**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Reportable

Case no: CA 2014/07

In the matter between

**KAROO HOOGLAND MUNICIPALITY** **Appellant**

and

**NOTHNAGEL, LOUIS** **First Respondent**

and

**BOTHA MARIUS KIRSTEN** **Second Respondent**

**Heard:** **05 March 2015**

**Delivered:** **15 April 2015**

**Summary: Mootness - court having discretion to deal with a matter which has become moot or academic if there exist circumstances of public policy related to the impact or likely impact of the judgment *a quo* that render it prudent that a judgment be given.**

**Court *a quo* misconstruing facts that led to the decision to institute a disciplinary enquiry into conduct of employees – evidence proving that municipal council took decision to institute an enquiry and that municipal manager mandated to carry out municipal's council's decision – municipal manager's role or influence not affecting the status of the decision nor its source — Authority vested in the municipal manager not invoked in the**

**decision – the finding of the High Court that the municipal manager was invalidly appointed not affecting the decision of the council - interpretation of the *Oudekraal* doctrine restated - invalid action remaining enforceable unless and until set aside - Labour Court erred in finding that decisions made by a municipal manager whose appointment is declared void are automatically to be set aside – appropriate to clarify the principle of law despite mootness- danger of dicta in labour judgment being cited selectively and causing confusion in future disputes before arbitators**

**employees opposing the correction of a legal point on appeal unwarranted and justifying costs against them- Appeal upheld with costs.**

**Coram: Davis, Ndlovu and Sutherland JJJA**

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**JUDGMENT**

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SUTHERLAND JA

Introduction

[1] The origins of the controversy which is the subject of this appeal lie in an urgent interdict obtained from the Labour Court (Steenkamp J) by the two respondents, Nothnagel and Botha on 15 August 2013. (Reported as *Nothnagel and Another v Karoo Hoogland Municipality* (2014) 35 ILJ 758 (LC)) The respondents were senior employees of the appellant, Karoo Hoogland Municipality. The Labour Court declared that steps taken to institute and prosecute a disciplinary enquiry into their alleged misconduct were unlawful and interdicted the municipality from taking any further steps pursuant to that decision to subject them to discipline. On 16 April 2014, the appeal against that order was lodged, ie about eight months later.

[2] The appeal was argued before this Court on 5 March 2015. At that moment, the court was informed that the two respondents were no longer employees of the appellant. Consequently, the dispute between the parties is moot, save for the question of costs. This much is accepted by both parties. The appellant's stance is that notwithstanding the mootness, the appeal should be heard, not only for the costs question to be resolved, but because it is appropriate that

certain statements by the judge *a quo* about the law, which are argued to be plainly incorrect, be overruled because if they are left to stand, they are likely to cause unnecessary subsequent litigation, especially if CCMA commissioners are misled by the questionable *dicta*. Counsel for the respondents, despite other arguments, ultimately, conceded that on the crucial point, he could not defend the reasoning in the judgment, although he contended the result was justifiable; ie the prevention of the continuation of the disciplinary enquiry. Nevertheless, it was argued on behalf of the respondents that the appeal should not be further entertained, on grounds of its academic nature and because, for reasons of established policy, any controversy about costs alone does not warrant a hearing.

Approach to Mootness

[3] It is the issue of mootness that now takes centre stage in the matter. However, because of the premise upon which it is advanced that there are proper grounds to deal with at least one issue despite the mootness of the order, it is unavoidable that the merits of the judgment *a quo* must be addressed. The paradox of having to take a view on the controversy in order to decide whether it is necessary to take a view is not lost on me.

[4] It is beyond doubt that a court may, at its discretion, deal with a matter even if it is moot or academic as between the principal parties, if there exists circumstances of public policy, related to the impact or likely impact of the judgment *a quo*, that render it prudent that a judgment be given. In *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd,*[1] a matter dealing with compelling the disclosure of a report as contemplated by the Promotion of Access Information Act, Wallis JA at [5] put it thus:

> 'The disclosure of the report means that any judgment or order by this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone. The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be

[1] 2013 (3) SA 315 (SCA),

> contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose. In exercising its discretion the court is always mindful of the wise words of Innes CJ in *Geldenhuys and Neethling v Beuthin*, that:
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> > "After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."'[2]

[5] In my view, as shall become evident, this is a case which requires a judgment on one particular legal issue to be given, despite mootness of the matter.

[6] A brief narrative of the history of the dispute is appropriate. The two respondents, long standing employees, and a newly appointed municipal manager, Saayman, ostensibly, did not hit it off. At once Saayman took the reins, he set in train investigations into the propriety of past financial decisions. Among others, the two respondents came under suspicion of committing improprieties. In turn, Saayman himself was accused of improprieties by the respondents. The two respondents were suspended in terms of a decision by Saayman, but an application to the Labour Court to set that aside succeeded. The appellant abided that court order.

[7] After that, the appellant nevertheless persisted in prosecuting an enquiry into alleged misconduct. Investigations were conducted by outsiders including the National Treasury. The Treasury recommended discipline against several employees including the two respondents.

[8] The two respondents launched an application seeking several forms of relief, much of it interlocutory.

[9] The Labour Court interdicted the enquiry on the basis that the decision to discipline the two respondents was unauthorised. The premise of that finding was the common cause fact that, on 22 February 2013, the Northern Cape

[2] At para 5.

Division of the High Court had delivered a judgment which declared that the appointment of Saayman as municipal manager was unlawful and set it aside.

[10] The application for the interdict had been launched before that date, on 12 February 2013. At that stage, the grounds relied upon, self-evidently, could not include the alleged unlawfulness of the decision to discipline based on Saayman's unlawful appointment, declared so only on 22 February. But on 27 February, the two respondents supplemented their founding affidavit by the introduction of that information, and invoked it as a basis to set aside the enquiry.

The Judgment of the court a quo

[11] The critical passages in the Labour Court Judgment explaining the reasoning supporting the order are at [19] – [28]. It is necessary to reproduce them in full:

> ' … Legality
>
> [19] The applicants base their claim to have the disciplinary hearings set aside on the principle of legality. They claim that a failure to intervene would lead to a grave injustice, summarized under three headings:
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> 19.1 the lack of authority for the holding of the disciplinary hearings;
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> 19.2 an alleged breach of the regulations; and
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> 19.3 a claim that the disciplinary hearings would amount to a gross injustice in the circumstances.
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> Authority
>
> [20] In the Northern Cape judgment, the High Court has declared the decision of the municipality to appoint Saayman as its municipal manager null and void and his employment contract has been set aside.
>
> [21] Saayman — who was accused of financial impropriety by the applicants — *played a central role in convening the disciplinary hearings against the*

*applicants that have not yet been held. The council mandated him to appoint a chairperson and an officer to lead evidence in those disciplinary hearings*.

[22] The Local Government: Municipal Systems Act regulates the appointment of municipal managers. Saayman's appointment was set aside, inter alia, because it did not comply with s 54A(2) of the Systems Act:

'(2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.'

[23] *The result is that all actions undertaken by Saayman in his capacity as municipal manager are null and void ab initio*. *One of those was to institute disciplinary action against the applicants, albeit by resolution of the council.* The municipal manager is the head of administration of the municipality. In terms of s 55 of the Systems Act:

'As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for — …

*(g)* the maintenance of discipline of staff;

*(h)* the promotion of sound labour relations and compliance by the municipality with applicable labour legislation.'

[24] Mr *Stelzner* argued that, flowing from the Northern Cape judgment, read with the provisions of the Systems Act, the disciplinary action against the applicants must be set aside as a result of the role of Saayman in initiating and prosecuting the hearings.

[25] Mr *Oosthuizen* countered that this did not follow, relying on the following passage from *Oudekraal Estates*

> '[26] ... But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review

> it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside…
>
> [31] Thus the proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.'

[26] But the respondents' reliance on those passages overlooks the phrase — repeated no less than three times in various forms in the passages cited by the respondents — 'for so long as the initial act is not set aside by a competent court'. *In this case, the initial appointment of Saayman as municipal manager has been set aside by the High Court. His consequent acts, including the prosecution of the disciplinary hearings against the applicant, cannot be legally valid.*

[27*] In these circumstances, the pending disciplinary hearings against the applicants must be set aside.*

Interdict: A clear right?

[28] *It is clear from the foregoing that the applicants have established a clear right for the relief they seek, based on the fact that the appointment of the municipal manager was null and void*. In the circumstances, I need not consider the second and third grounds, ie that the municipality did not comply with the regulations; or that the proceedings are an abuse of process.'

(Footnotes omitted; highlighted critical passages supplied)

[12] The locus of the controversy is in the highlighted passages. Two issues warrant attention. (1) First, on the facts, Saayman did not make the relevant decision to institute and prosecute an enquiry into alleged misconduct by the two respondents; the Council did so. (2) Second, the remarks about the application of what I shall call the *Oudekraal* doctrine do not accurately state the law.

The Facts

[13] The Council of the appellant, on 9 October 2012, resolved thus (immaterial remarks omitted):

> '2. That the municipal council… resolves …. that the charges against the following senior managers …. are serious:
>
> >Dr M K Botha
>
> >Mr L Nothnagel
>
> ….
>
> 3. The municipal council further notes that based on the national treasury….report it is recommended that council take appropriate action including disciplinary proceedings:
>
> > Council thus resolve to proceed with disciplinary proceedings against senior managers (Dr MK Botha and Mr L Nothnagel) in terms of the Local Government: Disciplinary Regulations for Senior Managers…
>
> > ….
>
> 4. Council further authorise the municipal manager, Mr E Saayman to proceed to (a) appoint and (b) sign the letters of appointment for:
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> > an independent presiding officer – Mr Silas Selemela;
>
> >An officer to lead the evidence – Adv Martin Phera; and
>
> > any other persons(s)/ experts that may be required to assist in conducting and concluding the disciplinary proceedings.'

[14] It is plain from the reading of this resolution, that Saayman's mandate was purely administrative. No part of what he was directed to do was dependent upon his status as municipal manager. No other act in furtherance of the disciplinary enquiry required a decision nor an act premised on the powers vested in the office of municipal manager, per se. Even the charge sheet was, apparently, signed by the pro forma prosecutor, Adv M Phera, who was selected by the Council rather than by Saayman. Later, a substitution of the selected presiding officer was effected and again this was a decision taken by the Council on 30 October 2012, not by Saayman.

[15] The Labour Court's finding that Saayman was mandated to *appoint* a chair for the enquiry and a prosecutor is semantically correct, but the text of the resolution, read in context, was a mandate to *administer* the Council's decision, a task anyone could have been assigned to do. The further finding

by the Labour Court that Saayman played "a central role" is an exaggeration of the relevant facts; what he did was to perform the acts of a functionary at the bidding of the Council and his "central" role as such ought not to be exaggerated. Although understandable that the most senior person in the bureaucracy was mandated to undertake these tasks, it makes no difference to the source or status of the decision itself. The allied perspective that the Council was heavily influenced by Saayman, and the implication that such influence was malign does not disturb the status of the Council as decision-maker nor the validity of its decision.

[16] Thus, on the facts adduced, however influential Saayman might have been, (an assessment which must be cautiously weighed in the light of the fact of outside forensic agents playing a role in the investigations and it being the Treasury's recommendation, not that of Saayman, to discipline the two respondents) Saayman did not make the critical decisions. A proper appreciation of the facts would have showed that no decision was necessary by the Labour Court about the validity of the authority of the municipal manager to make decisions.

[17] Notwithstanding this important aspect, the Labour Court decided the matter on the premise that Saayman was relevantly implicated in the decision to discipline the two respondents. That premise was not substantiated and once that edifice is absent there is no factual basis for the order that was granted.

The application of the *Oudekraal* doctrine[3]

[18] However, the more serious aspect is the notion that once a municipal manager's appointment is set aside, (paragraphs [23] and [26] of the judgment *a quo*, cited above) whatever decisions taken during the incumbent's reign purporting to exercise the authority now declared to have been invalidly exercised, are *ipso facto*, invalid too, and in consequence fall to be set aside automatically, without regard to the implications of so doing.

[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2*004 (6) SA 222 (SCA).

[19] On behalf of the appellant, it is argued that these *dicta* are incorrect. As alluded to earlier, the *dicta* were not defended in argument on behalf of the respondents. If these *dicta* are inaccurate, it is argued on behalf of the appellant, that the publication thereof holds out the real and likely risk of the judgment being cited in future disputes about the impugned decisions of municipal managers and inviting undesirable results, especially in SALGBC arbitrations, where as a reading of the law reports reveal, the corps of municipal managers has, over several years, contributed at least its fair share to the volume of litigation. It is argued that there is a threat to the interests of justice; more concretely, the real risk of public funds being consumed in litigation over the uncertainties. Moreover, such a controversy could apply to any public official whose appointment is voided, not only to municipal officials.

[20] This view is countered by the submission that the *dicta* in the judgment *a quo* have no precedent value, because any realistic confusion about the ambit of the *Oudekraal* doctrine has been eliminated by the remarks made in the decision of the Constitutional Court in *MEC for Health, EC v Kirland Investments (Pty) Ltd t/a Eye Laser Institute* 2014 (3) SA 481 (CC). In that case, the court was divided about the process that was mandatory to set aside invalid decisions. The Majority, per Cameron J, rejected what they called a shortcut by an organ of state to be released from the invalid decision taken by itself by regarding it as non-existent, and held that a review application to declare the decision invalid had to be prosecuted, and upon that being decided, a further decision would have to be taken about what to do about the consequences. (esp at [87] – [106])

[21] It must be fairly stated that comprehension of the *Oudekraal* doctrine is no easy task. It is the classic example of common sense triumphing over mechanical legal reasoning in order to prevent self-help, which cannot be sanctioned, and to ensure that an invalid decision must be set aside pursuant to a legal process, rather than be ignored by the decision maker.

[22] The critical passages in *Oudekraal* are cited above. The sting is in the idea that an act, albeit invalid for want of regularity, remains a fact. Later acts perpetrated on the assumption of the validity (incorrectly) of the initial act

remain enforceable unless and until they are set aside. The important dimension of this doctrine is that once a court has declared the initial decision invalid, thereafter, another court, recognising the invalidity of decisions made later upon that premise, must have such later decisions placed before it whereupon it shall consider the problem and make two decisions; first, to declare the later decision invalid, and second, decide what appropriate relief, consequent upon such a declaration, ought to follow.

[23] There is no room on the *Oudekraal* doctrine for an "automatic" washing away of the multitude of decisions made by a municipal manager, if his appointment, after usually several months if not longer, is declared to be invalid. It is for this reason that the *dicta* in the judgment [26] and [27] require qualification. It cannot follow as a matter of course that in every instance it is appropriate to unwind what has been set in train based on an invalid decision. A court must assess the consequences and on some occasions a pragmatic decision will be warranted, and when appropriate, an invalid decision will not be set aside.

[24] In the decision by Froneman J in *Benwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(4) SA 113 (CC) at [81] – [87] the approach of a court to dealing with invalidly made decisions was addressed. The issue was the identification of what consequences would a court permit to flow from an invalid decision, in the exercise of its discretionary powers. At [83] - [86] it was held thus:

> '…This 'generous jurisdiction' in terms of s 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.
>
> [84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. <u>This would make it clear that the discretionary choice of a further just and equitable remedy follows upon</u>

that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.

[85] The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.

[86] The High Court, after finding that the review was brought out of time and that there were no reviewable irregularities, nevertheless went ahead and stated that this was a case where a court in its discretion ought to decline to set aside the invalid administrative act. The majority judgment in the Supreme Court of Appeal adopted this reasoning. The reasons offered were fourfold, namely that: (a) it would make little difference to the members of the community whether Genorah or Bengwenyama Minerals exploited the prospecting rights; (b) reliance on s 104 of the Act was misplaced; (c) if the grant in respect of the two community farms were set aside, it would probably affect the viability of the remainder of the project; and (d) the public interest required finality.'

[25] As a result, such an enquiry follows as a matter of course, not an automatic setting aside of the decision, without more.

[26] The approach of the Labour Court to the decisions of the municipal manager, taken prior to his appointment being declared invalid, are inconsistent with higher authority cited above. Despite it being possible for the decision *a quo* to be understood to be trumped by higher authority, it remains equally realistic to suppose that in a dispute ventilated in the SALGBC, especially among non-lawyers, that the *dicta* in the court *a quo* might not be interrogated as carefully as the best practice might require, especially among those disputants who confine their reading to the Labour Law reports. The risk of avoidable appeals is real. A correction by way of the qualification set out above is therefore wholly appropriate.

The costs

[27] Counsel for the respondents pressed on us that the two respondents, as individuals, ought not to be ordered to pay costs. However, their conduct of the litigation is not such that they can be accused of seeking to resolve the dispute cheaply. The appeal was prosecuted after they had refused to consent to a re-institution of the disciplinary proceedings. Moreover, after a protracted period, they left the employ of the appellant when the appeal process was far advanced with only the hearing outstanding. They delivered heads of argument the day before the hearing raising mootness for the first time. The appellant's burden of costs was not given any weight in seeking their own strategic advantages. Lastly, the premise of the case they pressed on the Labour Court, in urgent proceedings, was fundamentally flawed. On the other hand, it could fairly be said that part of their case was unexplored in the court *a quo*, and it is inappropriate to explore it on appeal simply to assess it merits, if any, to determine the effect it may have on the costs. (See: *Mashoane v Mashoane* 1962 (2) SA 684 (D) at 687G). However, the costs applicable to the initial proceedings differ in character from the appeal proceedings. The insistence on the appeal process rumbling on, and active opposition at the eleventh hour to resist an appeal made moot by their departure from the employ of the appellant, to resist a correction of the

judgment on a legal point of public importance, in my view, justifies the two respondents paying the costs of the appeal. Such an order would, in my view, satisfy the species of considerations articulated by Centlivres CJ in *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339 (A) at 345H- 346A:

> 'Up to a late stage in the present case it appears that both parties mistook the position and it was not until October 21st that the plaintiff's attorneys notified the defendant's attorneys that the plaintiff would object *in limine* to the hearing of the appeal. By that time the major costs of appeal must have been incurred by both sides, the record having been lodged with the Registrar on August 15th and notice of set down having been given on August 31st. It is reasonable to assume from the letter of October 21st that by that time counsel had already been briefed for the appeal. None of the cases purport to lay down a hard and fast rule in a matter such as this nor can they be said to deprive the Court of its inherent discretion to make such an order as to costs as may be just in the circumstances of any particular case. Cf. Estate Maree v Redelinghuis, 1943 AD 547 at pp. 557 and 558. The defendant persisted in maintaining that the matter was appealable and as the Court did not feel able to give a decision on the preliminary point at once it heard argument on the merits and the argument in the whole case lasted two and a half days. This is a factor which must be taken into account.'

The Order

[28] The appeal is upheld.

[29] The order of the court *a quo* is set aside.

[30] The respondents shall pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

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Sutherland JA

Davis JA and Ndlovu JA concur in the judgment of Sutherland JA

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|---|---|
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