IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable

CASE NUMBER	**:**	1859/2023
DATE HEARD	**:**	17 October 2023
DATE DELIVERED	**:**	3 November 2023

In the matter between:

WERNER CHRISTOPH JONKER	APPLICANT
and	
HENDRY DE WEE	1ST RESPONDENT
ADAM JACOBUS EDWARD CLAASEN	2ND RESPONDENT
LYDIA LYNETTE OLYN	3RD RESPONDENT
SAMANTHA GAIL KOOPMAN	4TH RESPONDENT
GERT VYFER	5TH RESPONDENT
THOMAS FRANCIOS BANTOM	6TH RESPONDENT
JAN ANDRIES PALM	7TH RESPONDENT
KATHERINA JACOBA KLAZEN	8TH RESPONDENT
FRANCOIS JOHANN FARAO	9TH RESPONDENT
GERTRUIDA JOHANNA DE VRIES	10TH RESPONDENT
JOHANNA HANNELIE WILSCHUT	11TH RESPONDENT
THE MAYOR, HANTAM LOCAL MUNICIPALITY (ALEXANDER KOOS)	12TH RESPONDENT
THE SPEAKER, HANTAM LOCAL MUNICIPALITY (CHRISTO HENDRY SLAMBEE)	13TH RESPONDENT
THE HANTAM LOCAL MUNICIPALITY	14TH RESPONDENT
THE ACTING MUNICIPAL MANAGER, HANTAM LOCAL MUNICIPALITY (TEBOGO TLHOAELE)	15TH RESPONDENT

THE MEC: DEPARTMENT COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, NORTHERN CAPE PROVINCE 16TH RESPONDENT

Neutral citation: *Jonker v De Wee and 15 Others* (Case no 1859/2023 (3 November 2023)

Delivered: 03 November 2023

Coram: Olivier AJ

JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. The Applicant approached this Court on an urgent basis, moving for a rule *nisi*[1] in terms whereof the Respondents or any interested person are called upon to show cause why the following order should not be made a final order of Court:

1.1 That pending the final determination of the relief sought by way of a Part B of the application:

1.1.1 The Respondents be interdicted and restrained from commencing with a process of appointing another person to the position of Senior Manager: Finance and Corporate Services, alternatively as Chief Financial Officer or Director Corporate Service with the 14th Respondent;

1.1.2 The Respondents be interdicted and restrained from taking any action that would impede or interfere with the contractual rights and obligations existing between the Applicant and the 14th Respondent resulting from the contract of employment concluded between the Applicant and the 14th Respondent on 29 October 2020;

[1]This was Part A of the application.

1.1.3 The *status quo* of the Applicant's employment with the 14th Respondent as its Senior Manager: Finance and Corporate Services, with its consequent remuneration, benefits and responsibilities, be preserved.

2. The Applicant furthermore asked this Court to order that the above relief, shall serve as interim relief with immediate effect and also that the Respondents be ordered to pay the costs of the application only if opposed.

3. It is common cause that the application, in as far as Part A is concerned, was opposed by all of the Respondents bar from the 2nd and 6th to 10th Respondents.

4. The Applicant, by way of Part B of the application, seeks the following relief:

4.1 A declarator to the effect that the Applicant was appointed by the 14th Respondent as its Senior Manager: Finance and Corporate Services on a permanent basis with effect from 29 October 2020;

4.2 An order directing the Counsel of the 14th Respondent and/or the 14th Respondent to comply with all of its contractual obligations towards the Applicant resulting from the contract of employment concluded between the parties on 29 October 2020 in terms whereof the Applicant was appointed as the Senior Manager: Finance and Corporate Services of the 14th Respondent; and

4.3 An order to the effect that the Respondents be ordered to pay the costs of the application.

I will henceforth and where necessary, refer to the 1st, 3rd, 4th, 5th and 11th to 15th Respondents jointly as "*the Respondents*" and to the 16th Respondent simply as "*COGHSTA*".

5. It is common cause that the 1st to the 13th Respondents are the members of the Executive Council of the 14th Respondent (herein after referred to simply as "*the Council*").

6. In view of the fact that Part A of the application was properly opposed by the Respondents as well as by COGHSTA and also in view of the fact that the said parties dealt extensively with the reasons as to why the relief sought by way of Part A should not be granted, Mr Eillert on behalf of the Applicant rightfully conceded that it would serve little purpose for this Court to consider issuing a rule *nisi* at this point.

Mr. Eillert agreed that the Court should now, in light of the above, consider whether the Applicant is entitled to a final order in as far as the relief sought by way of Part A is concerned, pending the final determination of Part B of the application.

7. From the papers filed in the application and from the arguments on behalf of the respective parties, the following salient facts were, alternatively became common cause:

7.1 That, during or about September 2017, the Applicant was informed that he was appointed as Senior Manager: Finance and Corporate Services in the employ of the 14th Respondent (herein after referred to only as "*the Municipality*");

7.2 That the position of Senior Manager: Finance and Corporate Services was however re-advertised during or about September 2018, that the Applicant re-applied for the position and that it was decided by the Council of the Municipality that the Applicant be appointed to the position subject *inter alia* thereto:

7.2.1 That the Applicant may be permanently appointed to the position subsequent to him completing a minimum competency qualification within a period of 18 (eighteen) months; and

7.2.2 That the appointment be authorised by the Provincial Minister of Co-Operative Governance;

7.3 That the above appointment was effective as from 1 October 2018 and that a written fixed term contract of employment, which confirmed the above appointment was concluded between the Applicant and the Municipality on 1 October 2018 (herein after referred to as "*the October 2018 Contract*");

7.4 That the October 2018 Contract was to endure for a period of 5 (five) years starting on 1 October 2018;

7.5 That on or about 29 October 2020, the Applicant's permanent appointment to the position of Senior Manager: Finance and Corporate Services was confirmed by the Council subject *inter alia* thereto that the above Provincial Minister of Co-Operative Governance would be notified of the appointment;

7.6 That on or about 30 August 2023, COGHSTA addressed a letter to the 12th Respondent (herein after referred to as "*the Directive*") in terms whereof various alleged irregularities in respect of the Applicant's appointment were raised and in terms whereof further the Council was instructed to

> "*… rescind the decision on the permanent appointment of the Senior Manager: Finance and Corporate Services with Council Resolution **nr.RIK06/10-20** …*"[2]. (my underlining)

7.7 That subsequent to the receipt of the Directive and in compliance therewith, the Council resolved on 31 August 2023 during a Special Council Meeting that the resolution taken on 29 October 2020 to appoint the Applicant to the position of Senior Manager: Finance and Corporate Services on a permanent basis is rescinded and that notice was to be given to the Applicant that the October 2018 Contract would come to an end on 29 September 2023;

7.8 That such notice was indeed given to the Applicant on 31 August 2023 in terms whereof he was informed that the October 2018 contract expires on 27 September 2023 (herein after referred to as "*the Notice*");

[2]Resolution nr. RIK06/10-20 is indeed the resolution taken by Council to appoint the Applicant as Senior Manager: Finance and Corporate Services on a permanent basis.

7.9 That the Notice made no mention of the rescission of the above-mentioned resolution of 29 October 2020 in terms whereof the Applicant was appointed permanently; and

7.10 That it was only on or about 22 September 2023 that the Applicant learnt of the fact that the above resolution of 29 October 2020 was rescinded, when a letter to this effect was addressed to the Attorneys for the Applicant.

8. It is furthermore common cause that neither the resolution taken by Council during September 2018 to appoint the Applicant to the position of Senior Manager: Finance and Corporate Services and which gave rise to the October 2018 Contract, nor the resolution taken by Council on 29 October 2020 to appoint the Applicant to the said position permanently (herein after referred to as "*the 2020 Resolution*") have been set aside by a Court of law.

The same goes for the resolution taken on 30 August 2023 to rescind the 2020 Resolution (herein after referred to as "*the August 2023 Resolution*").

9. The Applicant takes umbrage with the August 2023 Resolution, stating that the August 2023 Resolution:

9.1 Constitutes a repudiation of his contractual rights which was not accepted by him; alternatively

9.2 Constitutes a unilateral amendment to his employment contract since he was not consulted before the August 2023 Resolution was taken.

10. The Applicant furthermore alleges that the 2020 Resolution was validly taken which created a contract of employment between the Applicant and the Municipality in terms whereof the Applicant was appointed as Senior Manager: Finance and Corporate Services.

11. It is however important to note that the Applicant could not produce a written contract of employment concluded on or about 29 October 2020 in terms whereof he was permanently appointed as Senior Manager: Finance and Corporate Services.

It is furthermore important to note that, even after the above was raised by the Respondents in their Answering Affidavit, the Applicant could only produce the October 2018 Contract in terms whereof the Applicant was appointed on a fixed term basis.

12. In their Answering Affidavits both the Respondents as well as COGHSTA *inter alia* questioned whether the application is indeed urgent and I was consequently required to firstly decide whether the application met the requirements for an urgent application.

URGENCY:

13. It is expected of an Applicant to make out a case for the relief sought by such Applicant in the Founding Affidavit[3] and this most certainly holds true in the case of applications brought on an urgent basis where the Uniform Rules of Court (herein after only referred to as "*the Rules*") provide that in every application brought on an urgent basis, an Applicant, in his/her Founding Affidavit

"*… must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.*"[4]

14. Mr. Eillert made it a point during his argument to reiterate on several occasions that this application was brought on a semi-urgent basis and, given the wording of the Notice of Motion this might very well have been the case, but I am firmly of the view that the question as to whether the application is indeed urgent (or even semi-urgent for that matter), should still be considered against the requirements of ***Rule 6(12)*** of the Rules and the relevant and applicable authorities.

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[3]**Treasure Karoo Action Group & Another v Department of Mineral Resources & Others** [2018] 3 All SA 896 (GP), par [10].
[4]See **Rule 6(12)(b)** of the Rules.

15. It has been held that:

"*All applications brought on an urgent basis must meet the requirements of Rule 6(12) of the Uniform Rules of Court, as a first hurdle before the matter can be enrolled and heard. Absent such satisfaction, the court will decline to entertain the application and will simply struck it from the roll.*"[5]

16. The *crux* of the Applicant's case in as far as urgency is concerned is that if the Municipality was allowed to continue with its unlawful actions[6] indefinitely, the Applicant would be left without employment and income which, if the application is heard in the normal course of events, will be detrimental to the Applicant and his family.

17. In its Answering Affidavit, COGHSTA took issue with the urgency of the application based thereon:

17.1 That the urgency that might exist was self-created; and

17.2 That financial hardships are not a ground for urgency.

18. In respect of the last-mentioned argument raised by Mr. Davis on behalf of COGHSTA as well as by Mr. Makola SC on behalf of the Respondents, it should be stated that I unfortunately cannot agree with their contentions in this regard as sufficient authorities exist therefore that commercial matters may invoke the application of the Rules in as far as urgent applications are concerned.[7]

19. In amplification of the argument set out in paragraph 17.1 herein above, Mr. Davis argued on behalf of COGHSTA that the period between 31 August 2023[8] and 11 September 2023[9] is inordinately long and further that no explanation was given by the Applicant for this delay.

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[5]**GPCM v Minister of Home Affairs & Others** [2019] JOL 44946 (GP) at page 5.
[6]These unlawful actions by the Municipality, according to the Applicant, are the rescission of the 2020 Resolution coupled with the intention shown by the Municipality to proceed with the process of filling the vacant post of Senior Manager: Finance and Corporate Services.
[7]**Twentieth Century Fox Film Corporation & Another v Anthony Black Films** [1982] 3 All SA 679 (W) at page 687. See also **AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia & Others** [2011] NAHC 184 (NAMIBLII Reference) at paragraph [47].
[8]This is the date upon which the Applicant received the Notice.
[9]This is the date upon which the Applicant first consulted his Attorney.

Mr. Davis furthermore enjoined the argument of Mr. Makola SC for the Respondents namely that the application should have been brought at an earlier stage.

20. Mr. Makola SC furthermore emphasized that the period between the date of the Applicant's consultation with his Attorneys on 11 September 2023 and the eventual lodging of this application on 3 October 2023 is also inordinately long and not properly explained.

21. It should however be mentioned that the Attorneys for the Applicant did in fact address a letter to the Municipality on 11 September 2023 subsequent to the afore-said consultation, in terms whereof the background to the issue according to the Applicant is set out and in terms whereof the Municipality is requested to retract the August 2023 Resolution by 15 September 2023.

It is also important to mention that the Attorneys for the Municipality requested and were afforded an extension to 22 September 2023 to answer to the letter from the Attorneys for the Applicant which they duly did.

22. The Applicant thereafter consulted with Counsel and the application was finalized and lodged on 3 October 2023.

23. I do not find the period between 22 September 2023 when the feedback from the Municipality was received and 3 October 2023 (when the application was lodged) problematic and certainly not a ground upon which self-created urgency can be claimed.

24. It is furthermore common cause that where one party first seeks compliance from another party before lodging an application, it cannot be said that the first-mentioned party was dilatory in lodging the application or that urgency was self-created.[10]

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[10] **Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others** [2003] JOL 10796 (SE) at paragraph [34]. See also **Stock & Another v Minister of Housing & Others** 2007 (2) SA 9 (CPD) at pages 11 and 12.

This effectively puts paid to any possible argument that the Applicant created his own urgency by firstly attempting to seek compliance from the Municipality by way of the letter of 11 September 2023.

25. The parties (Mr. Davis in particular) referred me to the recent decision by Tlaletsi JP in the matter of ***Oliphant v Thembelihle Local Municipality & Another***[11] where the Applicant in essence sought similar relief than the relief sought by the Applicant in this matter with one important distinction, namely that in the ***Oliphant matter*** Mr. Oliphant had already referred the dispute between himself and the municipality to the relevant Bargaining Council at the time when the interim relief was sought.

In the ***Oliphant matter*** therefore, the issue pertaining to the fairness/lawfulness of the termination of Mr. Oliphant's services was already pending in the Bargaining Council when the urgent application was brought for interim relief, whilst in this particular instance the Applicant is still contemplating referring Part B of the application to Court which will effectively boil down to a consideration of and decision on the lawfulness of the August 2023 Resolution in order to eventually decide upon the declarator sought by way of Part B of this application.

26. One specific remark by Tlaletsi JP in the ***Oliphant matter*** is however apposite in this instance namely:

"*The appointment of a person to fill the position is imminent. There is no indication that the Municipality will await the outcome of the dispute resolution process of the Bargaining Council. For that reason, I accept that the matter is urgent and it should be treated as such.*"[12]

27. I am of the view that the same situation applies to the matter at hand and I agree with Tlaletsi JP in this regard namely that this application might, at least in the sense that the appointment of someone else to the position of Senior Manager: Finance and Corporate Services is imminent, be deemed to be urgent.

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[11][2022] ZANCHC 60 (SAFLII Reference).
[12]See **Oliphant**, *supra* at paragraph [11].

28. The pertinent question to be answered in this instance though is whether the Applicant has satisfied the second requirement referred to in ***Rule 6(12)*** of the Rules, namely to convince the Court that he cannot obtain substantial redress by way of an application in due course.

29. It was held in the matter of ***East Rock Trading 7 (Pty) Ltd & Ano v Eagle Valley Granite (Pty) Ltd & Others***[13]:

"*…the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent … is underpinned by the issue of absence of substantial redress in an application in due course. The Rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the Rules it will not obtain substantial redress.*"[14] (My omissions and underlining)

It has further been held, in the same matter, as follows:

"*If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.*"[15]

30. In this instance the Applicant, by way of Part A of the application, seeks to secure certain alleged contractual rights which, according to the Applicant, emanates from a contract of service that was concluded between the parties on 29 October 2020.

The mentioned date of 29 October 2020 is also the date upon which the 2020 Resolution was adopted and because of this it is my view that the only reasonable inference that may be drawn, is that the Applicant's referral to a contract of service of 29 October 2020, is in fact a referral to an alleged contract of service in terms whereof the Applicant was appointed on a permanent basis, alternatively a contract in terms whereof his permanent appointment was confirmed.

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[13][2012] JOL 28244 (GSJ).
[14]**East Rock Trading 7 (Pty) Ltd**, *supra* at paragraph [6].
[15]**East Rock Trading 7 (Pty) Ltd**, *supra* at paragraph [9].

It should however again be mentioned that such a written contract was not produced by the Applicant alternatively did not form part of his papers and that the only contract that was in fact produced, was the October 2018 Contract, in other words the contract in terms whereof the Applicant was appointed on a 5-year fixed term basis.

One can therefore again only infer that a written contract of service signed on or about 29 October 2020 in terms whereof the Applicant was appointed on a permanent basis, alternatively in terms whereof his permanent appointment was confirmed, does not exist.

31. Mr. Makola SC argued that the relief sought by the Applicant in terms of Part A of the application and the relief sought in terms of Part B is not dissimilar and I have to agree with him in this regard.

I hold the view that what the Applicant essentially wants from this Court, is an order to the effect that the decision by the Council/Municipality to permanently appoint the Applicant as Senior Manager: Finance and Corporate Services was correct (lawful), that the Applicant is entitled to be reinstated to that position and that the remuneration and benefits associated with the position should be reintroduced.

32. Mr. Eillert strenuously argued that if the relief sought by the Applicant in terms of Part A of the application is not granted at this stage, the Applicant will not only be seriously prejudiced in the financial sense, but that the Respondents would then be able to, if the position is filled in the meantime, make use of the so-called "*horse has bolted*" argument that it would not be possible for the Municipality to reinstate the Applicant to the post, since the post had been filled.

33. If I may again shamelessly borrow from Tlaletsi JP in the ***Oliphant matter*** –

"*… should the Municipality employ someone in the position contested by the applicant, it will run the risk of creating a problem for itself in the event of the reinstatement order. It will either have to terminate the contract it entered into with the new employee or come to an arrangement with the employee or the applicant*."[16] (My omissions)

[16]See ***Oliphant***, *supra* at paragraph [22].

I can therefore not agree with Mr. Eillert's argument in this regard.

34. I hold the view further that, given the circumstances, nothing precludes the Applicant from vindicating his alleged contractual rights in due course and obtaining, in due course, an order of specific performance of the alleged contract of service of 29 October 2020 (should the existence of such a contract be proven).

35. In view of the above, I am of the view that the Applicant has failed to make out a case for the Applicant's contention that he will not be able to obtain substantial redress in due course and I am consequently of the view that the application ought to be removed from the roll on this basis alone.

36. It has recently been held however that a matter may be entertained, even in a case of material non-compliance with the Rules and depending on the facts of each case, if it would be in the interest of expediency and with due consideration to practicalities such as the unnecessary duplication in case preparation (with the consequent increase in legal costs) as well as the resultant duplication in as far as the attention and preparation of more than one Court is concerned.[17]

37. I view this application as one such instance because of the fact that all parties have had the opportunity to place their respective cases in as far as Part A of the application is concerned before me and the said parties' cases were also properly and fully argued on their behalf.

I deem it therefore unnecessary to burden a further/another Court with having to prepare for, hear and determine Part A of this application (in the event of the Applicant electing to place Part A of the application on the roll for hearing in due course) where this Court is in fact in a position to do so.

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[17]See **Magricor (Pty) Ltd v Border Seed Distributors CC: *In re*: Border Seed Distributors CC v Magricor (Pty) Ltd** [2020] ZAECGHC 103 (SAFLII Reference) at paragraph [38]. Also see the matter of **Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd & Others** [2013] ZAECMCH 14 (SAFLII Reference) at paragraph [10].

I can also not see how a determination of Part A of this application at this stage, will prejudice any of the parties (especially the Applicant) to these proceedings.

MERITS: PART A:

38. It is common cause that, for an Applicant to be successful with an application for an interim interdict, such Application should show:

38.1 A *prima facie* right;

38.2 A well-grounded apprehension of irreparable harm if the relief is not granted;

38.3 That the balance of convenience favours the granting of the interim interdict; and

38.4 That the Applicant has no alternative satisfactory remedy at his/her disposal.[18]

39. Based on the papers at hand, it may be safely accepted that, in as far as the Applicant's term of service at the Municipality is/was concerned, the following is common cause:

39.1 That the October 2018 Contract had lapsed/expired at the end of September 2023 due to the fact that the term of the said contract had run out; and

39.2 That the Applicant's alleged permanent employment with the Municipality and consequently the alleged service contract of 29 October 2020 was terminated by way of the August 2023 Resolution with effect also at the end of September 2023.

40. The parties' legal representatives appeared to be *ad idem* about the fact that a Municipal Council is entitled to rescind and/or alter its decisions.[19]

41. The problem facing the Applicant in this instance is that the August 2023 Resolution which the Applicant effectively seeks to impugn, remains a resolution in fact and

[18]**Hix Networking Technologies CC v System Publishers (Pty) Ltd & Another** [1996] 4 All SA 675 (A) at page 681. See also **Setlogelo v Setlogelo** 1914 AD 221.
[19]See as confirmation the matter of **Manana v King Sabata Dalindyebo Municipality** [2011] 3 All SA 140 (SCA) at paragraph [22].

consequently remains in force until set aside and has certain legal consequences that cannot be overlooked.[20]

42. One of the legal consequences which is of relevance in this instance, in my view, is that the permanent appointment of the Applicant has been set aside and if regards are to be had to the fact that the Applicant's fixed term contract with the Municipality has also expired, it means that the Applicant has no contractual rights that are extant at the moment which may be protected by this Court.

It should also be kept in mind that on the date that the application was lodged (3 October 2023) this was already the case.

43. In my view therefore the Applicant has failed to satisfy the first requirement for an interim interdict and Part A of this application therefore stands to be dismissed.

COSTS:

44. Despite the above, I am of the view that this is not a matter where the costs should simply follow the result.

45. It is common cause that when it comes to the issue of costs, the Court has the discretion to make an appropriate costs order which discretion has to be exercised judicially with due regard to all of the facts of the particular case and with specific consideration to the question of fairness towards both parties.[21]

46. Mr. Davis, with reference to ***Section 56*** of the Local Government: Municipal Systems Act[22] (herein after referred to only as "the Systems Act"), argued with great vigor that the Applicant's permanent appointment was null and void by virtue of the fact that the Applicant did not meet the necessary requirements for appointment as the Applicant did

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[20] **Oudekraal Estates (Pty) Ltd v City of Cape Town & Others** [2004] 3 All SA 1 (SCA) at paragraphs [26] and [31].
[21] See *inter alia* **Gelb v Hawkins** [1960] 3 All SA 371 (A) at page 376.
[22] Act 32 of 2000.

not have the necessary and required experience to be appointed to the senior position in question.

Mr. Makola SC had a similar argument on behalf of the Respondents.

47. The parties were furthermore *ad idem* about the fact that the Applicant's appointment was to a senior managerial position and that the Applicant was directly accountable to the Municipal Manager.

48. It is indeed correct that a person appointed to such a position should have the required expertise failing which the appointment would be null and void.[23]

49. I was furthermore referred to ***Regulation 8*** of the Local Government: Regulations and Conditions of Employment of Senior Managers[24] which provides as follows:

"*(1) No person may be appointed as a senior manager <u>on a fixed term contract, on a permanent basis</u> or on probation … unless he or she –*

(b) possesses the relevant competencies, qualifications experience, and knowledge …" (My underlining and omissions)

50. It is common cause that when the position of Senior Manager: Finance and Corporate Services was advertised in 2018, one of the requirements for appointment was that the successful candidate had to have at least 5 (five) years applicable senior and mid-level management experience of which at least 2 (two) years had to be on senior management level.

All indications are that this specific requirement have not changed from the time of the conclusion of the October 2018 Contract to the taking of the 2020 Resolution in other words at the time that the Applicant was appointed permanently, he had to have had the same experience as when he was appointed on a fixed term basis.

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[23]See **Section 56(2)** of the Systems Act.
[24]See Government Notice 21 as published in Government Gazette No 37245 of 14 January 2014.

51. The arguments on behalf of the Respondents and on behalf of COGHSTA were that at the time that the Applicant was appointed permanently, in other words approximately 2 (two) years after his appointment on a fixed term basis, the Applicant did not have the required experience which, necessarily, would mean that the Applicant would also not have had the necessary experience when he was appointed on a fixed term basis.

52. I consequently hold the view that the above alleged disqualifying condition should have been picked up by the Municipality during 2018 already and the Applicant should consequently not have been appointed to the position of Senior Manager: Finance and Corporate Services in the first place.

53. Despite the above and by virtue of the apparent lack of diligence on the part of the Municipality and also on the part of COGHSTA (who had to authorize the fixed term appointment), the Applicant was utilized in the position of Senior Manager: Finance and Corporate Services to the obvious advantage of the Municipality up and until 2023 when his appointment was suddenly questioned and deemed to have been made unlawfully.

54. It should furthermore be mentioned that COGHSTA's hands, in my view, are also not entirely clean in this instance.

55. Apart from the above apparent lack of diligence, it is common cause that approximately 3 (three) years have lapsed since the taking of the 2020 Resolution and the issuing of the Directive (of 30 August 2023) despite the fact that the Systems Act requires of the Member of the Executive Council ("MEC") of COGHSTA to take steps, if necessary, within 14 (fourteen) days from becoming aware of an appointment of a senior manager to ensure compliance with the provisions of the said Systems Act by a municipal counsel.[25]

56. Based on the evidence at hand, COGHSTA was informed of the 2020 Resolution (to appoint the Applicant on a permanent basis) by way of electronic mail (herein after "e-

[25] **Section 56(6)** of the Systems Act.

mail") on 24 November 2020 and it appears that the said e-mail message was sent to no less than 3 (three) different e-mail addresses.

57. COGHSTA afforded the Court no explanation as to why the MEC of COGHSTA did not act within 14 (fourteen) days from 24 November 2020, bar from simply stating that the e-mail of 24 November 2020 was never received.

I find this explanation strange and not very believable in the circumstances especially in view of the fact that the relevant e-mail was sent to 3 (three) different e-mail addresses at COGHSTA.

58. Although I have to agree with Mr. Davis' contention that the above lackadaisical approach by COGHSTA does not necessarily render the Directive and consequential August 2023 Resolution unlawful, I have to also agree with Mr. Eillert that it is extremely audacious of COGHSTA to cry foul in as far as the time that it took the Applicant to lodge this application is concerned, whilst not adhering to statutory time-frames themselves.

59. In view of the above I deem it appropriate for this Court to show its disapproval with the conduct of the Respondents as well as COGHSTA by way of an appropriate costs order.

Seeing that the application was not opposed by the 2nd and 6th to 10th Respondents, these Respondents are not included in the costs order made herein under.

ORDER:

60. In view of all of the above, the following order is made:

60.1 The application, in as far as Part A thereof is concerned, is dismissed; and

60.2 The Respondents (with the exception of the 2nd and 6th to 10th Respondents) are ordered, jointly and severally the one paying the others to be absolved, to make a contribution towards the legal costs incurred by the Applicant in

lodging Part A of this application, in an amount equal to 50% of the Applicant's taxed and/or agreed costs on a scale as between party and party.

OLIVIER AJ

FOR APPLICANT	**:**	Adv. A. Eillert o.i.o Van De Wall Inc. **KIMBERLEY**
FOR 1ST, 3RD, 5TH AND 11TH TO 15TH RESPONDENTS	**:**	Adv. B.L. Makola SC GMI Attorneys **PRETORIA** c/o Elliott Maris Attorneys **KIMBERLEY**
FOR 16TH RESPONDENT	**:**	Mr. C. Davis The State Attorney **KIMBERLEY**