

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 3282/2013

LINDIWE GAIL MSENGANA-NDLELA

Plaintiff

And

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

Defendant

Coram: **Chetty J**

Heard: **15 May 2015**

Delivered: **19 May 2015**

Summary: ***Contract*** – *Employment – Municipal Manager – Express provision warranting non-interference in execution of core functions - Political interference by executive mayor and his deputy established – Such constituting breach of contract – Damages awarded*

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**JUDGMENT**

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**CHETTY J: -**

[1] This is an action for damages for breach of a contract of employment. On 4 March 2013, the plaintiff concluded a fixed term contract of employment with the defendant in terms of which she was appointed as the Municipal Manager for the Nelson Mandela Bay Metropolitan municipality.

[2] On her appointment she was, in terms of s 55 of the **Local Government: Municipal Systems Act**<sup>1</sup> (the Act) the head of administration responsible for the formation and development of an economical, effective, efficient and accountable administration. In her dual capacity as the accounting officer, she was moreover responsible and accountable for: -

- “(a) all income and expenditure of the municipality;
- (b) all assets and the discharge of all liabilities of the municipality; and
- (c) proper and diligent compliance with the Municipal Finance Management Act.”

[3] Clause 2.2 of the agreement stipulated that irrespective of the date of signature the contract would commence on 1 March 2013 and terminate on 30 April 2017. It broadly circumscribed the plaintiff's main duties as: -

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<sup>1</sup>Act No, 32 of 2000

“2.1.1 The City Manager shall report to the Executive Mayor and Council on such matters and information that the Executive Mayor and/or Council may require from time-to-time. In particular, but without limitation of the above, the City Manager will be responsible for constituting part of the Management Team of the Municipal Administration as a whole and, more particularly, fulfilling the role of Chairperson of the Management Team and shall, inter alia, be responsible for the following:

- Providing strategic, technical and other advice and support to the Executive Mayor, Mayoral Committee and Council, to assist the aforementioned in fulfilling their duties, and providing strategic corporate leadership to the administration.
- Acting as the liaison between the administration and political office-bearers, and consulting with and advising them.
- Developing, facilitating and monitoring the implementation of the Integrated Development Plan.
- Taking ownership and leading the development, implementation, monitoring and evaluation of long-term developmental plans, strategic programmes and projects and being able to mobilise a vast array of internal and external resources that are crucial for development and organisational effectiveness.
- Facilitating public participation in accordance with legislative and policy requirements.
- Developing and implementing systems and strategies to deal with statutory requirements and responsibilities, including control and evaluation mechanisms, to ensure

the improved performance of the institution, and optimally allocating and managing resources.

- Preparing and giving account of all income and expenditure of the Municipality in accordance with accepted municipal accounting and administrative practices and procedures.
- Reviewing, setting up and maintaining economical, effective, efficient and accountable administration, including reviewing existing policies, systems and processes and ensuring adherence to accepted organisational values.
- Ensuring that the Municipality is a vehicle for the transformation and development of the City, and taking responsibility for any and all functions that may be assigned to the incumbent by the Executive Mayor and/or Council

2.1.2 The Employee shall at all times faithfully , promptly and punctually carry out all duties, including such duties as may conform with her position, be delegated or assigned to her, and shall use her best endeavours properly to conduct, improve, extend and develop the business affairs of the Municipality. In so far as the applicable local government legislation prescribes duties in addition to those listed in paragraph 2.1.1 above, the Employee will also fulfil such duties.

2.1.3 In addition to the requirements of the performance agreements concluded annually between the Employer represented by the Executive Mayor and the Employee, the Employee will at all times comply with the Employers performance management system.

2.1.4 In the fulfilment of her duties the Employees must be guided by the basic principles and values governing local public administration as set out in Section 50 as well as the management standards and practices as set out in Section 51 of the Local Government Municipal Systems Act.”

[4] Clause 2.6 of the agreement expressly provided that: -

**“The Employer warrants that there shall be no undue political interference of whatsoever nature in the Employee’s execution, delivery and performance of her duties and that the Employer undertakes at all times to provide the Employee with a working environment and necessary resources to enable her to fulfil her obligations in terms of this Agreement.”**

[5] Subsequent events however demonstrate, quite unequivocally, the defendant’s disdain for the provisions of Clause 2.6. In her testimony the plaintiff referred to a memorandum which she, in exasperation, submitted to the Member of the Executive Council for Local Government and Traditional Affairs of the Eastern Cape (MEC) pursuant to the provisions of Clause 16 of the agreement. Therein, under individual rubrics, she expounded upon the extent of the executive mayor, Mr *Nkosinathi Benson Fihla’s* and his deputy, Mr *Thando Ngcolomba’s*, interference in

the performance of her core functions and lamented the quandary she found herself in, as follows: -

- “3.1.1 **Undue political interference:** The Grievant is unable to discharge her duties as City Manager and Accounting Officer as a result of undue political interference by the First and Second Respondents;
- 3.1.2 **Supply chain management and the Lumen contract:** The attempts of the Grievant to protect the interests of the Municipality and guard against possible irregular or unlawful expenditure, through the Lumen contract, have been blatantly frustrated, thus hindering the Grievant in undertaking her accounting responsibilities in a collective leadership environment;
- 3.1.3 **Human Resources - the recruitment and appointment processes of senior managers:** The Respondents intentionally placed undue political pressure on the Grievant by unilaterally rescinding Council decisions on the macro organizational structure, the enhancement of the Grievant’s Office and questioning of advertised positions. This has hindered the Grievant in carrying out her responsibilities as Municipal Manager as contemplated in the MSA;
- 3.1.4 **Human Resources: Traditional management and approvals of acting Executive Directors:** In the context of a history of administrative instability and a vacuum in the management echelons of the NMBMM of

nearly four years, the Respondents have placed undue political pressure on the Grievant to appoint a political advisor in the administration as an Acting Executive Director of Corporate Services and/or other senior managers, irrespective of their competencies, qualifications and experience.

- 3.1.5 **Communications, the political environment, safety and security:** The Respondents intentionally or negligently omitted to maintain sound communication, engagement, discussion and resolution of administrative matters by instructing the Grievant to perform administrative acts that are contrary to government policies and procedures, in the name of 'majority rule'. The Grievant has been reminded by the First Respondent of incidents of violence and death when people do not comply with such rule. Furthermore, the Grievant has been instructed to appoint 16 members of the (MKVA) as Close Protection Officers of the Respondents, without due consideration of human resource policies and the availability of funds. The safety and security of the Grievant is severally compromised."

[6] In evidence before me, the plaintiff elaborated upon these grievances and in particular, the concerns for her own safety. Her uncontroverted evidence was that her reticence to appoint members of the MKVA as close protection officers to certain individuals in the defendant's council elicited a hostile confrontation by one of their ilk. And yet, her plaintive cries went unheeded. Fastidiousness, independence, integrity and a commitment to perform her duties strictly within the parameters of the

law, were, astonishingly, not traits which endeared themselves to the political hierarchy of the defendant. The intervention she sought from the MEC was not forthcoming and the interference continued unbridled. Finally, on 31 May 2013, the plaintiff tendered her resignation and shortly thereafter, in a missive to *Fihla* provided reasons for her resignation. She wrote: -

“My resignation is against the background of sustained inappropriate and undue political interference that has hindered and undermined my administrative position as City Manager in the Nelson Mandela Bay Metropolitan Municipality. This is unlawful and constitutes both a serious and a material breach of contract, which makes it impossible for me to perform my duties. I have no reason to believe that this problem has been (and will be) adequately addressed, hence this confirmation of my resignation.”

[7] As adumbrated hereinbefore the plaintiff's testimony stands uncontroverted. Neither *Fihla*, *Ngcolomba* or anyone else testified and refuted the plaintiff's evidence. Counsel for the defendant furthermore elected not to cross-examine the plaintiff or to make any submissions during argument. Under such circumstances I am bound to find for the plaintiff and what remains, is the determination of the amount of damages to be awarded.



[8] The plaintiff initially claimed the sum of R8 624 999.66 as and for damages. At the inception of the trial however, Mr *Beyleveld*, by virtue of the plaintiff in the interim being employed, sought an amendment to the particulars of claim reducing the damages to R2 985 829. 18. The amendment furthermore sought to introduce an additional claim in the sum of R156 405.99 in respect of legal fees incurred by the plaintiff under case no 1459/2013. Defendant's counsel, Mr *Nobatana*, however objected to both amendments and, somewhat belatedly, sought a postponement from the bar. The objection was ill-founded. Although the matter had been set down for hearing on Monday, 11 May 2015, it was, by agreement between the parties rolled over to Friday, 15 May 2015. If the defendant in truth required a postponement it had ample time within which to prepare a substantive application. The defendant however elected not to do so and the attempt to seek a postponement in consequence of a non-prejudicial amendment to the particulars of claim is opportunistic in the extreme. Consequently, I granted the amendment and refused the postponement. The introduction of the claim for legal fees held no prejudice whatsoever for the defendant. It is common cause that the defendant had, as far back as May 2013, undertaken to indemnify the plaintiff for such legal costs. It is cynical to now retract such an undertaking.

[9] The defendant's entire approach to the litigation merits opprobrium. My disquiet however does not extend to either their counsel or their attorney – it would appear that they were merely acting in accordance with their instructions. It is however obvious that, notwithstanding the denials encapsulated in the plea, the defendant had no intention of refuting the plaintiff's version by the adduction of *viva*

voce evidence. And yet, they persisted with their opposition with the concomitant incurring of legal costs, which the rate payers of the city will ultimately have to bear.

[10] In the result the defendant is ordered –

1. To pay the plaintiff the sum of R3 142 235. 17 as and for damages.
2. To pay interest thereon, a *tempore morae* at the legal rate, calculated as from date judgment to date of payment.
3. Costs of suit.

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**D. CHETTY**

**JUDGE OF THE HIGH COURT**

*Obo the Plaintiff:*

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*Instructed by*

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