respondents. In *Premier, Free State and Others v Firechem Free State (Pty) Ltd*,[16] the Supreme Court of Appeal (SCA) made it clear that such a clause is unenforceable since the absolute discretion vests in the parties to agree or disagree. That is the case more so where, as typified in the present

[15] See: *Chubisi v South African Broadcasting Corporation (SOC) Ltd and Others* [2020] ZALCJHB 218; (2021) 42 ILJ 395 (LC); *Ngoye and Others v Passenger Rail Agency of South Africa and Others* [2021] ZALCJHB 21; (2021) 42 ILJ 1267.

[16] 2000 (4) SA 413 (SCA) para 35; see also *Hugo, Kirsten & Kirsten (Pty) Ltd v Collotype Labels (Pty) Ltd* (323/2019) [2020] ZASCA 21.

case, there is no deadlock-breaking mechanism in the agreement to negotiate new terms.[17]

[21] It stands to reason, therefore, that reliance clause 2.3 to support the claim that the fixed term contract had been renewed is misplaced. It is so, particularly, because Enoch Mgijima Municipality had communicated its intension not to renew this contract and, as a result, it terminated by effluxion of time on 30 September 2017.

[22] When it comes to Mr Dayi, it is not disputed that his original fixed term contract of employment was subject to section 57 of the Systems Act and subsection (6) thereof provides that:

> '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 after the election of the next council of the municipality;
>
> (b) include a provision for cancellation of the contact…;
>
> (c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and
>
> (d) …'

[23] The only construction to be accorded to section 57(6) of the Systems Act was well articulated by the SCA in *Mawonga and Another v Walter Sisulu Municipality and Others,*[18] where it was stated that, given the legislature's resolve that the contract ought to be for a fixed term that cannot exceed five years, it follows that a renewal in terms of section 57(6)(c) can only occur if the term of the contract had not run for the maximum five years permissible in terms of section 57(6)(a). Then an extension under those circumstances would be lawful, subject to compliance with section 57(6)(c), in that the terms of renewal

[17] See: *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at paras 11-16; *Roazer CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) at para 13.
[18] [2020] ZASCA 125; 2021 (1) SA 377 (SCA) at para 23.

would have to have been stipulated in the contract and agreed between the parties.[19]

[24] It follows that Mr Dayi's five year fixed term contract as Municipal Manager terminated automatically in terms of section 57(6)(a) on 30 June 2016 and could not have been extended in terms of section 57(6)(c) nor transferred to Enoch Mgijima Municipality in terms of section 197 of the LRA. Any reliance on the terms of the expired fixed term contract is equally misdirected.

[25] Of course, as contended by Mr July, from the applicant's attorneys record, the fact that the applicants' fixed term contracts had already expired and are unenforceable does not end the matter. So, that takes me to the next question, which is whether there is any valid employment relationship that survived the High Court order to support the applicants' claim as pleaded.

[26] It is not in dispute that Mr Nxano was appointed as an Acting Director: Technical Services; and Mr Dayi Acting Manager Intergraded Planning and Economic Development. These appointments were regulated by section 56 of Systems Act, which pertinently provides:

> '56(1)(a) A municipal council, after consultation with the municipal manager, must appoint –
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> (i) a manager directly accountable to the municipal manager; or
> (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.
>
> (b) A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed.
>
> (c) A person appointed in terms of paragraph (a)(ii) may not be appointed to act for a period that exceeds three months: Provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in

[19] Id.

paragraph (a), for a further period that does not exceed three months.

(2) A decision to appoint a person referred to in subsection (1)(a)(ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –

(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, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).' (Emphasis added)

[27] While section 66 of the Systems Act provides:

'(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must –

(a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and

(d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

(2) Subsection (1)(c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.

(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.

(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of

the decision, is null and void if the appointment was made in contravention of subsection (3).

(5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision.' (Emphasis added)

[28] Despite the above provisions, the applicants assert that they remained employed by Enoch Mgijima Municipality until their dismissal on the basis of the High Court judgment which did not order their dismissal. This doctrinaire stance was persisted with in oral submissions. Mr July submitted that I should not be concerned with the nature of the applicants employment, even if it is was unlawful. As long as it could be shown that it existed, it must be upheld.

[29] Well, this contention is patently fallacious. Not every employment relationship may possibly survive an order setting aside or declaring null and void a contract of employment. What the applicants seek to vindicate, it would seem, is the employment relationship that came into existence in terms of their acting appointments which terminated when they were appointed to the impugned positions.

[30] Yet, as submitted by Mr Rorke SC, respondents counsel, there is no evidence that the applicants held any identifiable positions in terms of the staff establishment structure of Enoch Mgijima Municipality that would have legitimised their acting appointments. In any event, even if there was an employment relationship consequent to the applicants' acting appointments, it is apparent from the facts before me that those appointements contravened sections 56(1)(c) and section 66(3) of the Systems Act and were accordingly null and void in terms of sections 56(2)(b) and 66(4) Systems Act.

[31] In *Absa Bank Ltd v Kernsig 17 (Pty) Ltd*,[20] the SCA endorsed the notion that the Court may to take the point of illegality *mero motu* as axpressed in *Yannakou v Apollo Club*[21] where it was held that:

> 'And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded. It is true that it is the duty of the court to take the point of illegality mero motu, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and in the latter event, if it is also satisfied that all the necessary and relevant facts are before it.' (Emphasis added)

[32] To my mind, on the evidence before me, there is no valid employment relationship that survived the High Court order that is enforceable on the basis of the applicants' pleaded case.

[33] It follows that the authorities referred to by the applicants afford no assistance to their case as they are obviously distinguishable. In *Democratic Alliance*, the court found that there was a permanent employment that survived the order that set aside Mr Motsoeneng's appoint as COO. Similarly, in *Chubisi v South African Broadcasting Corporation (SOC) Ltd and Others*[22] the court intervene to protect the employment relationship that survived a declaration of irregularity by the Public Protector. While in *Ngoye and Others v Passenger Rail Agency of South Africa and Others,*[23] the court was concerned with the legality of the board decision to terminate a contract of employment in breach of the applicant's contractual terms.

[34] Notwithstanding the finding that there is no valid employment relationship that survived the High Court order that is enforceable on the basis of the applicants' pleaded case, I have furthermore taken into account the caution against the

[20] [2011] ZASCA 97; 2011 (4) SA 492 (SCA); [2011] 4 All SA 113 (SCA) at para 23.
[21] 1974 (1) SA 614 (A) at 623G-H.
[22] [2020] ZALCJHB 218; (2021) 42 ILJ 395 (LC)
[23] [2021] ZALCJHB 21; (2021) 42 ILJ 1267.

inflexible application of the *par delictum* rule[24] that was conveyed by LAC in *Kylie v Commission for Conciliation Mediation and Arbitration and Others*[25]. In that case, confronted with the termination of employment contract of a sex worker, the LAC held that the constitutional right to fair labour practices, as enshrined in the LRA, vests in 'everyone', including parties with no valid contract of employment.[26] This authority, nonetheless, finds no application in the present case because the applicants disavow any reliance on the fairness of the decision to terminate their employment. Sure enough, there is nothing that would bar them, subject to the applicable prescripts, from pursuing that course of action, if at all.

Conclusion

[35] In all the circumstances, there are no valid employment contracts and/or employment relationship between the applicants, respectively, and Enoch Mgijima Municipality that survived the High Court order that declared the impugned appointments null and void. Put differently, there are no rights that persist consequent the High Court order that are enforceable on the basis of the applicants case as pleaded. It follows that the applicants failed to make a case for the relief sought in the Notice of Motion.

Costs

[36] Turning to the issue of costs, both parties pursued costs. Mr Rorke SC the applicants were ill-conceived in launching this application because they conceded during the High Court matter that should the appointment be declared null and void, they would lose their jobs. To the extent that the applicants raised the constitutional matters in good faith, I am persuaded against saddling them with costs.

[24] This rule is expressed in the maxim *in pari delicto potior est conditio defendentis* (the *par delictum* rule). The principle underlying the *par delictum* rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law.
[25] [2010] ZALAC 8; 2010 (4) SA 383 (LAC); (2010) 31 ILJ 1600 (LAC); [2010] 7 BLLR 705 (LAC).
[26] See: *Nehawu v UCT* 2003 (2) BCLR 154 (CC) at paras 33 - 40, referred to in *Kylie*, where the Constitutional Court emphasised that the focus of section 23(1) of the Constitution was on the 'relationship between the worker and the employer on terms that are fair to both'.

[37] In the circumstances, I make the following order.

Order

1. The application is dismissed.
2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicants:	Mr S July from Werksmans Attorneys
For the first respondent:	Advocate SC Rorke SC
Instructed by:	Wesley Pretorius & Association Inc.