THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 345/09
No precedential significance

In the matter between:

MPUTUMI CAMARON MANANA **Appellant**

and

KING SABATA DALINDYEBO MUNICIPALITY **Respondent**

Neutral citation: *Manana v King Sabata Dalindyebo Municipality* (345/09) [2010] ZASCA 144 (25 NOVEMBER 2010)

Coram: MPATI P, NUGENT and MHLANTLA JJA

Heard: **10 NOVEMBER 2010**

Delivered: **25 NOVEMBER 2010**

Summary: Contract of employment – resolution of the municipal council – must be adhered to until rescinded or set aside.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Pakade J sitting as court of first instance).

The appeal is upheld with costs that include the costs of the earlier hearing of this appeal. The order of the court below is set aside and substituted by the following:

'1. The respondent is ordered to account to the applicant for such money as might be due to him as salary and back pay in consequence of his appointment to the position of Manager: Legal Services.

2. The respondent is ordered to pay the amount that is due forthwith.

3. Subject to any events that might have occurred since the appointment that alter the legal position, the respondents are ordered to effect the necessary adjustments to the applicant's salary in consequence of the applicant's appointment to the position of Manager: Legal Services.

4. The respondent is ordered to pay the costs of this application.'

JUDGMENT

NUGENT JA (MPATI P and MHLANTLA JA concurring)

[1] This appeal arises from an application that was brought by Mr Manana (the appellant) against the King Sabata Dalindyebo Municipality, (the respondent) in the Eastern Cape High Court at Mthatha for the

payment of remuneration that was said to be due to him by the municipality and for related relief. After hearing full argument on all the issues the court below (Pakade J) held that it had no jurisdiction in the matter – relying in that regard upon the decision in *Chirwa v Transnet Ltd*[1] – and dismissed the claim. In the course of his judgment the learned judge remarked that Mr Manana was 'strong on the merits of the application', from which I think it can be inferred that, but for his finding on jurisdiction, he would have upheld the application. Mr Manana appealed to this court with the leave of the court below.

[2] The court below cannot be faulted for having found that it had no jurisdiction in view of the decision in *Chirwa* that was binding on it at the time. But that decision was subsequently clarified in *Gcaba v Minister for Safety and Security*,[2] from which it became apparent that the court indeed had jurisdiction to consider the claim. Meanwhile, the appeal had been set down to be heard on 6 May 2010. On 6 January 2010 the municipality's local attorney wrote to the registrar curtly as follows:

'We have been instructed by our correspondents to inform you that the [municipality] does not intend opposing the appeal and will therefor not file Heads of Argument.'

Some two weeks later the attorney wrote to the registrar as follows:

'With reference to the above as well as our letter dated 6 January 2010 when we advised that our client does not intend opposing the appeal, we however wish to point out that we still require notification of the date of hearing of the appeal so as to enable us to monitor the process on behalf of client and correspondents.'

[3] It is trite that an appeal lies against the order that is made by a court, and not merely against the reasons for its order. In the absence of opposition to the appeal – and the absence of any legal representative for

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[1] 2008 (4) SA 367 (CC).
[2] 2010 (1) SA 238 (CC). See, too, *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

the municipality when the appeal was heard – this court set aside the order of the court below and substituted the order that was sought in the court below, in accordance with its ordinary powers on appeal. As it turns out, the municipality intended to concede only the jurisdictional objection that had been taken in the court below. It was under the impression that once the order was set aside the matter would have been remitted to the court below – a fruitless exercise bearing in mind that all the issues had been fully traversed in that court and any finding against the municipality would undoubtedly have returned to this court.

[4] The approach that was taken by the municipality warrants two observations. Having concluded, correctly, that it could not defend the jurisdictional finding of the court below, the municipality could simply have abandoned the order in its favour, as it was capable of doing,[3] even if only on terms as to the disposal of the matter that the parties might have agreed. Instead the municipality put Mr Manana to the trouble and expense of having to brief counsel and to pursue the appeal so as to have the order set aside, and put this court to the inconvenience of convening in order to do so. Moreover, having adopted that course, and knowing that the appeal would have to proceed, the municipality then failed to ensure that a representative was present when the appeal was heard, if only to note the proceedings in accordance with conventional courtesy. Had that been done the problem would also have been avoided.

[5] Nonetheless, the parties are at one that in the circumstances I have outlined the order was erroneously made in the absence of the municipality and it may and should be recalled. We order accordingly.

[3] Rule 41(2) of the Uniform Rules.

They are also agreed that this court may and should dispose of the matter on its merits.

[6] The material facts are straightforward. The appellant was formerly employed by the Umtata Transitional Local Council as a legal advisor. In about 2000 the Umtata Transitional Local Council merged with the Mqanduli Transitional Local Council to form the municipality with which we are now concerned. Certain disputes arose between the appellant and the municipality concerning his position and I deal with those below to the extent that they are material. For the moment it is sufficient to say that they culminated in a resolution being adopted by the municipal council on 3 November 2006 in the following terms:

'(a) That, with effect from 10 August 2006, and in line with the ruling of the presiding officer of the grievance, Mr Manana is placed on the position of the Manager Legal Services, which position is on grade 3;

(b) …

(c) That, taking into account the ruling of the presiding officer on Mr Manana's grievance, and the fact that he has been caused to act for a lengthy period of time and thereby deprived of the benefits attached to the post, that he be back paid accordingly, with effect from August 2006.'

[7] On 21 December 2006 the appellant was notified of the resolution in a letter addressed to him by the Acting Director: Corporate Services. The following day Mr Manana signed the foot of the letter in acknowledgment of his acceptance of the appointment.

[8] That notwithstanding, no adjustment was made to Mr Manana's salary. On 13 February 2007 he wrote to the Acting Director: Corporate Services, drawing that to his attention, and requesting that the matter be

rectified. He was advised in reply the following day that the matter was receiving the attention of the Municipal Manager.

[9] By 20 February 2007 nothing further had happened and the appellant's attorney wrote to the Municipal Manager demanding that steps be taken immediately to account to Mr Manana for salary adjustments and benefits in consequence of his appointment. The Municipal Manager replied as follows:

'Please be advised that the purported appointment of your client is currently the subject of review which my office is facilitating with the Council of the Municipality as part of the intervention by the MEC for Housing, Local Government and Traditional Affairs to investigate acts of maladministration and irregularities in the Municipality.

The review is aimed at re-looking at all acts and omissions which would appear to have elements of maladministration or irregularities. Your client's purported appointment unfortunately falls into such category.

Your client has been advised of the above process and I appeal to you to advise your client to kindly await the outcome of the review process which will be communicated to him as soon as a decision has been taken.'

[10] Mr Manana was not willing to wait. On 20 March 2007 the present proceedings were launched, in which he claimed, essentially, payment of moneys that had become due to him in consequence of his appointment, and an order directing the municipality to make the appropriate adjustments to his salary.

[11] Meanwhile, the relevant member of the executive council of the province had appointed Ms Zitumane as 'caretaker municipal manager' of the municipality. Her brief was to investigate various irregularities in its affairs that were alleged to have occurred. Precisely what her position

entailed has not been elaborated upon but there is no suggestion that her powers were any greater than those of a municipal manager duly appointed under the provisions of the Local Government: Municipal Systems Act 32 of 2000.

[12] The answering affidavit opposing the application was deposed to by Ms Zitumane. At first sight it seems curious that the municipality should be contending that effect should not be given to its own resolution, which had not been rescinded at the time the answering affidavit was deposed to.[4] It seems to me that the curiosity arises from a misconception as to the nature of a municipality – which raises the question whether the opposition to the application was authorised, a matter that I return to presently. The misconception also pervades most of the argument that was presented before us and it is as well to dispel it at the outset. For the purposes of this judgment I will assume that the municipality is properly before us in opposition to this appeal.

[13] The constitutional structure of government is separated into three spheres: the national sphere, the provincial sphere, and the local sphere.[5] The local sphere of government consists of 'municipalities', which must be established for the whole of the territory of the Republic.[6] The executive authority of a municipality does not vest in its municipal manager (or any other of its employees). Its executive authority[7] is constitutionally vested in its municipal council.[8]

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[4] We were told from the bar that it has still not been rescinded.
[5] Section 40(1) of the Constitution of the Republic of South Africa, 1996.
[6] Section 151(1) of the Constitution.
[7] Also its legislative authority, but that is not now relevant.
[8] Section 151 (2) of the Constitution.

[14] The Act provides the framework within which a municipality must function. As is to be expected, the Act is replete with provisions recognising that executive authority vests in the council and in nobody else. Indeed, ordinary legislation is not constitutionally capable of divesting a municipal council of its executive authority – or any part of it – and the construction of a statute that would produce that result must be avoided if it is possible to do so.[9]

[15] The first submission that was made on behalf of the municipality was that the resolution to which I have referred is not relevant because the power to appoint employees vests in the municipal manager and not in the municipal council. For that submission counsel relied on s 55(1)(a)-(e) of the Act – in particular subsection (e). Confining myself to the relevant part of that subsection it reads as follows:

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

(e) the appointment of staff …'

[16] A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself. As the authors of *De Smith's Judicial Review*

[9] Per Langa CJ in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) paras 21-26.

express it:[10]

'[I]t has sometimes been stated that delegation implies a denudation of authority…. This cannot be accepted as an accurate general proposition. On the contrary, the general rule is that an authority which delegates its powers does not divest itself of them ….'

[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. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.[11]

[18] On a subsidiary, but related, point, I said earlier that the resolution of the municipal council was communicated to Mr Manana in a letter addressed to him by the Acting Director: Corporate Services, which he signed in acceptance. It was submitted – based once more on the subsection I have referred to – that only the municipal manager (and not the Acting Director: Corporate Services) had authority to conclude an employment contract. There are at least two answers to that submission. First, it was not the Acting Director: Corporate Services who purported to make the appointment. As appears from the terms of the resolution, it was

[10] 6 ed by The Rt Hon The Lord Woolf, Jeffrey Jowell QC, Andrew Le Sueur, assisted by Catherine M. Donnelly para 5-146. See too, *Administrator, Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A) at 323G-H: *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1987 (4) SA 155 (W), relying on the extensive treatment of the subject by Marinus Wiechers: *Administrative Law* pp 51-56.

[11] See Langa CJ in *Investigating Directorate: Serious Offences*, above, paras 21-26.

the municipal council itself that did so. The Acting Director: Corporate Services did no more than to execute the resolution administratively. But even if the Acting Director: Corporate Services had purported to make the appointment, on the authority conferred by the resolution, there is nothing to suggest that he did not have delegated authority to do so. Municipal managers do not singlehandedly perform all the functions referred to in s 55(1). They ordinarily delegate at least some of those functions to subordinates – whether expressly or by implication – and there is no suggestion in the answering affidavit that that has not occurred in this case. Indeed, it is not even a ground upon which the application was resisted in the answering affidavit.

[19] The second submission sought to impugn the resolution itself. In her affidavit Ms Zitumane alleged that the resolution was brought into being irregularly and was in conflict with the municipality's employment policy. I need not deal in detail with the alleged irregularity. It is sufficient to say that she alleges that the 'ruling' referred to in the resolution – which purported to 'rule' that Mr Manana be appointed to the post – was 'concocted' to induce the municipal council to make the appointment. (I need to make it clear that there is no suggestion that the resolution was adopted contrary to the proper procedures for the adoption of resolutions and was thus formally defective.) Ms Zitumane's view that this resolution, and other resolutions that had been adopted, were irregular, caused her to submit a report to the municipal council requesting it to rescind the various resolutions, but that had not occurred at the time the answering affidavit was deposed to.

[20] Against that background it was submitted that the resolution was invalid and thus not binding upon the municipality. I am not at all sure

that the allegations establish that the resolution was irregular but I will assume nonetheless that it is indeed liable to be impugned.

[21] No authority was advanced for the submission that a duly adopted resolution of a local authority might be ignored by its officials if they have a belief that it is invalid, even if that belief is well-founded. Indeed, the contrary was held in the early case of *Grace v McCulloch.*[12] In that case a resolution was adopted by a municipal council in contravention of its standing orders. After it was adopted the chairman of the council ruled the resolution to be out of order and instructed the town clerk not to act on it. Upholding a claim by members of the council to set aside that ruling and instruction Curlewis J said the following:[13]

'[W]hen once the council has taken a resolution it is not competent for the chairman, any more than for any other councillor, to declare it invalid and of no effect; nor is it competent for him to take upon himself the responsibility of instructing the town clerk not to act on a resolution passed by a majority of the council. If the chairman or any councillor is dissatisfied with a resolution, his course is to give notice of motion to rescind or reconsider the resolution as provided by the standing orders. That is one course. If the resolution is clearly wrong or illegal another course is to come to Court, and ask to have such resolution declared illegal. But I do not think the power to declare resolutions invalid lies with the chairman.'

[22] Although that case was decided a considerable time ago we were referred to no subsequent authority that conflicts with it and I know of none. And although this case must be decided under a different constitutional dispensation I can see no new principle that drives one in another direction. On the contrary, it seems to me that it would be conducive to disorderly public administration if officials were entitled to choose between executing or not executing a duly adopted resolution of

[12] 1908 TH 165.
[13] At p. 175.

the council depending upon their belief as to its validity – whether or not the belief is well-founded. In the absence of authority to that effect, or a principled explanation for why that should be so, neither of which is before us, I think the submission must be rejected. A municipal council acts through its resolutions. No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.[14]

[23] The final submission is reminiscent of a debate that I thought had run its course once *Gcaba* was decided. It was submitted that the facts of this case ground a claim for relief under the Labour Relations Act. In those circumstances, so I understood the submission, it cannot be a claim that is good in law in the high courts. Counsel said that the decisions of this court in *Makhanya v University of Zululand*[15] and *South African Maritime Safety Authority v McKenzie*[16] support that submission. They do no such thing. The evidence in this case establishes the existence of a contract of employment between the municipality and Mr Manana and he wishes to enforce the contract. It is conceded that the high court had jurisdiction to do so, which it clearly does. That he might have been entitled to other relief under the remedies provided for under the Labour Relations Act does not somehow extinguish his contractual rights.

[24] In my view no proper grounds were advanced for resisting the claim and the appeal must be upheld.

[14] Cf *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), and numerous cases that have followed it.
[15] Above.
[16] 2010 (3) SA 601 (SCA).

[25] There remains the question of costs. I have drawn attention to the curiosity of the municipality purporting to oppose the execution of its own resolution while simultaneously leaving it intact. The curiosity arises because Ms Zitumane purports to be speaking for the municipality when it is not clear that the full municipal council is aware of the fact. There is no resolution of the municipal council authorising the opposition. Ms Zitumane relies instead upon a general delegation by the municipal council to the municipal manager to institute and defend legal proceedings. It is questionable whether that delegation is to be construed as authorising the municipal manager to challenge the validity of a resolution of the municipal council itself but we need not decide that question. She has purported to oppose the proceedings in the name of the municipality and I think the municipality must pay the costs. It is open to the municipal council to consider whether she was authorised to do so and to act accordingly. I need to add that there can be no doubt that she acted at all times in good faith, even if in law she might have been mistaken, and I make no suggestion of any impropriety on her part.

[26] I need also to make it clear that the order that I intend to make does not purport to declare the position at any time after the application was brought and does not take account of subsequent events that might have altered the position or might yet do so.

[27] The appeal is upheld with costs that include the costs of the earlier hearing of this appeal. The order of the court below is set aside and substituted by the following:

‘1. The respondent is ordered to account to the applicant for such money as might be due to him as salary and back pay in consequence of his appointment to the position of Manager: Legal Services.

2. The respondent is ordered to pay the amount that is due forthwith.

3. Subject to any events that might have occurred since the appointment that alter the legal position, the respondents are ordered to effect the necessary adjustments to the applicant’s salary in consequence of the applicant’s appointment to the position of Manager: Legal Services.

4. The respondent is ordered to pay the costs of this application.’

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

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