REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J 1331/09

JS 1330/09

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**First Applicant**
LINDA CAROL MAKHUBU	**Second Applicant**

and

DIHLABENG LOCAL MUNICIPALITY	**Respondent**

Date Of Hearing: 12- 13 November 2012

Date Of Judgment: 3 November 2014

Summary : (Breach of contract – transfer from post into which applicant had been reinstated without agreement – discrimination/victimisation for exercising rights by litigating over dismissal)

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LAGRANGE, J

Introduction

[1] The events leading to these two matters, which have been consolidated in these proceedings, happened over a long time period. The claim brought under case number JS 1330/09 concerns the respondent's alleged infringement of the applicant's rights under s 4(1)(b), 4(2)(a),5(1),5(2)(b),5(2)(c)(iii), 5(2)(c)(vi), and 5(2)(c)(vii) of the Labour Relations Act, 66 of 1995 ('the LRA'), which I will refer to collectively as 'the discrimination claim' or 'the victimisation claim' for purposes of distinguishing it from the other matter. The claim under case number J 1331/09 relates to the same events underpinning the first matter but is a claim for specific performance in the form of payment of remuneration at the level of a Community Development Officer ('CDO') in the office of the Mayor of Dihlabeng Local Municipality ('the contractual claim'). The two claims were consolidated in terms of a court order dated 1 August 2012.

[2] At the hearing of the matter, the respondent raised an *in limine* point objecting to the second matter proceeding on the basis that it had not been referred to the CCMA prior to being referred to this court. This point was withdrawn after it was acknowledged that it was a contractual claim, which did not have to go to conciliation before being brought to this court. A similar *in limine* point the respondent had intended to raise in respect of the discrimination claim was not pursued.

[3] Only the second applicant, Ms L C Makhubu, and Mr J Botha, the Head of Administration at Dihlabeng Local Municipality ('the Municipality') since 1990, for the respondent, gave evidence.

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Outline of the sequence of events

[4] The events relating to both claims, which to a significant degree are common cause, are outlined below.

[5] Makhubu was employed in August 2001. There is some dispute about documentation relating to her appointment and the terms of her appointment. In particular, there is some disagreement about whether Makhubu was employed as a CDO deployed in the office of the Mayor and reporting directly to the Mayor, or whether she was deployed as a CDO together with other employees in the office of the Mayor only during August 2002. In his opening address, Mr Lebea, who appeared for the municipality said his client contended that Makhubu's posting to this position was a temporary one and there were CDO posts but those wereonly for fixed term appointments linked to the tenure of the mayor. Mr Orr, appearing for the applicants, objected to this as it was contrary to the Municipality's pleaded case that the posts of CDO's were terminated in the entire structure of the municipality. Mr Lebea sought to explain that this reference in the pleadings was to be understood as a reference to permanent CDO posts and not to CDO posts filled with fixed term contract employees. The issue of whether the respondent had been honest in its characterisation of the existence of CDO posts became an issue of some significance during the proceedings.

[6] In November 2002, Makhubu was suspended pending the outcome of a disciplinary enquiry and on 11 August 2004, nearly two years later, she was dismissed on the basis of alleged misconduct. Makhubu was a shop steward and deputy provincial chairperson of SAMWU in the Free State, the first applicant. Subsequently, an unfair dismissal dispute was referred to the South African Local Government Bargaining Council and on 12 September 2005 her dismissal was found by an arbitrator to be substantively and procedurally unfair. The arbitrator awarded Makhubu reinstatement with effect from the date of her dismissal on the same terms and conditions applicable under her employment contract prior to her termination of service and specifically referred to her position as a CDO in this regard.

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[7] There was also some dispute about whether there were two other CDOs employed in the municipality at the time of Makhubu's dismissal and what their specific areas of responsibility were, and whether Makhubu was specifically responsible for local economic development

[8] Between August 2004 and September 2005 the Municipality claimed that there were far-reaching organisational changes it undertook which included terminating the CDO posts, as a result of which that post did not exist in the office of the Mayor at the end of that period

[9] Contempt proceedings were instituted against the Municipality by the applicants who alleged that the respondent had not complied with the arbitration award, but before the contempt proceedings could be heard the municipality instructed Makhubu to report for duty at its head office on 10 April 2007. On reporting for duty she was immediately placed on 'special leave' for a three week period and on her return was told to occupy an office in the corporate services department. Botha could not provide an explanation why it had been necessary for Makhubu to take this step to get the Municipality to reinstate her.

[10] It was also a matter of dispute whether Makhubu tendered her service as a CDO on her return from the special leave and whether this tender was rejected by the municipality. It is also a matter of dispute whether she could not be assigned any duties as a CDO during this period.

[11] The municipality ordered Makhubu to tender her services at an administrative unit under its control in Clarens. The circumstances surrounding this posting were contentious. Thus, the municipality claimed that there was consultation with Makhubu beforehand starting in January 2008, which she disputes. Further, Makhubu claims that she was issued with a letter by the municipality indicating her transfer to the Admin unit at Clarens was with immediate effect and whether the letter indicated the post she was required to assume. There was also disagreement about whether or not the letter unilaterally varied her contract.

Makhubu claimed that another letter dated 6 June 2008 was handed to her on the 11 June 2008, which instructed her to report to the "unit manager" at Clarens, who would assign her duties to perform. The letter from the

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Municipality dated 11 June 2008 advised Makhubu that the municipality would not accept her tendering her services at Bethlehem and she would not be remunerated for that was also a point of disagreement. Related to this, was a dispute about whether any of Makhubu's salary was withheld because she failed to tender her services at Clarens.

[12] The dispute concerning the withholding of Makhubu's remuneration came before the Labour Court on an urgent basis on 16 July 2008. The Court handed down an order interdicting and restraining the municipality from withholding any of the applicant's remuneration in consequence of her failure to tender her services at Clarens, without first complying with its obligation to follow a fair procedure.

[13] The applicants also claim that the instruction to tender services at Clarens amounted to an alteration of her workplace and was a unilateral variation of her contract. The municipality claims that the Clarens unit is part of its own workplace, as it is one of four towns administered by the municipality, the others being Paul Roux, Rosendal and Bethlehem.

[14] It was also not common cause whether Mr T Posholi, the Human Resource Manager, commuted daily from Bethlehem to Clarens and back.

[15] The municipality claims that Makhubu's position at Clarens (described as Supervisor: Solid Waste) is superior in status and responsibilities as a CDO as well is the position Makhubu held in the corporate services directorate. The respondent contended that Makhubu had 30 staff reporting to her in this position whereas previously nobody reported to her as a CDO..

[16] The municipality claimed that the decision to oblige the second applicant to render her services at Clarens was because of the absence of CDO positions or any equivalent positions or work to perform in Bethlehem. The respondent contends that effectively there was nothing for the applicant to do in Bethlehem.

[17] Having listed some of these factual disputes, it must be said that during the course of the trial many of them turned out to be insubstantial as

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there was little evidence from the respondent to support its contentions in regard to all of them.

Issues the court must determine

[18] The substantive issues identified by the parties, which the court was asked to decide may be summarised as:

18.1 Was the transfer of Makhubu to Clarens a breach of her employment contract?

18.2 Whether any part of Makhubu's salary was withheld as a result of her refusing to accept the transfer, and if so whether that was lawful.

18.3 Was there no genuine reason for transferring Makhubu to Clarens because the real reason was that she had successfully challenged her dismissal and was an active shop steward?

18.4 Did the municipality's actions violate Makhubu's rights in sections 4 and 5 of the LRA, set out above, and if so what relief should she be granted under that Act if any?

18.5 If the municipality breached Makhubu's employment contract, what relief if any should be ordered for that?

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The evidence

[19] It is not my intention to summarise the oral testimonies but only to mention what I consider reasonable for the purposes of narration and dealing with the disputed issues.

Makhubu's appointment

[20] Makhubu was issued with a letter of appointment dated 31 July 2001 in the name of the acting municipal manager of the municipality. Pertinent portions of that letter read:

> *"I have pleasure informing you that you have been appointed with effect from 1 August 2001 as Community Development Officer at*

the salary notch 76 984 per annum of the salary scale of 76984, 80 [8] 96, 85016 per annum (Post Level 6 of a Grade 8 Local Authority)

your service contract is governed in terms of an agreement of the bargaining Council for the local government undertaking, free state division provided that:...

The following particulars also relate to your appointment:

(a)...

(h) Workplace — *Determined by the place where service rendering is needed*

...

Your attention is drawn to the fact that you are appointed on the staff establishment of the Dihlabeng Local Council but you can be utilised at another local authority in a similar position should circumstances necessitate it.

...”

[21] Makhubu testified that when she was appointed she was located at the municipality’s head office and reported to the mayor. At the time there were three other CDOs employed apart from herself each of whom had their own portfolio, just as she did. They worked in the mayor’s office and reported to the mayor. The post of a CDO was common in Free State municipalities, a situation she was familiar with because of her travels in her capacity as a shop steward.

[22] Under cross-examination she explained that she had been dismissed in 2005 for allegedly saying that councillors were corrupt and putting up posters as well as representing someone in breach of a suspension.

[23] During the arbitration proceedings, the municipality’s representative failed to attend the proceedings on two successive occasions and the arbitrator decided to proceed. The municipal manager who attended the case was unable to conduct the municipality’s defence because he was unfamiliar with the facts of the case. In the arbitration award issued on 12

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September 2005, the municipality was ordered to give effect to her reinstatement by no later than 1 November 2005. The reinstatement portion of the award read as follows:

> *"The Employer party is hereby ordered to reinstate the Employee party retrospectively from the date of her dismissal being 1 August 2004 and on the same terms and conditions of employment which prevailed prior to her dismissal and in the post of Community Development Officer Post Level 6".*

Botha agreed that the arbitrator had ordered that Makhubu should be placed back in her post as CDO. The reason this was not done, in his personal view, was that the mayor was told that it was a fixed term position and that the political climate was not the same as it was in 2003.

[24] It was necessary to apply for the certification of the award and subsequently, in order to enforce the payment of back-pay, a writ of execution had to be issued. It was only in June 2006 that the municipality's attorneys of record at the time responded, after the attachment of the mayor's vehicle. They claimed that the municipality had erroneously filed an application to rescind the arbitration award at the CCMA and accused Makhubu of acting in bad faith in obtaining the writ of execution as she was aware that the municipality was intending to rescind the award. Makhubu denied she had any knowledge of such a rescission application and no evidence of that application being served on her was adduced. Because the applicants' believed the municipality was wasting time they were not prepared to agree to the writ being stayed pending the rescission application. The rescission application was heard in December 2006. Once again, the employer's representative was not present and it was agreed the matter would be dealt with on written submissions. As the rescission application had been filed late, the municipality had to apply for condonation before it could be considered. In January 2007, the arbitrator dismissed the condonation application, effectively dismissing the rescission application in the process.

[25] The municipality still did not comply with the order reinstating Makhubu. This necessitated the launching of a contempt application which was set

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down for 27 March 2007. Just before the matter was heard, the municipality issued a letter to Makhubu confirming her reinstatement and requesting her to report for duty on 10 April 2007. The last paragraph of the letter stated:

> *"Furthermore your reinstatement will be on Post Level 6 and further detail regarding your post and the Department must be discussed with Mr Nakana L Masoka the Director: Corporate Services"*

[26] Makhubu said that when she reported for duty at the mayor's office, he told her to see Masoka. Masoka told her she could not go back to her previous post because it was filled by someone else, but that she would be part of the Corporate Services department and would work there. He further said he would discuss her situation with the municipal manager. It was put to her under cross-examination that Masoka had said that she would not be reinstated as a CDO but she denied this. He then placed her on three weeks special leave. According to the payslip she was issued with in April 2007 her job title was incorrectly recorded as an Assistant Building Inspector ('ABI') and her date of engagement as 1 April 2007.

[27] At the time of her reinstatement, as far as Makhubu knew, there were two persons occupying CDO posts and one post was vacant because one of the incumbents, a Mr Mokwena, was on suspension. Under cross-examination she agreed that she was aware those appointees were on fixed term contracts.

[28] On returning from her special leave she went back to Masoka and showed him the erroneous job description on her payslip. His response was that the payslip was just for administrative purposes so she could be paid. She was not satisfied with this explanation and on 7 May 2007 wrote three letters to the municipal manager. One letter requested clarity on why she had not been allowed to resume the post which she previously occupied ('the clarification letter'). Another complained about the unlawful changes to her job designation without due process and sought an explanation of who was responsible for making the change

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and when the decision was taken and why she was not consulted (' the job designation letter'). The third letter also sought clarity about whether her current employment relationship was under review as she was concerned in the delays in resuming her duties. In each of the letters she requested a response by 11 May 2007. She denied that it was understood by her that she could not go back to the CDO position: at the time she was waiting for feedback from Masoka after he had discussed the situation with the municipal manager.

[29] Having received no response to any of the letters, on 12 June 2007 she wrote three more letters requesting a response to each issue by 15 June 2007. It was only on 10 July 2007 that she received a response from Masoka which only referred to her complaint about her job description being changed without consultation. In the letter, which he asserted was written on the instructions of the municipal manager, it is stated that the matter was discussed with Makhubu. The explanation he gave her was that her job description had not been unilaterally changed or otherwise, and that her salary was being carried "on a vacant post", with a salary level equivalent to what she earned before she had been dismissed. The letter also stated that the arrangement would be revisited once the Council had addressed itself on her matter. Makhubu understood this to mean that her job description in terms of condition of employment had not changed and that she was still a CDO. It was suggested to her that she could not have genuinely believed that she was still in that position when she had been placed in the Corporate Services department, but Makhubu pointed out that she was doing nothing in that department at that time and Masoka's letter of 10 July 2007 asserted that her job description had not been changed. She denied that Masoka had told her she would not be reinstated.

[30] From July to October 2007 she was not assigned any work, whereas the other two CDOs were performing duties. When she was asked if she had ever complained about not being reinstated as a CDO during this period, she said she had written letters and when she had met with Masoka and Msibi they would say they were looking into the matter.

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[31] In October 2007 she met together with a shop steward with Mr Msibi, the new municipal manager. Masoka was also in attendance. She claimed to have introduced herself with reference to her position as a CDO, which Masoka did not dispute. Msibi claimed to be aware of her problem and undertook to deal with it. Notwithstanding this, Makhubu was not assigned any duties between then and May 2008. Between October 2007 and May 2008, she was given the similar responses whenever she enquired about progress, namely that her matter was being looked into. In May 2008 she met the new Director of Corporate Services, Mr M Seoke ('Seoke'), in the passage who asked her what she was doing. When she explained her situation, he said he would follow up on it.

[32] This encounter led to a meeting that month with Posholi. He showed her an unsigned transfer letter to Clarens in terms of which she would be working as a housing clerk. Makhubu refused to sign the transfer letter as she believed it amounted to a demotion as the accompanying salary level was 8 or 9 rather than her current level 6. Posholi undertook to speak to Seoke. Subsequently she received a letter dated 13 May 2008 from Seoke. The body of the letter reads:

> *"<u>TRANSFER AND ASSIGNMENT OF NEW DUTIES</u>*
>
> *Kindly note that you are transferred to the Admin Unit Clarens with effect from Monday, 19 May 2008 to occupy and perform the duties as lined out in the job description that you will receive. Your attention is drawn that too that as you are an employee of Dihlabeng Local Municipality no transport cost will be paid to you.*
>
> *Should you wish to relocate to Clarens the Municipality Policy will be effected."*
>
> (*Sic*)

Following receipt of this letter, Makhubu spoke to Seoke and told him that she doubted she would agree to the transfer in the absence of knowing what her duties were, but Seoke did not respond positively. This prompted the union to send a letter to Seoke, dated 13 May 2008, advising that the communiqué amounted to a notice of a unilateral variation of Makhubu's

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contract and was tantamount to a notice of dismissal. It further reminded Seoke of the terms of the arbitration award and called for the transfer to be reversed by 23 May 2008. She denied that there had been any consultation with her about the transfer prior to receiving the letter.

[33] Two weeks later, on 6 June 2008 the municipal manager responded to the union's letter. It is useful to quote this letter in its entirety:

> *"TRANSFER OF LC MAKHUBU: CLARENCE UNIT*
>
> *We refer to our previous letter dated the 13th of May 2008 addressed in the above matter.*
>
> *I record that despite you having been informed that your services are not required in that Department Corporate Services and that the municipality does not derive any benefit at your being in the Department of Corporate Services, and that your services are best required and will add more value if you are transferred to the Clarens Unit, you have nevertheless refused to transfer to Clarens Unit and have continued to tender your services at the Department of Corporate Services despite there being no duty or work for you to perform.*
>
> *I advised that the Municipality does not accept your purported tender of your services at the corporate services department and you will accordingly not be remunerated for such a tender. In addition the Municipality reserve the right to Institute disciplinary action for insubordination as there is no doubt that the instruction to work at the Clarens unit where you will add value to the municipality is a lawful and reasonable one.*
>
> *You are therefore once again hereby instructed to tender your services at Clarens unit in terms of the initial letter which was sent to you in this regard by not later than Monday, 9 June 2008 at 07:30. On arrival at Clarens unit you will report to the unit manager who will then assign duties to you to perform."*
>
> *(original emphasis)*

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[34] Makhubu agreed that she had refused to tender her services in Clarens as instructed, even though she was not doing any work in Bethlehem, because the transfer amounted to a unilateral change of her job description. When she returned to the municipality she returned as a CDO and the transfer letter of 13 May did not even specify her new duties. She disputed the contention put to her by *Mr Lebea* that she had been an ABI in the Corporate Services Department since 1 April 2007, and pointed out that the letter of 10 July 2007 from Masoka was confirmation that her job had not been changed. She had been satisfied with this response on this issue. Likewise, that letter explained the rationale for the job designation on her payslip. Moreover, if she had been an ABI she would not have been reporting at Corporate Services, but at Public Works. She never performed ABI tasks and there was no ABI post in the Municipal organogram.

[35] Under cross-examination, Botha agreed that no evidence of the terms and conditions applicable to that post had been provided by the respondent and, if it did exist, it would not be in Corporate Services but in the Public Works department. If it had been a post in the former department it would have to have been a newly created one and he agreed that there was no document showing that such a post existed. He refused to comment on whether the arbitration award resuscitated the previous contract of employment.

[36] Thereafter, matters were escalated to the party's attorneys. Makhubu agreed that an understanding had been reached towards the end of June 2008 between the attorneys that the implementation of the transfer would be suspended pending the finalisation of the consultation process between the municipality and Makhubu. During that time she would continue to report for duty at Bethlehem and would be paid her normal remuneration.

[37] Eventually, on 1 July 2008, a consultation meeting was held between Makhubu and the municipal management under the chairmanship of Posholi. As far as Makhubu was concerned, this was not a consultative meeting because Posholi effectively told her that she would have to

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report on Monday 7 July at 7.30 at the Clarens unit as a Supervisor of the Community Services with the same package and conditions. Although Botha did not attend the meeting, he thought it was unlikely that Posholi would have simply told Makhubu to report for duty at Clarens because he was not like that and it would have been couched as a request because it was consultative process. The minutes of the meeting records that she complained that her remuneration would be affected if she had to travel to Clarens without being paid a travelling allowance, but the employer insisted that Clarens was a unit within the municipality and therefore travelling would not be paid , but she could be paid a relocation allowance. The meeting ended inconclusively on the basis that she would consult with her lawyer and the union and a further meeting would be held.

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[38] It was suggested in cross-examination that Posholi had merely tabled a proposal, but Makhubu pointed out that her shop-steward Mr Mokoena had immediately noted that it seemed she was being given an instruction. Makhubu said that as far as she knew there were persons in certain posts receiving a travel allowance at the Municipality when they used their own vehicle rather than the Municipality's vehicle, such as Maqelepo when he was a CDO. The allowance had to be authorised by the Municipality. Makhubu only reluctantly agreed that a travel allowance was only payable if the employee was using their vehicle in the course of performing their duties and not for travel from home to work. Makhubu emphasised that the effect of doing a return journey to Clarens each day would effectively reduce her net income, unless she received a travel allowance. If an agreement had been reached authorising a travel allowance she could have used her vehicle for travelling to and from work and for work purposes. As she had never seen the travel allowance policy she could not say that an allowance for that dual purpose would be irregular. Botha confirmed that nobody was paid an allowance for travelling from home to work.

[39] Botha testified that travel allowances were dealt with in a national agreement and it was only payable to persons occupying post levels 1 to 3. All other personnel had to apply for it. Moreover, the allowance was

only for work outside the municipal Council area, so no claim for payment of a travel allowance could be made for example for travelling to another town within the district.

[40] According to Botha, Makhubu was not the only employee who was transferred, and he recalled the cases of a few persons who had been transferred from Bethlehem to work at other towns within the municipality. The approximate distances from Bethlehem to Paul Roux, Rosendal (where Botha himself had worked for 6 months without a travel allowance), Clarens and Fouriseberg were 40, 100, 35 and 54 kilometres respectively. In particular, one Ms Mmamabulu who worked in Community Services had been transferred to Clarens but lived in Bethlehem. In terms of what he could recollect of the relocation policy, the municipality would carry the cost of moving the relocating employee's furniture. He also testified that, contrary to what was stated in the letter from the applicant's attorneys dated 15 October 2008, Makhubu had not been transferred to a different workplace because the entire municipality was the workplace, which included each of the towns falling within it.

[41] The next consultation meeting took place on 4 July 2008 this time under the chairmanship of Botha, at the time the Manager: Support Services. At the beginning of the meeting there was some debate about whether the transfer decision had already been taken in light of a letter sent to Makhubu, but the chairperson said it should merely be seen as a consultation letter. One of the shop stewards at the meeting requested the letter be withdrawn so they could continue with the meeting, and presumably the consultations. The letter in question was sent on 2 July 2008 after the first consultation meeting. The letter purported to confirm that, after the consultation meeting the previous day, which the letter described as 'successful', Makhubu would resume her duties on 7 July 2008 as Supervisor: Community Services under the same conditions of appointment and without receiving a travel allowance. Botha, who drafted the letter, says he described the consultation meeting as 'successful' because it was just an ordinary transfer and not a serious matter. The union asked management to withdraw the letter but they refused because the letter was seen as a consultative document and the meeting

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on 4 July was to obtain feedback from Makhubu. As Botha understood the meeting, there was no feedback given because of the issue made of the letter. He did confirm that during the meeting he had said that the letter was only intended to confirm the municipality's offer on the terms on which Makhubu should report to Clarens and that he had said no decision had been taken at that stage. It was only after this second meeting that a decision was taken.

[42] Makhubu was not willing to move to Clarens because a return trip from Bethlehem was 70 km and she had been appointed in Bethlehem reporting at the head office. If she made the move to the Clarens unit her petrol costs would rise dramatically and she would be unable to attend to her father on a daily basis who had suffered a stroke in 2004. Whilst in Bethlehem she was able to visit him during lunch times. It would have been difficult to move him. Botha concurred that Makhubu had raised these issues.

[43] In any event, the meeting on 7 July did not achieve any consensus and it was clear that management was of the view that they had held sufficient consultations on the matter. At the meeting, management made it plain that they were not prepared to withdraw the letter. Makhubu agreed that nothing had been agreed at the meeting and that a deadlock had been reached. Although the employer claimed it had the right to implement its decision at that stage, in her view, as the employee, she also had the right to challenge it.

[44] Botha said that management took the decision not to pay Makhubu if she tendered her services in Bethlehem and confirmed the summary of management's stance, which was set out in the minutes of the meeting, namely that: there had been sufficient consultation under the LRA; the transfer was necessary for operational reasons; there were no duties for Makhubu to perform in corporate services; Makhubu had had a reasonable time to comply with the instruction, and her salary and conditions of service would stay the same on post level 6. Botha said that at no stage during the second meeting did Makhubu say she wanted to go back to the CDO position, and no other proposal was put on the table

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by the union. If she had asked to be restored to that position it would have been on a fixed term basis and he was doubtful she would have been willing to do that. In answer to a leading question, Botha said that it would not have been reasonably practicable to have restored her to her former position before 10 May 2007 because there was no permanent CDO position in the office of the mayor. In so far as the applicant's attorneys might have proposed mediation of the issue on 21 July 2008, Botha pointed out that proposal was made *after* the transfer had already taken place. Under cross-examination, he conceded that the union had proposed implementing the terms of the arbitration award as a way of addressing the issue, at the meeting.

[45] In Botha's view there was nothing unusual about the transfer which was normal practice. In terms of the letter issued in the name of the municipal manager after the second consultation meeting, Makhubu was to be placed in a line manager position which meant that others would be reporting to her. It would not have affected her career progression. Under cross-examination, Botha was referred to the provision in Makhubu's contract of employment which states that she could be utilized at another local authority in a similar position if circumstances necessitated it, and he agreed that there was no similarity between her position as a CDO and in Community Services. However, in re-examination he pointed out that Clarens was not 'another local authority' as envisaged in that clause and therefore the provision was inapplicable to her transfer there.

[46] Under cross-examination, Makhubu had disputed the employer's right to transfer her in terms of the same provision in her contract of employment that Botha had commented on. She also agreed that the municipality of Dihlabeng was a single municipal unit comprising five towns namely Bethlehem, Clarens, Paul Roux and Fouriesberg and having a head office in Bethlehem. Makhubu was asked whether in fact the so-called transfer was not simply a re-deployment because she was being moved to a place where services needed to be rendered, which was anticipated in the wide definition of a workplace in her contract. Makhubu responded by pointing out that when one is appointed, the appointment it is to a particular Municipal post in a particular town for which the post is

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advertised. Makhubu denied that the case of one Mr Lekota who was transferred to Clarens from Bethlehem where services were needed contradicted this assertion. According to her, Lekota had applied for a post as unit manager in Clarens and spent one month there being inducted once when he was appointed.

[47] Botha was questioned on the supposed need for Makhubu's services in Clarens. In a letter of 8 June 2008 from the Municipal Manager to the Unit Manager at Clarens, the letter simply advised the Clarens manager that Makhubu would be transferred to the unit with effect from 8 July 2008 and contained a request to allocate her functions as per the requirements of the unit. The only reference in the letter to the needs of the unit is an allusion to a 'need for permanent staff'. Botha conceded that when attempts were made to transfer Makhubu to Clarens in May and June 2008 no post had been identified in Clarens. Botha could only say that as far as he knew the Municipal Manager wanted to transfer her to Clarens and a position would be created for her there because she was doing nothing in Bethlehem and there was no vacancy there. However, he agreed that the issue of the existence of any vacancy in Bethlehem had never been discussed. He could not give a reason why it had been necessary for Makhubu to institute court proceedings to compel the Municipality to consult over the transfer.

[48] Makhubu was also asked to explain why the transfer would have been so prejudicial as the municipality would have paid her relocation costs to Clarens and her father could have moved with her. Makhubu said that there was no hospital in Clarens and most of the doctors were in Bethlehem. As a result of having to care for her father if she was located in Clarens, she would incur a lot of expenses and her home was in Bethlehem. Makhubu agreed that ordinarily one's workplace could be near or far from home and might necessitate using public transport to commute to work

[49] It was suggested to Makhubu that her real complaint was relating to the inconvenience of the transfer and had nothing to do with the municipality

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not wanting to utilise her services, which the move to Clarens was intended to give effect to, when it realised she was idle and had no work to do. It was further suggested that to be reinstated in the position as CDO in the mayor's office could only be achieved by way of enforcing the arbitration award. Makhubu referred to her earlier evidence on her status.

[50] Makhubu was tested on why her appointment as a CDO was not raised as an option or an issue in the consultation meetings, but she countered this by saying that there had been a proposal from the union that the arbitration award should be implemented because the transfer would affect her remuneration. Implementing the arbitration award would have meant she was reinstated as a CDO. It was also suggested to her that she did not mention that she was idle in the Corporate Services department and did not insist that she was a CDO, because she did not recognise herself as a CDO and her heart was not in working in that capacity in the mayor's office. Makhubu vehemently denied this.

[51] Under re-examination, Makhubu was referred to the supplementary affidavit she had signed on 10 July 2008 in support of the application for an interim order preventing the municipality from withholding her salary or taking any disciplinary action against her for failing to tender her services in Clarens. In that affidavit she alleged that at no point during these consultations did the municipality explain why she could not be placed in her former position as a CDO from which she had been unlawfully dismissed and to which she was reinstated, and for which she continued to tender her services. Makhubu confirmed that was her view at the time.

[52] In the course of the correspondence between the lawyers, the respondent's lawyer had stated that Makhubu could not be reinstated "to her previous position as a Community Development Officer in the mayor's office as such position no longer exist in terms of the organisational structure of the Municipality but was deployed to an equivalent position in the Corporate Services Directorate of the

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Municipality." Makhubu disputed that this was true at the time of the letter and, even at the time of the trial, because two CDOs, Mr Maqalepo and Mr Mokoena were working in that capacity in June 2008. Currently Maqalepo was still working there together with another CDO Mr R Mokoena. Makhubu had also made representations to this effect at that time during a hearing into whether or not she should receive her wages for the period from 7 July to 31 July 2008. In those submissions she expressed the view that the pending transfer to Clarens was a continuation of the employer's disregard of the arbitration award and the Labour Court and was an attempt to victimise her for the legal proceedings she had instituted or for her union activities.

[53] Makhubu believed that the municipality had broken her contract of employment by failing to implement the arbitration award and by requiring her to go to Clarens without an agreement. Much was made by the respondent of the statements made in one of the first letters written by Makhubu's attorney objecting to the decision to transfer her, dated 12 June 2008. In the introductory paragraph of that letter, the point was made that Makhubu was reinstated in terms of the arbitration award into her previous employment as a Community Development Officer, at the head office and goes on to record that the municipality re-employed her on 13 April 2007 but failed to reinstate, by re-employing her in the Department of Corporate Services as an Assistant Building Instructor instead.

[54] Based on that paragraph it was suggested to Makhubu under cross-examination, that at the time of her transfer she was not a CDO because she had actually been employed as an ABI as stated in that letter. Botha's evidence on this issue was essentially along these lines too, namely that her actual post when she was returned to the municipality was an ABI in the Corporate Services Directorate. According to him, if it indicated ABI on her payslip then that is what she was and any private discussion to the contrary with Masoka did not make any difference. At the date of her transfer she was accordingly in the position of an ABI in Corporate Services not a CDO working in the office of the mayor. Makhubu said that, as far as she was concerned, her status had been

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clarified in the letter of 10 July 2007 which meant that she was still a CDO. Further, there was no post of an ABI in the organogram of the municipality. It was also suggested to her that if she had really disagreed with what had transpired she would have had the award made an order of court and instituted contempt proceedings. Makhubu's response was that, that would be a matter for the court to decide.

[55] According to Makhubu's understanding, in order to change the municipal structure it is necessary for the employer to make a proposal to the local labour forum which would debate it, because it was a matter of mutual interest. If agreement was reached the agreement would go to the SALGBC for endorsement. She sat on the Local Labour Forum and no proposal had been made in that chamber to abolish the CDO post.

[56] When Makhubu was cross-examined on changing the status of CDO appointments from permanent to fixed term ones, she said that she was one of the first appointees to a CDO position and the new mayor then decided to make CDO posts fixed term ones. However two existing CDOs, D Motaung and PJ Mokoena who had been employed in December 2003 on fixed term contracts linked to the term of office of the mayor continued working when the mayor's term of office expired, though Makhubu did concede that their extension of their employment was for a short term and then their services were subsequently terminated. She agreed that the same was true of the appointment of T Maqapelo and L Mokoena, who were appointed on the same terms in July 2006. Makhubu agreed that their term of office had also been linked to the office of the mayor at the time, Mr Mofokeng, who was still the incumbent may when she was reinstated in 2007 and still in office at the time of the trial. She further said she understood that when she returned nobody else was employed as a CDO on a permanent basis. Makhubu was aware of the municipality's version that one of the reasons why she could not be restored to the position of CDO was that things had changed, but she pointed out that the municipality had stated that the position was abolished. However, as far as she was concerned, her permanent post still existed in terms of her contract and organisationally the position still existed in the mayor's office.

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[57] It was further suggested that the applicants had made no attempt to resolve the deadlock over her transfer, but under re-examination she was referred to the letter dated 21 July 2008 written by her attorneys shortly after the labour court had interdicted the municipality from withholding her salary for her failure to tender her services in Clarens, in which her willingness to engage in mediation to facilitate an agreement regarding the proposed transfer was canvassed.

[58] In Botha's evidence in chief he explained that the problems had developed when a new mayor was appointed after the 2000 elections because he had wanted a new secretary. As a result of these problems the Council took a decision in 2003 that all positions in the office of the mayor should be fixed term contracts linked to the term of the incumbent mayor. The decision applied to CDO positions also, and as a result all CDOs were currently on fixed term contracts. He agreed that Makhubu had been permanently employed in the position of CDO and that the changes mentioned had already taken place by the time she was dismissed

, but when she was reinstated in April 2007 she could not be reinstated as a permanent CDO because all the posts were fixed term posts, though he agreed he was not personally involved with her return. Under cross-examination, he did concede that when the other CDO posts were changed to fixed term positions in 2003 Makhubu remained in a permanent position despite the change.

[59] Botha was questioned closely about various references in the respondent's attorney's correspondence and the respondent's pleadings both in this matter and in the litigation launched over Makhubu's transfer, in which the respondent's stance was that there were no CDO positions at the respondent when Makhubu was reinstated. For example, the municipal manager at the time of the transfer, M S J Msibi, stated in his opposing affidavit that:

> *"Furthermore, at the time when the Applicant was reinstated and thereafter nobody occupied or held the position of a Community Development Officer."*

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(emphasis added)

Botha agreed that this statement was wrong but could not explain why it was said that nobody occupied such a position. In her supplementary affidavit in that matter Makhubu had also clearly stated that she could not understand why she could not be placed back in the CDO position because it still existed. However in his reply to that, Msibi once again reaffirmed that she could not be restored to her former position as a Community Development Officer "… because this position no longer exist in the first respondent's organisational structure." Msibi further dismissed the relevance of a payslip of another Community Development Officer ('Maqalepo') dating back to July 2006 as evidence of the existence of the position of a Community Development Officer. However, Botha conceded that at the time the affidavit was deposed to, Maqalepo was in fact a Community Development Officer and that Msibi's allegations in his affidavit were wrong. He also conceded that his own confirmatory affidavit was wrong and that he had failed to raise his concerns about those allegations with Msibi if he had indeed thought they were wrong at the time.

[60] Botha further agreed that nowhere in the respondent's pleadings

had fixed term and permanent CDO posts been distinguished or even mentioned, and he accepted that it was incorrect to say that CDO positions in the entire structure had been done away with because the position still existed in the structure of the municipality. He could not give an explanation why the wrong information had been conveyed, but denied that the respondents had deliberately attempt to mislead the court until the discovery of documents made it impossible to sustain the original version.

[61] In cross-examination, it was put to Makhubu that the second prayer in her claim for contractual relief namely that the municipality be ordered to remunerate her for a tender of services as a CDO in the office of the mayor was complied with, but Makhubu insisted she was entitled not only to be paid the remuneration of a CDO but also to work as one in the mayor's office.

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[62] In relation to her claim that in August 2001 she had entered into an oral contract with the mayor at the time that she would be employed as a CDO and deployed within his office, which she claims was confirmed in a letter from the municipality dated 19 July 2002, Makhubu claimed that on the first day at work the mayor had called in all the persons who were going to work as CDO's and said they would work with him in his office. After a while they received the letter. In answer to whether she would be prepared to work for the current mayor but on a fixed term contract linked to his office, Makhubu insisted that she was appointed on a permanent basis and if the court agreed she should go back there would be 'a discussion', as the municipality would have to consider having a permanent CDO. She accepted that the current CDO appointments were fixed term ones but the post of CDO itself had not been abolished.

[63] In relation to her discrimination claim, Makhubu agreed that the issue in that case was that she believed that the reason for being transferred to Clarens was because she had referred her unfair dismissal dispute to the Bargaining Council. She agreed that there had been other cases of municipal employees' whose dismissals had been found to be unfair in the Bargaining Council and that for example, the dismissals of three other employees had been settled in 2011 on the basis that the municipality agreed to reemploy them. However, she could not say that the municipality had not held anything against them for challenging their dismissal. Although she conceded she was not the only person who had won a case against the municipality, she believed that what happened to her showed that she had been victimised.

[64] As far as Botha could recall, the reason for the transfer was that Makhubu was not performing any duties in the Corporate Services Department. Had she gone to Clarens she would have been responsible for the parks section of community services and would have had work to do and personnel reporting to her. He agreed that as a CDO she would not have had anyone reporting to her. What Botha could not explain was why Makhubu had been assigned to an ABI post with no duties attached to it.

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[65] It was also suggested to Makhubu that if the chronology of events following the default award in her arbitration case was considered there was nothing to suggest that the municipality was victimising her because she had challenged them. She disagreed vehemently pointing out how she had been suspended for a lengthy period and that municipality's representative had not attended the arbitration proceedings which delayed matters and that her case had taken a long time to finalise. Further, if the municipality had acted in good faith she would not have been idle for three months after her reinstatement. That conduct was part and parcel of her victimisation by the municipality. As far as she was concerned, the reason for transferring her to Clarens was not because she had no work in the Corporate Services Department as an ABI, nor was that a justifiable reason for transferring her. Just because the appointment in the Corporate Services Department was supposedly at an equivalent level to her CDO post, did not mean she was not being victimised. Makhubu did concede that she was not the first person who had been transferred from Bethlehem to Clarens, but she could not comment on the specific case of Ms N Mabena who had supposedly been transferred there because there was no position for her in Bethlehem.

[66] It was also suggested to Makhubu that no claim of victimisation had been made in either of the consultation meetings on the 1st and 4th of July 2008 and that the only reason why the discrimination case had been raised was that by then 3 years had passed since the arbitration award had been made which meant that it could not be made an order of court. Under re-examination reference was made to the disciplinary hearing held on 24 July 2008 following the unsuccessful consultation process relating to the Clarens transfer and to submissions made by Makhubu in those proceedings. In their submissions Makhubu made it clear in that document that she believed that the attempt to transfer her was an attempt to victimise her for either her union membership or activities, or for instituting legal proceedings against the municipality after her dismissal. In those submissions it was also argued that the fact that the position of CDO still existed and that the municipality had provided no

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proof to the contrary was a further indication of the employers of ulterior motives in trying to transfer her

[67] Makhubu was also challenged on why she was claiming 24 months remuneration when she was already receiving the salary of a CDO. Makhubu's response was that she had been spending R1260 extra on petrol per month and had been referred to a doctor, though she did not elaborate on what this related to. In Botha's view Makhubu had suffered no financial loss because she was receiving the same remuneration she would have received as a CDO. She had also not been prejudiced and there was no basis for making an order of compensation based on her victimisation claim.

Evaluation

[68] The arbitration award of 2005 unequivocally fully reinstated the applicant in her previous position as a CDO. What emerged from the evidence is that other CDO positions were turned into fixed term posts in 2003 at a time prior to the applicant's dismissal. At the time of her dismissal she still occupied a full-time position as a CDO and that was the post she was reinstated to.

[69] The municipality did almost everything it could to resist giving effect to the award, despite having made a poor effort to defend the original dismissal in the arbitration. The applicant was compelled to take, or had to threaten to take, legal action at every subsequent step in order to give effect to the award in her favour. At no stage in these proceedings was any legitimate rationale provided for the municipality's obdurate resistance to complying with the award once it had failed to rescind it. For example, simply to enforce payment of the back pay that was due to her, it was necessary for the applicant to go so far as to attach the mayor's vehicle. Secondly, it was only when a contempt hearing over the municipality's failure to reinstate her was imminent, that it agreed she could return to work. No sooner did she report for work at the office of the mayor than she was placed on three weeks' special leave' after being told that there was a problem in that 'her post' was currently being filled

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and that the special leave was to give the respondent some time to address the matter. Makhubu's evidence in this regard was not contradicted.

[70] The arbitration award was certified and was binding on the municipality in any event under s 143(1) of the LRA. However, instead of simply resuscitating the applicant's employment as a permanent CDO in the mayor's office as it was obliged to by the award, the municipality placed her in a kind of employment limbo under the notional supervision of the Corporate Services Department with a job title that did not have any relationship to any post in that department, and without assigning her any duties. As soon as she returned from the enforced leave and realised that the issue had not been resolved, Makhubu took up the question of the job description on her payslip, but essentially was told it was merely there for administrative purposes. She was not satisfied and pursued the matter. She was assured that the Head of Corporate Services was discussing it with the municipal manager.

[71] Thereafter, within less than a month of her return she made very pointed enquiries in writing to clarify her position and, in particular, queried why she had not been placed in her old position as CDO. Although it was alleged she was told she could not be placed in that position, the municipality could not muster any witness to confirm this, nor could it produce any evidence that she had been told in no uncertain terms that she could not be placed in her previous position because the only CDO posts that existed were for fixed term employment linked to the office of the mayor and her appointment had been a permanent one. There was no evidence she was even offered the opportunity to accept alternative appointment to a fixed term CDO post, if indeed it was not "practicable" as the respondent claimed to give proper effect to the reinstatement order.

[72] The first time that the respondent articulated the argument that she could not be reinstated because the post no longer existed was only mentioned in a letter from the respondent's attorney as late as 19 June 2008, more than a year after she returned to work and tendered her services to the

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mayor. Subsequently the nonexistence of CDO posts was wrongly asserted by the municipal manager in the respondent's opposing affidavit to the application to prevent her transfer. The respondent persisted with these contentions until *Mr Lebea* at the eleventh hour sought to qualify them in his opening address at the commencement of the trial proceedings. No formal application to amend the respondent's pleadings was ever made to rectify this significant departure from what had originally been pleaded on this issue.

[73] At this juncture, it is important to mention that the stance adopted by the municipality was that there simply were no CDO posts in existence in the structure of the municipality following a major restructuring which occurred prior to her reinstatement. It was only when *Mr Lebea*, sought to qualify those averments by saying that they had only been intended to refer to the non-existence of permanent CDO posts that the respondent first clearly articulated this contention after a period of approximately five years, during which it had made no mention of a distinction between fixed term and permanent CDO posts. On the contrary, the inescapable impression it sought to create during all that time was that no CDO posts existed any more. What makes all this worse, is that these representations were made on affidavit as well, which indicates that the deponents to those affidavits were willing to say whatever was expedient in resisting the applicant' s claim to continue working in her previous job, even when they must have known it was not true. Obviously this reflects on the *bona fides* of the respondent which will be addressed later.

[74] After a significant delay, the written response to some of the applicant's queries from the Director of Corporate Services on 10 July 2007 unequivocally stated that her job description had not been changed unilaterally or otherwise and implied that the designation of her job as an ABI was merely for salary administration purposes. The respondent argued that the applicant had acquiesced in this indeterminate status because she did not enter into further correspondence until it took steps to implement her transfer in May 2008. However, the respondent led no evidence to rebut her claim that she did interact with her director and the municipal manager on the issue and was told that they were still looking

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into it. In any event, the respondent did nothing to alter the representation made in the letter of 10 July 2007 that her job description had not been changed, so there was no reason for the applicant to believe that at least the respondent had formally accepted at that point that the job she was supposed to perform was the same as the one she always held.

[75] In the course of cross-examining Botha, the sham nature of the ABI job designation became glaringly apparent. In the circumstances, it was absurd of the respondent to suggest that Makhubu had actually been placed in that position, when in truth it simply did not exist within the Corporate Services directorate. It was the respondent that was the principle cause of her idleness for the period from the time she returned to work until it decided to transfer her in May 2008. It is apparent that it took the respondent from May to July 2008 to come up with some occupation for the applicant in Clarens. This is important because it demonstrated that the respondent was intent on transferring Makhubu to Clarens in May 2008 before it had even identified what need she would be addressing by rendering her services there. The most probable inference to draw from this is that the real object of the transfer was to relocate the applicant somewhere else, other than in Bethlehem, without even having a clear idea what she would do.

[76] If the municipality's concern was truly about her lack work to do, which arose from the respondent knowingly placing her in circumstances where she had no duties, it is odd that the respondent's first idea was to make her work in another town, without any apparent effort to identify whether it could deploy her in some function in Bethlehem.

[77] It is true that the applicant did not come up with any creative alternatives to the transfer, but the clear and most obvious way of utilising her as a CDO, which is the role she ought to have been fulfilling, was raised by the union during the consultation process but was not addressed by the respondent. During the phase when the transfer was on the table, the applicant once again was compelled to go to court simply to get the respondent to consult with her over the intended to transfer. Once again,

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Botha could offer no explanation why the respondent had not simply agreed to consult over the issue.

[78] The respondent argued that Makhubu last occupied the position of CDO when she was dismissed on 11 August 2004. This argument loses sight of the fact that she successfully challenged that dismissal and a binding award was issued reinstating her in exactly the same post she had occupied. The effect of the reinstatement was to revive the dormant employment relationship by restoring her to the position she held and the duties she performed before she was dismissed. Moreover reinstatement means that the contractual relationship between the employer and employee remains unaltered unless conditions are attached to the reinstatement in the award. In this regard it is important to mention that no evidence was adduced to show that Makhubu's position as a full time CDO was altered when all other CDO's posts were changed to fixed term ones, so there is no reason to suppose her post did not remain extant. The respondent argued that there was no continuity because she did not actually resume employment in that position, and this was acknowledged by her attorneys in their letter of 12 June 2008 in which they complained that the respondent had failed to give effect to the order of reinstatement in the arbitration award. It is obvious though that this was not an acknowledgment that her contractual entitlements had been altered. At this point, it must also be mentioned that the only written contract existing at the time of the trial was the applicant' s original one entered into when she was first appointed as a CDO.

Breach of contract

[79] Since the arbitration award restored the applicant's pre-existing employment relationship including her specific appointment as a CDO, the transfer of the applicant to Clarens was a breach of those terms as she was not employed as a CDO at the Clarens unit. It is true that the definition of a workplace identifies it as any place where service rendering is needed, but that does not detract from the fact that the services the applicant was contracted to render were not those attached

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to the Clarens unit. Likewise her allocation to a non-existent post with no duties in the Corporate Services department was also a breach of her appointment as CDO in the officer of the mayor.

[80] Ultimately the parties were agreed that the other provision in Makhubu's contract of employment referring to the respondent's ability to transfer her to another local authority was of no application to her transfer to Clarens as the town falls within the Dihlabeng Local Municipality.

[81] The applicants also contended that because the respondent had pleaded it was unable to reinstate the applicant because no CDO posts existed it could not alter its defence, without amending its pleadings, once it had been revealed that this was simply not true. I agree with this contention. In any event, even if the respondent had been permitted to amend its pleadings to reflect a defence that the only CDO posts which existed were fixed term ones and therefore it would not been practical to place the applicant in such a post, the difficulty with this argument is that the evidence showed that the applicant had continued to occupy a permanent CDO post even though other CDO posts in 2003 were all fixed term appointments linked to the office of the mayor, and therefore it was not unrealistic to expect her to resume that position.

Discrimination or Victimisation claim

[82] I have already mentioned above that the respondent did almost everything within its power to avoid giving effect to the arbitration award. At every step of the way the applicant had to litigate, or initiate litigation, to get the respondent to comply with any of its obligations under the award. Once it reluctantly allowed her to return to work, it sought to manipulate her working circumstances to ensure that she did not return to the job she was entitled to return to by allocating her to a non-existent post with no duties attached to it and then, without a rationale based on the needs of the Clarens unit, it took steps to remove her from the Bethlehem office, knowing the inconvenience it would cause her. It is evident that the intention of relocating her in Clarens preceded any analysis of why she should be placed in that particular unit. At best for the respondent, even accepting that the applicant was idle in Bethlehem,

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that too was a clear result of its own actions in not placing her in her former post, but instead ensuring that she remained non-functional by the spurious allocation of her to the corporate services division as an ABI. In this regard, it must be remembered that the uncontradicted evidence of Makhubu was that she was told she could not return to her own post because it was currently filled by someone else. The defence that the posts no longer existed was a justification the respondent took a year to come up with and was subsequently proved to be a lie. It is also telling, that at no stage did the respondent provide any evidence that it had considered other alternatives within the head office, if indeed it was a genuine concern that the applicant was not doing anything and if indeed it believed she could not be utilised in a CDO capacity.

[83] The overall impression one has is that in handling the applicant's return to work, the respondent did not act with a *bona fide* intention of attempting to honour the terms of the arbitration award as far as possible by trying to restore the pre-existing contractual relationship including her specific job as CDO to which she was reinstated. On the contrary, its efforts were all directed at thwarting such an objective being realised, and genuine operational motives were not the reason for its actions. The clear message its conduct sent is that the applicant would not obtain the benefit of the award she had received if it could avoid it. Any other employee observing her treatment would surely have wondered whether it was worthwhile trying to vindicate one's right not to be unfairly dismissed, given the resources it would require, if successful, to get the respondent to give effect to such award.

[84] It was suggested to the applicant under cross-examination that there was no reason the respondent would have an antipathy towards her because of her union activities and that it had reinstated other employees who had litigated against it. The applicant did not persist with her claim that her treatment was related to her union activities, even though it is obvious she was a fairly prominent union figure not only in the municipality but in the Free State. However, it is difficult to escape the signal sent by the respondent's treatment of her that it adopted retaliatory measures to effectively deny her the relief she obtained and thereby demonstrate that

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for exercising her rights she would suffer further prejudice. This impression is reinforced by the absence of any evidence indicating that the respondent acted in a *bona fide* manner in not reintegrating her in the Municipality.

[85] I agree that the principles enunciated by the LAC in ***Kroukam v SA Airlink (Pty) Ltd***[1], are apposite here, namely:

> **"***[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.***"**[2]

[86] I am satisfied on the analysis of the evidence above that the applicant has raised a sufficient basis for arguing that her prejudicial treatment by the respondent since her return to work in 2007 was probably due to successfully challenging her unfair dismissal and exercising her legal right to do so under the LRA and accordingly, the respondent acted in breach of s 5(2)(c)(vi), in particular when it unilaterally transferred her to a job in breach of her contract of employment as a result of which she suffered inconvenience and incurred extra travel expenses, apart from being denied the chance to perform the work she had been engaged for in terms of her contract.

[87] Accordingly, there is no reason why she should not be afforded relief in terms of s 158(1)(a) of the LRA in the form of compensation and an order restoring her to her positions as a permanent CDO, in keeping with the approach of this court in ***National Union of Mineworkers v Namakwa Sands - A Division of Anglo Operations Ltd***.[3]

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[1] (2005) 26 ILJ 2153 (LAC)

[2] At 2207, per Davis JA

[3] **(2008) 29 ILJ 698 (LC)** at 724, para [48].

[88] In determining the compensation due to Makhubu I rely on her uncontested evidence of the additional costs she incurred as a result of her transfer to Clarens, namely R 1260, 00 per month for a period of 52 months, amounting to R 65, 520,00.

Costs

[89] Given the respondent's conduct both in its attempt to thwart the applicant's right to resume her contractual employment relationship following her reinstatement, and the element of dishonesty it resorted to in contending that CDO posts no longer existed, I would be inclined to order costs against it on an attorney own client scale, but as the applicant has not sought these, I will not do so.

Order

[90] In light of the analysis above, I find that -

90.1 The respondent acted in breach of the second applicant's contract of employment in not allowing her to continue to perform her duties in terms of her permanent appointment as a Community Development Officer as per her contract of employment.

90.2 The respondent contravened s 5(2)(c)(vi) of the Labour Relations Act in transferring the second applicant to Clarens in 2008.

[91] Accordingly, it is ordered that, within 14 days of this judgment -

91.1 The respondent must pay the second applicant, compensation in the amount of R 62520,00 (sixty two thousand, five hundred and twenty rands), and

91.2 The respondent is ordered to comply with the second applicant's contract of employment by permitting her to tender her services as, and perform the work of, a Community Development Officer in the office of the Mayor of the Respondent in a permanent capacity.

[92] The respondent must pay the applicants' costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

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APPEARANCES

For the Applicant: C Orr

Instructed by : Cheadle Thompson Attorneys

For the First Respondent: J Lebea of Lebea & Associates

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