IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION OF THE HIGH COURT, GQEBERA)

Case No: 1655/2022

In the matter between

SIYANDA MAYANA	Applicant
And	
EXECUTIVE MAYOR: NELSON MANDELA	1st Respondent
BAY METROPOLITAN MUNICIPALITY CITY MANAGER: NELSON MANDELA	2nd Respondent
BAY METROPOLITAN MUNICIPALITY NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	3rd Respondent
EXECUTIVE DIRECTOR: CORPORATE SERVICES NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	4th Respondent

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JUDGMENT

PAKATI J

INTRODUCTION

[1] The applicant approached this Court on an urgent basis seeking an order declaring the alleged unlawful termination of his employment as a Strategic Advisor by the first and third respondents. He also applied for an order setting aside the said termination as of no force and effect and that he be reinstated pending compliance with; (a) the Disciplinary Procedure Collective Agreement of 2018 to 2023; (b) the terms of the written contract of employment concluded between him and Nelson Mandela Bay Metropolitan Municipality ("the Municipality"); and (c) the Municipality's, applicable Code of Conduct and Human Resources policy. He alleged that the decision to terminate his employment was unlawful, unconstitutional and null and void. He sought an order that the Executive Mayor, Municipality and Executive Director, first, third and fourth respondents respectively, together with any other respondent who unsuccessfully opposed the application, be directed to pay costs of the application, jointly and severally, the one paying the other to be absolved, on attorney and client scale, including costs of two counsel. The respondents opposed the application.

THE PARTIES

[2] The applicant was employed by the Municipality, as a Strategic Advisor: Monitoring and Evaluation and is linked to the current term of office of the Executive Mayor and reports directly to her. He is a member and regional chairperson of a political party called GOOD in the Nelson Mandela Region. The first respondent is the Executive Mayor: Nelson Mandela Bay Metropolitan Municipality (the Executive Mayor"), and is cited in her personal and official capacity. The second respondent, the City Manager, is cited in his/her official capacity as the accounting officer. No relief is sought against him/her. The Municipality and Executive Director: Corporate Services, ("the Executive Director") are third and fourth respondents, respectively. The Municipality is cited as the applicant's employer and the fourth respondent, as the functionary who signed the letter that terminated his employment.

BACKGROUND FACTS

[3] The foundational facts herein are as follows: on 09 December 2021 the applicant and the Municipality concluded a Memorandum of Agreement ("the Agreement") in which he was employed in his current position at Task Grade 15 on a fixed salary package ofR844 236 per annum. His contract commenced on 01 December 2021, and this was regardless of the date on which the Agreement was signed.

Regarding fringe benefits, paragraph 9 of the Agreement stipulates that 'the Contractor shall not be entitled to any of the fringe benefits applicable to permanent staff and consequently shall not at any stage have any claim against the employer for pension, medical, group life, housing subsidy or other benefits. For purposes of this case, the relevant terms of the agreement are inter alia, recorded in paragraphs 16 and 17 of the agreement thus:

" 16. Misconduct

The Contractor shall be guilty ofmisconduct ifhe/she:

16. I commits a breach ofany ofthe provisions ofthis agreement;

16.2 does not obey a lawful order given by any person having authority to give it, or disregards or willfully neglects to execute such order, or by word or deed shows resistance;

16.11 engages in any rude, abusive, insolent, provocative, intimidatory or aggressive behavior to a fellow contractor or member of the public;

16.12 engages in any other behavior or commits any other act which would give just cause for discipline.

17. Termination of Contract

The contract will terminate:

17.1 automatically and without notice on expiry ofthe term referred to in the contract, subject to any extension or renewal. It is specifically recorded that the contract shall not be interpreted in such a manner as to create expectations ofa permanent employment, extension or renewal. The Employer's decision not to renew or extend the contract shall not constitute an unfair dismissal and the Contractor shall not be entitled to anyform ofcompensation;

17.3 at the Employer's initiative, for reasons relating to misconduct, incapacity, unacceptable or unsatisfactory performance, breach, or for any other reason recognised by law as sufficient, on the following basis:

17.3. I one (1) week's written notice if the Contractor has been employed for six (6) months or less; or

17.3.2 two (2) weeks written notice if the Contractor has been employed for more than six (6) months but not more than one (1) year; or

17.3. four (4) weeks written notice ifthe Contractor has been employedfor one (l) year or more.,,

[4] The issues for determination are whether:

4.1 The respondents are properly before Court;

4.2 The matter is urgent;

4.2 The applicant's employment was unlawfully terminated in accordance with the employment contract, and whether he has made out a case for reinstatement;

4.3 There is a need for compliance with the Disciplinary Procedure Collective Agreement of 2018 to 2023 and the Municipality's code of conduct and Human Resources policy.

IS THE MUNICIPALITY PROPERLY BEFORE COURT?

[5] On 20 June 2022, a notice in terms of Rule 7 of the Uniform Rules of Court was filed by the applicant's attorneys of record disputing the authority of Ms Siganga to oppose the application and McWilliams & Elliot Attorneys to act on behalf of

the respondents. He argued further that a resolution to institute or defend an application should be taken by the Municipal Council and not the Municipal Manager. He stated that Ms Siganga and McWilliams & Elliot Attorneys should provide a resolution issued by the Municipal Council and a power of attorney authorizing them to oppose the application on behalf ofthe Municipality otherwise the answering affidavit is pro non scripto. A resolution dated 17 June 2022

("annexure "SMV') signed by Dr Nqwazi, the City Manager, giving authority to Ms Siganga to 'sign all affidavits pertaining to this matter and to also ratify all steps taken in the matter' was, according to Mr Ndamase, on behalf of the applicant, not a valid resolution because the names of the attorneys were not mentioned.

[7] For this assertion, Mr Ndamase relied on s 11(1) of the Systems Act which states that the executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to s 59 [1] . He also relied on s 151(2) of the Constitution which provides that the executive and legislative authority of a municipality is vested in its Municipal Council.

[8] Ms Msizi, for the respondents, submitted that the City Manager should not be expected to call a council meeting every time there is a legal issue to be attended to. She submitted further that it is settled law that deposition to an affidavit could not be challenged by using Rule 7. She relied on several decided cases, inter alia, Unlawful Occupiers School Site v City ofJohannesburg 2005 (4) SA 199 (SCA) 207. She further mentioned that on 22 November 2021 a resolution was adopted by the Municipal Council authorizing the City Manager to issue a resolution

1 S 59 of the Local Government: Municipal Systems Act 32 of 2000 provides: "59(2) A delegation or instruction in terms of subsection (l) – (a) must not conflict with the Constitution, this Act or the Municipal Structures Act; (b) must be in writing: ... (e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty;"

authorizing a person to act on behalf ofthe Municipality. However, this resolution was not part of the papers. It was therefore her say so.

[9] Rule 7 of the Uniform Rules of Court provides:

> "Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[10] Streicher JA in Ganes andAnother v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) ([2004] 2 All SA at 624[2] held:

> "The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a M Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (see Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 C- J)[3]"

[11] Nugent JA in Manana v King Sabata Dalindyebo Municipality [2011] 3 All SA 140 (SCA)[4]

> "[17] In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers."

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2 At para 19.

3 In Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C – J Flemming DJP held: "I find the regularity of arguments about the authority of a deponent unnecessary and wasteful."

[12] In casu, Ms Siganga, the deponent to the answering affidavit need not be authorised to depose to an affidavit as provided for by Rule 7. Regarding McWilliams & Elliott Attorneys, the notice of filing of the answering affidavit was delivered under their name and signature. The said notice was filed on behalf of the respondents as that was unchallenged by the applicant. In any event if McWilliams & Elliott Attorneys had acted on behalf of the respondents without the authority to do so, the respondents would challenge that. In this case, they did not. It must be accepted that acting on behalf of the respondents by the said firm of attorneys was authorised.

JURISDICTION

[13] When this matter was heard jurisdiction was not an issue. For the first time, Ms Msizi submitted in the supplementary heads of argument that because the applicant challenged his dismissal, he should refer his matter to the Commission for Conciliation, Mediation and Arbitration ("CCMA") in terms of clause 24 of the Agreement[5]. It is noteworthy that this was not the reason why supplementary heads of argument were filed in the first place. I requested the parties to file same

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[4] At para [17].

[5] Clause 24 of the Memorandum of Agreement provides: "Jurisdiction — The parties consent firstly to the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) and if the CCMA is not able to adjudicate, the Labour Court or the High Court of South Africa, whichever has jurisdiction, will adjudicate the dispute."

after Ms Msizi filed three authorities two days after the matter was heard. The applicant was granted an opportunity to deal with the authorities. The authorities dealt with whether a party could rely on a collective agreement when he/she was not a party. In any event, the parties consented to the jurisdiction of this court in terms of clause 24 of the Agreement. The challenge of lack of jurisdiction can, therefore not stand.

URGENCY

[17] The applicant insisted that the matter was urgent. According to him, non-payment of his salary would adversely affect his ability to meet his financial obligations. He stated further that as a breadwinner he would be unable to provide for his family who depend on him for support and that proceedings in due course would not address his non-payment. He further listed his monthly obligations showing severe prejudice he stood to suffer if his employment would be terminated. He asserted that by terminating his employment, the Municipality did not honour its contractual obligation. He asserted further that he received the letter of termination on Friday 10 June 2022 and approached his attorneys of record on 13 June 2022 which shows no delay.

[18] In response, the respondents contended that financial strain on its own is not sufficient to justify grant of an order on an urgent basis in that the applicant failed to comply with the requirements of Rule 6(12) of the Uniform Rules of Court. That is so because he failed to explicitly set out the grounds for urgency and the reasons why he claimed that he would not be accorded substantial redress at the hearing in due course. They asked that the application be struck from the roll for lack of urgency.

[19] It is trite that an applicant seeking relief on an urgent basis must justify the necessity to circumvent the ordinary time periods set out in the rules. Coetzee J in Luna Meubel Vervaardigers v Makin and Another 1977 (4) SA 135 (WLD) [4]explained what urgency in applications save for the applications that fall under Rule 6(4) thus:

> "Urgency involves mainly the abridgment of times prescribed by the Rules and, secondarily, the departure from establishing filing and sitting times of the Court.

4 At 136H.

> l. The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.
>
> 2. Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.
> 3. Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.
> 4. Once the Court has dealt with the causes for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.
> Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.

[20] A court faced with an urgent application should consider whether the reasons that make the matter urgent have been set out and whether the applicant will not obtain substantial relief at a later stage. The applicant must satisfy the court that the

matter is indeed urgent by setting out in his/her founding affidavit cogent reasons why he/she seeks urgent relief.

[21] Only once an applicant has persuaded the court that sufficient grounds exist which necessitate a relaxation of the rules and ordinary practice, will the court proceed to consider the matter as one of urgency. The extent to which the court

will allow parties to dispense with the rules relating to time periods will depend on the degree of urgency in the matter.[5]

[22] In Caledon Street Restaurants CC v D'Aviera [1998] JOL 1832 (SE) Kroon J held:

> "In applications brought under Rule 6(12) of the Uniform Rules of Court, it is incumbent on the applicants to persuade the court that the non-compliance with the Rules and the extent thereof was justified on the grounds of urgency. The applicant will have to demonstrate sufficient real loss of damage were he to be compelled to rely solely or substantially on normal procedure. In deciding whether financial exigencies constituted a ground for urgency finding that no general rule to such effect could be laid down. Much would depend on balancing the disadvantages and prejudices of all parties.',

[23] In Harley v Bacarac Trading 39 (Pty) Ltd [2009] 6 BLLR 534 (LC) [8] Mr van Der Merwe submitted that the application was not urgent and contended that the court had been disinclined to consider financial hardship and more particularly loss of income as a good ground for urgency. For this assertion, he referred to several cases. The court as per Van Niekerk J held:

> "The principle established in these cases is one that inclines this Court to avoid what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardship and loss of income can never be a ground for urgency. Ifan applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this Court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.',

[24] In HOSPERSA & another v MEC for Health, Gauteng Provincial Government [2008] 9 BLLR 861 (LC) Basson J held that an employee was entitled to urgent relief in circumstances where her employer had unilaterally terminated her salary.

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5 Natal Union of Mineworkers v Black Mountain-A Division of Anglo Operations Ltd [2007] 28 ILJ 2796 (LC) at para [12]. [8] At 536.

[25] In casu, the applicant's employment was summarily terminated. It was not denied that non-payment of his salary would adversely affect him and his children as he would be unable to provide for their schooling, nutrition and shelter. It was further undisputed that an application of this nature would take less than four to six months to be heard if opposed. There was no allegation that the urgency was selfcreated as there was no delay in instituting the application. Paragraphs 62 to 76 of the founding affidavit deal with grounds upon which the applicant alleges that the application is urgent and explained why he would not be afforded substantial redress at the hearing in due course. The reasons stated by the applicant allegedly rendering the matter urgent were not in dispute. There is also no allegation that the urgency was self-created. Similarly, the allegation that the applicant failed to comply with the requirements of Rule (6)12 cannot stand. I am satisfied that the application is urgent

THE APPLICANT'S CASE

[26] The applicant asserted that the infighting amongst the political parties represented in the Municipality has culminated into various legal challenges since the appointment of the City Manager, in what he described as 'a chaotic meeting on

16 March 2022.' He referred to paragraph 15 of a judgment penned by Goosen J under case number 862/2022, delivered on 05 April 2022 as depicting 'the infamous council meeting'. It reads:

> "(b) Urgency
>
> [15] Mr Albertus (who appeared with Moorehouse) for the applicants, submitted that the matter was urgent by reason, inter alia, of the fact that there presently were two

> persons who claimed authority to exercise the powers ofthe municipal manager. This was causing significant confusion amongst senior managers and staff members of the municipality. This fact alone required urgent intervention to prevent ongoing prejudice to the municipality. It was also argued that the purported authority exercised by Mr Qaba may result in administrative actions being taken to the financial and other prejudice of the municipality. Insofar as urgency was concerned both Mr Beyleveld (for the first and second respondents) and Mr Mullins (for the third respondent) accepted that a case for urgent enrolment had been made out. It is therefore unnecessary to address the issue any further. ',

[27] The applicant mentioned a further meeting held on 23 March 2022 whereat the Municipal Council resolved to revoke the decision of the Executive Mayor to irregularly appoint Dr N Nqwazi as the City Manager and another, on 02 June 2022, attended by the Mayor whereat some of the resolutions taken can be summarized thus:

27.1 The council decision taken on 16 March 2022 regarding the purported appointment of Dr Nqwazi was revoked;

27.2 The Municipality would approach this court for an order setting aside the purported appointment of Dr Nqwazi; and

27.3 That the Council appointed Mr Lonwabo Ngoqo ("Mr Ngoqo") as the City Manager with immediate effect after having been recommended by the selection panel as the second candidate.

[28] On 04 June 2022, Dr Nqwazi approached the court on an urgent basis seeking an interdict against the Mayor and Mr Ngoqo from carrying out the council resolution

taken on 02 June 2022 which sought to appoint the latter as acting City Manager. The matter was heard on 07 June 2022. The application was opposed by the Municipality. The applicant, in the company of Councilor Lawrence Troon, another elected representative of the Good political party, stated that he was present in court on the day. The matter stood down until 14:00 at the request of the Municipality after which counsel for the latter received instructions from the

Municipality's attorneys of record to consent to the order sought by Dr Nqwazi. He was dismayed at the conduct ofthe Mayor for acting contrary to the Council resolution of 02 June 2022 which revoked the purported appointment of Dr Nqwazi. It is against this background that he and Councilor Troon approached the Mayor at Dehli Restaurant in Richmond Hill and enquired from her as to why she acted against the said council resolution.

[29] In response, the Mayor told him that 'she will do what she says as she gives instructions as the Executive Mayor'. His response to the Mayor was: "We will deal with you, politically and will remove you as the Mayor." By this, he said he meant that they would remove her as Mayor because she was not acting in the best interest of the Municipality.

[30] On 10 June 2022, the applicant received a letter dated 08 June 2022 ("NS3") from the Executive Director: Corporate Services, which reads:

> "POLITICAL CONTRACTUAL STAFF TERMINATION: STRATEGIC ADVISOR
>
> With reference to your contract entered into with the Nelson Mandela Bay Municipality, you are hereby notified that your contract terminates with immediate effect (8 June 2022). Thank you for the service rendered during your contract period"

[31] Attached to the above letter, was an email (Annexure "SMS') written by the Mayor to the City Manager, which records:

> "As the Executive Mayor I am completely appalled at the behavior of Mr Mayana who is employed in my office as an advisor.
>
> In a Country where we face a pandemic of Gender Based Violence his behavior towards myself, the Deputy Executive Mayor, the Chief Whip and the legal team on 7 June 2022 made it very clear that he is not an ambassador in our Country's fight against the [scourge] of abuse facing women and children. His aggression and body language made me realize that I have a political appointee that has no respect for this office and specifically towards me as a woman who holds the position of Executive Mayor.

> This office can never be a place where women feel unsafe, it will not be tolerated, and I cannot employ an individual who contributes to such despicable acts of violence and his utter and blatant lack of respect in our fight against Gender Based Violence. Note he has previously at a press briefing openly indicated his lack of support towards me.
>
> You are hereby instructed to terminate Mr Mayana's employment with immediate effect, and he is not to return to my Offices.',

[32] The applicant alleged that the contents of the letter dated 08 June 2021 (Annexure "SM5") were a distortion of what happened at the restaurant on 07 June 2022. He contended that the argument between the Executive Mayor, Deputy Mayor and himself as well as the Chief Whip came about as a result of an instruction to the Municipality's legal team that was at odds with the council resolution dated 02 June 2022. He contended further that the allegation of gender-based violence was false and misleading as he uttered no words that could constitute any form of gender-based violence towards the Executive Mayor. He stated: "What happened on the day are the machinations ofthe political infighting that has been brewing in the Municipality since the new administration assumedpower after 2021 local government elections.

[33] The applicant insisted that the termination of his employment was unlawful and that there was non-compliance with the notice period ofthe employment contract. He stated that the only email he received from Executive Director on 10 June 2022 is the one attached to the answering affidavit (Annexure "NS3") The became aware of NS2 to the answering affidavit when he consulted with his legal representative during the preparation of the replying affidavit. He argued that annexure "NS2" also failed He further alleged that no due procedure was followed by the respondents. The respondents contended that there existed no employment relationship between the applicant and the Municipality. However, the respondents admitted that the Municipality was bound by the employment agreement signed by the parties.

[341 The applicant alleged further that neither the Executive Mayor nor the Executive Director had the authority to terminate his employment. For this assertion, he relied on s 55(1) (g) and (h) of the Systems Act 32 of 2000 which provides:

> "550) 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."

[35] In paragraph 19 of the answering affidavit, the respondents' response records:

> "AD PARAGRAPHS 44 TO 61 THEREOF
>
> I have already explained that the Applicant is not an employee of the Municipality. The terms of his contract with the Municipality are fully explained in the Annexure SMI to the Founding Affidavit. If the Applicant contends that there has been a disregard of the terms of this contract, that issue must be determined in due course not in this application."

THE RESPONDENTS' CASE

[36] The respondents denied that the applicant is an employee of the Municipality and alleged that no employment relationship existed between them. They confirm his appointment as a Strategic Advisor of the Municipality. It is undisputed that the applicant's appointment is a political one, distinct from that of an employee. It was also undisputed that political appointments are made in terms of the Municipality's Organizational Establishment Policy which was approved by the Municipality's Executive Mayoral Committee on 10 November 2010. Clause 4 of this policy states that individuals who are political employees fall into a category of employment with no benefits, save for those provided for by the Basic Conditions of the Employment Act. The respondents admitted that the applicant's employment was terminated by the Municipality as per the letter dated 10 June 2022 (Annexure "NS2") in terms of clause 17.3 of the Agreement dealing with termination (see paragraph 3 above). It is further undisputed that

according to clause 2 of the agreement the applicant's appointment is linked to the current term of office of the Executive Mayor.

[37] The respondents submitted that the Judgment of Goosen J relied upon by the applicant is irrelevant to the issues at hand. They argued that the applicant has not given an explanation why he has joined the City Manager, the Executive Mayor and the Director of Corporate Services. In the absence of such an explanation, they submitted that this was a misjoinder. However, they did not pursue this argument when the matter was heard and it was also not dealt with by the parties in their heads of argument. I will deal with the issues at hand.

[38] According to the Acting Director: Legal Services of the Executive Mayor, and the deponent to the answering affidavit, at approximately 12:00, she, the Executive Mayor, Deputy Mayor, Ms Buyelwa Mafaya, the Chief Whip, Mr Wandisile Jikeka, and the Municipality's legal team were busy consulting on the urgent application brought by Dr Nqwazi against the Municipality at Dehli Restaurant. The applicant burst into the restaurant in the company of Mr Troon. The former asked: "Why are you doing this?" At that time, he was directly confronting the Mayor. Both the applicant and Mr Troon shouted and pointed fingers at the Mayor and her companions. The applicant simulated firing a gun at her and the deputy Mayor, using his right hand. He and Mr Troon enquired: "Why are you selling the Municipality? Why are you doing this thing, we are going to deal with you after this thing! The applicant turned to Mr Troon and said: "Let's waitfor those other people to come." He sat down for a while and stood up again. He pointed a finger

at the Deputy Mayor and threatened that they were also going to deal with her. The Deputy Mayor responded that she had noted the threats. The applicant and Mr Troon also insulted the two attorneys present at the meeting and told them to ignore the instructions given by the Executive Mayor and other officials,

otherwise, they would be removed from the panel of lawyers in the Municipality database.

[39] In her confirmatory affidavit, the Executive Mayor stated that the applicant and Mr Troon were angry and aggressive at her and the Deputy Mayor but not the Chief Whip who was a male officer. She stated further that she was shaken up by the incident as the applicant and Mr Troon's demeanour showed a heated confrontation to such an extent that she laid a criminal charge against them at Humewood Police Station under CAS 91/6/2022. The fact that the applicant held a special position in her office, aggravated the situation, she added. She said: "His position required him to have adopted a reserved and professional approach in dealing with the office of the Mayor, in other words with me and the Deputy Mayor. " While this incident unfolded, it was captured on the video attached to the answering affidavit.

RELATIONSHIP BETWEEN THE APPLICANT AND THE MUNICIPALITY

[40] The applicant alleged that 'as a municipal employee' he should be subjected to the same Code of Conduct as any other municipal employee. The respondents dispute that the applicant is an employee of the Municipality. They alleged that the terms of his contract are as contained in the Memorandum of Agreement. In reply, the applicant maintained that he is an employee of the Municipality.

[41] It is common cause that the applicant's position of Strategic Advisor is a political appointment. His position is therefore distinct from an employee of the Municipality. It is undisputed that political appointments were made in terms of the Municipality's Organisational Establishment Policy approved by the Mayoral Committee on 10 November 2010. Clause 4.4 of the said policy records:

"4.2...

> • That the resolution should clearly state the period ofemployment (with effect from when to whenl) and in this case for the term of office of the political office bearer concerned; noting that such employment falls into the category of contract employment with no benefits, save for those provided for as per the Basic Conditions of Employment Act.',

[42] What remains of the relationship between the applicant and the Municipality and a contractual relationship is undisputed. This means that both parties are bound by the terms of the agreement they signed and nothing more and nothing less.

TERMINATION OF THE APPLICANT'S EMPLOYMENT

[43] The applicant alleged that the termination of his contract by the respondents was in breach of the employment contract as he was given the requisite notice as envisaged in paragraph 17.3 and more specifically 17.3.2 of the Agreement and this rendered the termination unlawful. It is worth mentioning that the applicant admitted to receiving two letters (annexures "SM4" and "SM5") on 08 June 2022.

[44] The applicant attached these annexures ("SM4" and "SM5") to the founding affidavit. On 10 June 2022 at or about 10:07 am he also received (annexure "NS3") attached to the answering affidavit via email from the Executive Director. This annexure is attached to the founding affidavit as annexure "SM9". Annexure "NS3" records:

> "POLITICAL CONTRACTUAL STAFF TERMINATION: STRATEGIC ADVISOR
>
> With reference to your contract entered into with Nelson Mandela Bay Municipality, you are hereby notified that your contract terminates with immediate effect (8 June 2022)
>
> Thank you for the service rendered during your contract period.',

[45] The similarity in annexures "MS5" and "NS3" is that they do not comply with the notice period provided for in clause 17 3 2 of the Agreement. The applicant admitted having received annexure "NS3" as it was addressed to him but he did not attach it to the founding affidavit, but it was attached to the answering affidavit. No explanation for this was proffered by the applicant. Strangely, annexures "SM4 and "SM5" that he claimed were forwarded to him by the Executive Director, were forwarded to the Executive Director by the Executive Mayor. The effect of annexure "SM5" is that the Executive Mayor instructed the City Manager to terminate the applicant's employment with immediate effect. The applicant did not advance an explanation as to how he got to be in possession of these documents.

[46] Another letter dated 10 June 2022 written by the Executive Director (Annexure "NS2") was, according to the respondents, forwarded to the applicant which he claims that he did not receive. It reads thus:

> "POLITICAL CONTRACTUAL STAFF TERMINATION: STRATEGIC ADVISOR
>
> Please note that your contract was terminated based on a breach ofthe following clauses:
>
> 16.2 does not obey a lawful order given by any person having authority to give it, or disregards or willfully neglects to execute such order, or by word or deed shows resistance;
>
> 16.11 engages in any rude, abusive, insolent, provocative, intimidatory or aggressive behavior to a fellow contractor or member of the public;
>
> 16.12 engages in any other behavior or commits any other act which would givejust cause for discipline.
> Although the termination is effective from 8 June 2022, you will be compensated for a period of two weeks in lieu of a notice period stipulated at Clause 17.3.2 of your contract under the heading "Termination of Contract".

[47] The letters dated 8 June 2022 ("NS3" and "SM5") failed to give notice in compliance with clause 17 of the agreement. However, the letter dated 10 June 2022 signed by the Executive Director (Annexure "NS2" above), and allegedly sent to the applicant, records that the applicant would be compensated for the two weeks' period in lieu of a notice period, thereby acknowledging the failure to comply with two weeks' notice in the letters dated 08 June 2022. Be that as it may, the applicant maintained that Annexure "NS2" 'is a deliberate and desperate attempt by the respondents to mislead this Honourable Court into believing that there has been compliance with the provisions of section 17 of my employment contract when, in fact there has been no such compliance. ' He alleged that the deponent to the answering affidavit failed to explain how annexure "NS2" was delivered to him.

[48] The respondents did not dispute that annexures "NS3" did not comply with clause 17 of the Agreement. To confirm this, paragraph 15.2 of the answering affidavit states:

> "I admit the memorandum of agreement concluded between these two parties and the terms thereof as summarized by the applicant. I particularly admit that the Third respondent is bound by the terms of clause 17 of the Agreement. It is for this reason that, after the applicant committed the misconduct, which I refer to later in this affidavit, the Third Respondent terminated the contract as per its letter of 1 0 June 2022 issued in terms of clause 17.3 of the contract. I attach a copy of this letter marked Annexure NS2."

[49] I consider that annexure "NS2" is dated 10 June 2022, two days after annexure "NS3" was forwarded and received by the applicant. The notice of motion is dated 17 June 2022 and the matter was filed on the same date. To suggest that annexure "NS2" was a deliberate and desperate attempt to mislead the court is unsubstantiated considering the admission by the respondents in clause 15.2 of the answering affidavit. The respondents immediately recognized the noncompliance with clause 17.3.2 of the Agreement and within two days, before the application was instituted on 17 July 2022, it was corrected. Annexure "NS2"

as well as the admission in clause 15.2 of the answering affidavit is an acknowledgement by the respondents that the applicant is entitled to two weeks' written notice as he had been employed for more than six months but less than a year. In the circumstances, the applicant cannot insist that the termination of his employment was unlawful because he was not given notice.

[50] The applicant asserted that the Municipality acted unlawfully by not subjecting him to the Code of Conduct like other municipal employees. He was not afforded an opportunity to be heard and no due process was followed, so he argued. For this assertion, he relied on clause 16.12 of the employment contract (see para 3 supra). The applicant alleged that the Executive Mayor abused her powers for an ulterior motive because he held a different view to hers. He stated that the Municipality was not supposed to summarily terminate his employment without a fair process being followed. That is so because it is the Municipal Manager who has the authority to terminate an employment contract, the argument continued.

[51] The applicant requested that his employment contract be read together with the provisions of the Collective Agreement of 2018 to 2023 which is applicable to all municipalities including the City Manager. In response, the respondents submitted that the applicant is not an employee of the Municipality.

[52] The Collective Agreement is in accordance with the provisions of the Labour Relations Act 66 of 1995 as amended and was entered into between the South African Local Government Association (SALGA), the Employers Organization and Independent Municipal and Allied Trade Union (IMATU) and South African

Municipal Workers Union (SAMWU). Clause 7 deals with the disciplinary procedure which is brought before the Municipal Manager or his authorized representative for consideration and decision.

[53] It is not in dispute that the applicant is not a member of a trade union and was not a party to the Collective Agreement of 2018 to 2023. He is also not an employee of the Municipality in the sense that he is not a formal employee. He is a contract employee and therefore bound by the terms of the Agreement. No disciplinary process was provided for in the Agreement. No clause in the Collective Agreement that includes contract employees. Similarly, no clause deals with the code of conduct in the Agreement. He signed the Agreement and is therefore bound by it. It is noteworthy that in the supplementary heads of argument, the applicant did not insist that the respondents should comply with the Collective Agreement. In my view, the Code of Conduct and Collective Agreement applicable to other municipal employees, were not applicable to the applicant.

[54] Reliance be the applicant on sub-clause 16.12 of the Agreement cannot stand because this sub-clause is one of the lists of misconduct a contractor would be guilty of if committed. It is not an independent clause.

[55] Clause 22 of the agreement deals with good faith and reads: "The parties undertake to observe the utmost goodfaith in the implementation ofthis contract, and they warrant that, in their dealings with each other, they will do anything nor refrainfrom doing anything that might prejudice or detractfrom the rights, assets or interests ofeach other. " The parties act in good faith if they allow themselves to be bound by the terms of the Agreement they concluded. That is not the position in this case. In my view, the applicant has not made out a case for reinstatement.

The application must fail.

COSTS

[56] The outstanding issue is costs. Mr Ndamase submitted that the conduct of the respondents amounted to abuse of power and urged me to show displeasure and grant a punitive costs order against the respondents. He submitted further that the respondents employed two counsel which shows the seriousness of the matter. He requested that the applicant also be granted costs of two counsel, if successful.

[571 Ms Msizi argued that costs should follow the result and no punitive costs order should be made. She added that costs should be on a scale as between party and party.

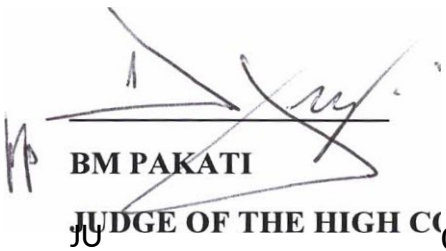
[58] It is a fundamental principle that a party who succeeds should be awarded costs and this rule should not be departed from except on good grounds [6] The award of costs is wholly within the discretion of the court. It is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at. [10]

[59] In my view, costs on a scale as between party and party would be a proper award in the circumstances. There is no reason why costs should be ordered on a scale as between attorney and client.

[60] In my view, this matter was not complicated to justify employment oftwo counsel.

6 See South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at 912. Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A).

The applicant's application is dismissed with costs on a scale as between party and party.



JU OF THE HIGH COURT, EASTERN CAPE
DIVISION, GQEBERA

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DA TE HEARD: 21 JUNE 2022

DATE DELIVERED: 05 AUGUST 2022