

SOUTH AFRICA / JUDGMENT

Mayana v Executive Mayor: Nelson Mandela Bay Metropolitan Municipality and Others - Appeal (CA09/2023) [2023] ZAECKMKHC 106 (19 September 2023)

[2023] ZAECKMKHC 106

COURT

Eastern Cape High Court, Makhanda

BEFORE

GH Bloem, JGA Laing, ZZ Matebese

CASE / FILE NUMBER

CA09/2023

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FLYNOTES: LABOUR – Contract – Termination – Misconduct at municipality – Appellant confronting mayor and deputy mayor at restaurant – Court a quo found nothing wrong with the termination – Employment contract did not expressly provide for hearing prior to termination – No basis for reading the collective agreement with the employment contract and there was no implied term that entitled him to a hearing – Appellant elected to frame his claim in contract and cannot complain about the alleged unfairness of the procedure – Appeal dismissed.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA09/2023

In the matter between:

SIYANDA MAYANA

APPELLANT

and

EXECUTIVE MAYOR: NELSON MANDELA BAY

FIRST Respondent

METROPOLITAN MUNICIPALITY

CITY MANAGER: NELSON MANDELA BAY

SECOND Respondent

NELSON MANDELA BAY: NELSON MANDELA

THIRD Respondent

EXECUTIVE DIRECTOR: CORPORATE

FOURTH Respondent

SERVICES NELSON MANDELA BAY

APPEAL JUDGMENT

Bloem J

[1] At the centre of this appeal is whether the appellant's services were terminated in accordance with the agreement in terms whereof he was employed. The court a quo found nothing wrong with the manner in which his services were terminated and dismissed his application for reinstatement. It is against the judgment and order of the court a quo that he now appeals with the leave of the court a quo.

[2] The appellant concluded a written agreement with the Nelson Mandela Bay Metropolitan Municipality (the municipality), the third respondent, to perform tasks, as specified by the Executive Mayor of the municipality (the mayor), the first respondent, as Strategic Advisor-Monitoring and Evaluation (the employment contract). The employment contract commenced on 1 December 2021 and was linked to the term of office of the incumbent mayor. The parties agreed that the appellant's services would automatically terminate should the mayor's services be terminated before the expiry of her

term as mayor and that the employment contract would automatically terminate on expiry of the mayor's term of office.

[3] It was undisputed that on 2 June 2022 the municipality's council resolved firstly, to approach the High Court to set aside the appointment of its municipal manager, Dr Nqwazi; and secondly,

to appoint Lonwabo Ngoqo as municipal manager with immediate effect. Before the municipality could give effect to the resolutions,

Dr Nqwazi instituted an application on 4 June 2022 wherein she sought an order that the municipality be interdicted from giving

effect to the above resolutions. That application was on the roll of cases to be heard on 7 June 2022. The appellant was at court when the municipality's counsel received a telephone call from the municipality's attorney instructing her to consent to the order sought by Dr Nqwazi. The appellant overheard the conversation between the municipality's counsel and attorney. He was dismayed at what he had heard. He, accompanied by a councillor, Lawrence Troon, approached the mayor at a restaurant. She was in the company of the deputy mayor, the chief whip of the municipality's council, the municipality's legal advisor and two attorneys from the firm which

represented the municipality in the litigation with Dr Nqwazi. It is from this stage that the parties' versions differ.

[4] The appellant's version was that, upon their arrival at the restaurant, 'I asked the First Respondent why she was acting contrary to the Council Resolution of 2 June 2022 to appoint Mr Lonwabo Ngoqo as a City Manager. The First Respondent's response was that she will do what she says as she gives instructions

as the Executive Mayor' and his words to the mayor, the deputy mayor and the chief whip were 'that we will deal with you, politically and will remove you as the Mayor'. He said that the deputy mayor insinuated that he was threatening to harm her when he was referring to removing her and the mayor from leading the municipality as they were, according to him, 'clearly not acting in the best of interests of the Municipality, and defying the lawfully taken Resolution of the Municipal Council of 2 June 2022'.

[5] The mayor and the municipality's acting director of legal services, Nobuntu Siganga, said they were perturbed by the appellant's version, which was intended to mislead the court and to downplay his violence at the restaurant. They relied on a video which someone had taken inside and outside the restaurant when the appellant and Mr Troon confronted the mayor and her party. The video consists of two parts. The first part shows what happened inside the restaurant while the second part shows what happened outside the restaurant. The video showed that,

inside the restaurant, the appellant and Mr Troon approached the table at which the mayor and her party were sitting. What

follows hereunder is a transcription of what can be seen and heard on the video:

'Appellant: Why are you doing this? We are not conceding anything. I am telling you now. And we will deal with you after this thing (pointing a finger at the mayor). Appellant addressing Mr Troon: Let us wait for these other people to come here. The appellant then sat down at the same table shared by the mayor and her party and said: There is going to be no instruction to say that those people must concede. That is a non-sensical instruction.

Mayor:

It is fine.

Appellant: It is not fine.

Mayor:

There is. No, there is. No, there is.

Appellant: (got up and said, pointing a finger at the mayor). You voted for Ngoqo. Now you want to distance yourself from that decision. It is not going to happen.

Mayor:

There is an instruction.

Appellant: (to the municipality's attorneys). We are telling you now, if you go ahead with that thing, we will take you off the panel. I am telling you now, pointing a finger at the attorneys.

Mayor:

(to the attorneys). You do what the mayor says.

Mayor:

(to the appellant): You can jump up and down.

The appellant and Mr Troon then focussed their attention on the deputy mayor and the chief whip.

Mr Troon: (to the chief whip). You are not worth being the chief whip because you sold out the municipality.

Deputy mayor: (asking the appellant). Are you saying that you will deal with me?

Appellant: We are going to deal with all of you.

The appellant and Mr Troon told the attorneys not to proceed with "that thing" lest they be taken off the panel.

Mr Troon: (to the attorneys). You will be off that panel. You come here to mix with these thieves.

Deputy mayor: (to the appellant). If you say you will deal with me, anything that happens to me, you will answer for it.

Appellant:

No, no. You know what I mean. Politically we will remove you as deputy mayor. We will deal with you politically.

Mayor:

(to the appellant). And you are going out of my office.

Appellant:

Let us see. Are you bigger than council?

The deputy made a call reporting to a person that an advisor in the mayor's office was threatening them.

The appellant left briefly.

Appellant:

(on his return). Let me repeat it. Politically, we are going to remove you as mayor, so also the deputy mayor. This is

a promise.

Deputy Mayor: I am reporting the threat to a senior police officer.

The appellant and Mr Troon then left the restaurant.’

[6] The video furthermore shows that outside the restaurant, the mayor, deputy mayor and unknown persons are seen with the appellant and Mr Troon, accompanied by two other males. Mr Troon can be heard

saying that the mayor gave instructions that the municipality must concede Dr Nqwazi’s application. He enquired from where she obtained the mandate to make that concession. The deputy mayor is heard saying that her family would know who was responsible for her death if she was killed. She said that she would be the third councillor to be shot and killed by the appellant.

[7] The court a quo correctly identified clauses 16 and 17 of the employment contract as the ones applicable to the dispute between the municipality and the appellant. The relevant parts of those clauses read as follows:

‘16. Misconduct

The contractor shall be guilty of misconduct is he/she:

16.1 commits a breach of any of the provisions of this agreement;

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

...

16.12 engages in any other behaviour 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 of the 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 created expectations of a permanent appointment, 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 any form of compensation;

17.2 at the Contractor’s initiative on the following basis:

17.2.1 one (1) week’s written notice if the Contractor has been employed for six (6) months or less; or

17.2.2 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

17.2.3 four (4) weeks written notice if the contractor has been employed for one (1) year or more.

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:

17.3.1 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

17.3.3 four (4) weeks' written notice if the contractor has been employed for one (1) year or more.'

[8] The court a quo found that the appellant was given notice of the termination of the employment contract in terms thereof and that he had accordingly failed to show that the termination of the employment contract was unlawful. The finding of the court a quo in that regard was criticised before us.

[9] The context of the termination of the employment contract was that it could be terminated either automatically; by the appellant, as the employee; or by the municipality, as the employer. The

employment contract could automatically terminate in terms of clause 17.1 on the expiry of the period of the employment contract.

Clause 17.1 had to be read with clause 2, which provided that the duration of the employment contract was linked to the term of office of the then incumbent mayor. It meant that, if the mayor's services were terminated before the conclusion of her term of office, the employment contract also terminated on the date of the termination of the mayor's services.

[10] Clause 17.2 provided for the termination of the employment contract at the instance of the appellant. In terms thereof, he was not required to give a reason for such termination. What was required of him was to give written notice to the municipality of his intention to terminate the employment contract. The different periods of the notice depended on the length of his service. If he was employed for six months or less, he was required to give one

week's written notice to the municipality, two weeks' written notice if he was employed for more than six months but not more than one year; and four weeks' written notice if he was employed for more than one year. The purpose of requiring the appellant to give notice was obviously for the benefit of the municipality. The municipality would, once it knew that the appellant would terminate the employment contract, firstly, establish whether the appellant was up to date with the execution of the duties that he was required to perform for the mayor and, if he was not, to ensure that he performed those duties during the notice period; and secondly, make

arrangements for the appellant's replacement. Because the notice period was for the municipality's benefit, nothing prevented the municipality from releasing the appellant from serving the full notice period, provided that the appellant was paid his full salary and other benefits for the notice period.

[11] Clause 17.3 provided for the termination of the employment contract at the instance of the municipality. The notice periods in that case were the same as in the case where the termination of the employment contract was at the appellant's instance. The difference between clauses 17.2 and 17.3 was that, where the municipality terminated the employment contract, it had to have a reason to do so. The listed reasons were 'misconduct, incapacity, unacceptable or unsatisfactory performance, breach, or for any other reason recognised by law as sufficient'.

[12] The municipality relied on clause 16.12 for the contention that on 7 June 2022 the appellant misconducted himself for the manner in which he confronted the mayor and deputy mayor at the restaurant about the instruction to counsel not to oppose Dr Nqwazi's application. In terms of clause 16.12, the appellant shall be guilty of misconduct if he engaged in behaviour which would give the municipality just cause to discipline him. Mr Ndamase, counsel for the appellant, submitted that the text in clause 16.12 must be understood to mean in that, in the event of the appellant's behaving or acting in a manner that gave just cause to discipline him, the municipality was required to institute disciplinary proceedings against him. The submission was that the word 'discipline' equated to disciplinary proceedings. That submission cannot be sustained. If the parties had intended disciplinary proceedings to be instituted against the appellant once the municipality had just cause to discipline him, the parties would most certainly have said so in the employment contract. The interpretation that was sought to be given the word 'misconduct' in the context of clause 16.12 would lead to absurdity and an unbusinesslike

result. Such an interpretation would have had the result that, in cases where the municipality made political appointments of employees, like in the case of the appellant, on the same terms as in the present matter, it would have been required, in every instance where allegations of misconduct were raised against those employees, to institute disciplinary proceedings. That would be the case even though the municipality, for reasons of its own, may not have wished to pursue such matters or institute disciplinary proceedings.[1] In my view, the purpose of clause 16.12 was to give the municipality the right to terminate the employment contract once the appellant's behaviour gave rise to just cause for discipline. In such a case the appellant "shall be guilty of misconduct". The municipality could then, in terms of clause 17.3 of the employment contract, terminate the employment contract. In my view, based on the appellant's conduct at the restaurant, the municipality had just cause to discipline him.

[13] The appellant's case was that the municipality breached the terms of the employment contract, in that he should have been given a hearing before it terminated the employment contract. The law relevant to the entitlement of a person to a hearing before the termination of his or her services was articulated in *South African Maritime Safety Authority v McKenzie*.

[2] Therein Wallis AJA (as he then was) stated that an employee is entitled to a pre-dismissal hearing where that right is conferred by a statute or by an employment contract. The right to be heard before an employee's services are terminated arises contractually where the contract provides for it either expressly, impliedly or tacitly.[3] The appellant was required to prove that the employment contract contained an express, implied or tacit provision that entitled him to such a hearing.

[14] It is common cause that the employment contract did not expressly provide that the appellant was entitled to a hearing before the termination of the employment contract at the municipality's instance. The appellant also did not allege that his alleged entitlement to a hearing arose from an implied or tacit term of the employment contract. Wallis AJA explained the difference between implied and tacit terms as follows in McKenzie:[4]

'An implied term properly so called is a term that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such a contract, subject only to the parties' entitlement in certain, but not all, instances to vary it by agreement. Where reliance is placed on such a term the intention of the parties will not come into the picture and the issue is the purely legal one, of whether in those circumstances in relation to a contract of that particular type the law imposes such a term on the parties as part of their contract. A tacit term is a term that arises from the actual or imputed intention of the parties as representing what they intended should be the contractual position in a particular situation or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question.'

[15] In *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another* NNO[5] Brand JA stated that a tacit term is not easily inferred by courts. That is so since courts are afraid that they might make contracts for the parties or supplement their agreements merely because it appears reasonable or convenient to do so. A party who seeks to rely on a contract which was tacitly concluded, must specifically allege that the contract relied upon is a tacit one.[6] The same principle applies to a party who seeks to rely on a tacit term of a contract. The appellant did not place facts before the court from which a tacit term, that the employment contract contained a term which entitled him to a hearing before the municipality could terminate the employment contract, could be inferred. He accordingly cannot claim that he and the

municipality tacitly agreed that he was entitled to such a hearing.

[16] Since the appellant has failed to prove that the agreement contained an express or tacit term that entitled him to a hearing before the employment contract was terminated at the municipality's instance, I will now consider whether the employment contract contained, by operation of law, an implied term to that effect. Mr Ndamase relied on paragraphs 56, 57 and 58 of the appellant's founding affidavit for the submission that the terms of a collective agreement concluded in the South African Local Government Bargaining Council (the SALGBC) were incorporated in the employment contract. That collective agreement was

concluded on 6 February 2018 between the South African Local Government Association and two trade unions, the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union (SAMWU). The

purpose of that collective agreement was stated in clause 5.1 thereof to be the establishment of a fair, common and uniform procedure for the management of employee discipline.

[17] Paragraphs 56, 57 and 58 of the appellant's founding affidavit read as follows:

'56. I also humbly request that the provisions of my employment contract be read together with the provisions of the Disciplinary Procedure Collective Agreement of 2018 to 2023 ("the Collective Agreement") which is applicable to all municipalities, including the Second Respondent herein. A copy of the said Collective Agreement is attached hereto marked SM6 and to which this Honourable Court is respectfully referred.

57. I further wish to state that at the hearing of this matter I shall place reliance on the contents of the entire contents of the said Collective Agreement, particularly clauses 5 to 7 thereof.

58. In summary, from the said clauses, it is clear that the application of the said disciplinary procedure is peremptory, that the rules of natural justice and fair procedure shall be adhered to, and that any allegation of misconduct against any employee must be brought to the attention of the Municipal Manager or his authorised representative who shall proceed with disciplinary proceedings, if satisfied that there is a prima facie cause to believe that a case of misconduct has been committed.'

[18] It is apparent from the above quoted paragraphs that the only basis upon which the appellant contended that the employment contract should 'be read together with the provisions of the Disciplinary Procedure Collective Agreement' is because, according to him, the collective agreement 'is applicable to all municipalities, including the Second Respondent herein'. No factual or legal basis was laid in the appellant's affidavits for the contention that the collective agreement applied to him. The heads of argument drafted on behalf of the appellant also did not set out the basis upon which the appellant sought the collective agreement to be read with the employment contract.

[19] At the hearing Mr Ndamase's attention was drawn to clause 1 of the collective agreement, which provided that the terms thereof 'shall be observed by all Employers and Employees who fall within the registered scope of the SALGBC'. Counsel then submitted that the collective agreement applied to the appellant because he was the municipality's employee. The submission was that, in terms of clause 1 of the collective agreement, the municipality, as the employer, and the appellant, as the employee, were required to observe the terms of the collective agreement. What was missing from that submission was whether the appellant fell within the registered scope of the SALGBC. He may or he may not. If he fell within the registered scope of the SALGBC, the disciplinary proceedings, which provided that he was entitled to a hearing before the termination of the employment contract, would have applied to him. If he did not fall within the registered scope of the SALGBC, the

collective agreement would not have applied to him. The appellant did not demonstrate, in his affidavits, heads or argument and at the hearing, that the appellant fell within the registered scope of the SALGBC. There was no factual basis upon which reliance could be placed on clause 1 of the collective agreement. The appellant accordingly failed to establish that the collective agreement was binding on him.

[20] Clause 4 of the collective agreement referred to the period of operation of the collective agreement. Clause 4.1 provided that the collective agreement commenced on 1 February 2018 in respect of the parties thereto. In respect of non-parties, clause 4.2 provided that the collective agreement would operate from a date to be determined by the Minister of Labour. The appellant adduced no evidence to prove that the Minister of Labour had indeed determined the date when the agreement became operative in respect of non-parties. For that reason, it cannot be found that the collective agreement came into operation in respect of non-parties, like the appellant.

[21] Clause 23 of the Labour Relations Act 66 of 1995 provides for the legal effect of collective agreements. Section 23(1) and (3) reads as follows:

‘(1) A collective agreement binds–

- (a) the parties to the collective agreement;
 - (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
 - (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates–
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
 - (d) employees who are not members of the registered trade union or trade unions party to the agreement if–
 - (i) the employees are identified in the agreement;
 - (ii) the agreement expressly binds the employees; and
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.
- (2) . . .
- (3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.’

[22] In terms of section 23(1)(d), for a collective agreement to bind an employee who is not a member of the registered trade unions party to that collective agreement, three conditions have to be fulfilled. The first condition is that the employees must be identified in the collective agreement. In this case the employees who were identified in the collective agreement were 'employees who fall within the registered scope of the SALGBC'. As pointed out above, the appellant failed to establish that he fell within the registered scope of the SALGBC. The second condition is that the collective agreement must expressly bind the employees. Employees referred to in section 23(1)(d)(ii) are those employees who are not members of the registered trade union parties who are nevertheless bound by the collective agreement, by virtue of them falling in the registered scope of the SALGBC. Employees are not bound by the collective agreement if they do not fall in the registered scope of the SALGBC. It has been not established that the appellant fell within that

scope. The third condition is that the members of the trade unions which concluded the collective agreement with the municipality

must be the majority of employees and employed by the municipality in the workplace. There was no evidence that members of IMATU and SAMWU were the majority of employees employed by the municipality in the workplace. In the circumstances, the appellant has failed to establish the fulfilment of any one of the three conditions. In the circumstances, he did not establish that the collective agreement was binding on him.

[23] Since the appellant failed to prove a factual basis for 'reading the collective agreement with the employment contract', it must be found that he failed to prove that the employment contract contained an implied term that entitled him to a hearing before the municipality terminated the employment contract. The appellant failed to satisfy the requirements of the test for impliedly or tacitly importing a term into the employment contract that entitled him to a hearing before the municipality terminated the employment contract. It is accordingly found that the employment contract did not contain a term that entitled the appellant to a hearing before the municipality terminated the employment contract.

[24] The second issue to be determined is whether the municipality was, in the words of the appellant, 'entitled to abruptly terminate the employment relationship and without following a fair procedure'.

The appellant elected to frame his claim in contract. He relied on section 77(3) of the Basic Conditions of Employment Act 75 of 1997, which provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. The appellant expressly disavowed reliance on the Labour Relations Act and the remedies provided therein. His claim was accordingly not that the municipality unfairly terminated his services when it informed him that the employment contract was terminated with immediate effect without giving him two weeks' notice. He can accordingly not complain about the alleged unfairness of the procedure followed.

- [25] In terms clause 17.3 of the employment contract, once the municipality has terminated the employment contract on any of the bases contained therein, the appellant was entitled to two weeks' written notice in terms of clause 17.3.2. His entitlement to notice arose ex contractu. The appellant was accordingly entitled to two weeks' written notice, during which period he was required to perform his duties in exchange for his salary and other benefits. In the event of the municipality failing to give notice in terms of clause 17.3.2, the appellant was entitled to be paid his salary and other benefits for the two-week period after the termination of the employment contract. In this case, the municipality terminated the employment contract with immediate effect. The appellant did not perform his duties during those two weeks because the municipality elected not to insist on this, but placed him in the same position in which he would have been had he served the two weeks' notice period by paying him the remuneration to which he was entitled for those two weeks. Since the appellant received such remuneration, he had no cause for complaint in that regard.
- [26] The third issue is whether the mayor or the municipality's executive director of corporate services, the fourth respondent, had the authority to terminate the employment contract. The appellant relied on the provisions of section 55(1)(g) and (h) of the Local Government: Municipal Systems Act 32 of 2000 for the contention that only the municipal manager of the municipality, the second respondent, is responsible and accountable for the maintenance of discipline of staff and the promotion of sound labour relations and compliance by the municipality with applicable labour legislation.
- [27] The evidence that the appellant placed before the court in his founding affidavit shows that on 8 June 2022 the mayor addressed a memorandum to the municipal manager wherein she complained about the appellant's behaviour at the restaurant. She informed the municipal manager that her office should not be a place where women feel unsafe and that her office could not employ an individual who contributed to such despicable acts of violence. She also drew attention to the fact that the appellant had previously indicated his lack of support towards her. It was against that background that the mayor instructed the municipal manager to terminate the employment contract. On that same day a letter was addressed to the appellant by the fourth respondent, wherein he notified the appellant that the employment contract was terminated with immediate effect. In a letter dated 10 June 2022 by the fourth respondent to the appellant, he was informed that, although the termination of the employment contract was effective from 8 June 2022, he would 'be compensated for a period of two weeks in lieu of a notice period as stipulated in clause 17.2.2 sic of your contractor under the heading 'termination of contract'. The fourth respondent, acting on the instructions of the second respondent, who, in turn who would have acted on behalf of the municipality, terminated the employment contract. It is, in my view, immaterial who, on behalf of the municipality, terminated the employment contract, which required the municipality to terminate the employment contract. The employment contract was accordingly terminated, on

behalf of the municipality, in terms of the employment contract.

[28] In the circumstances, the appellant has failed to show firstly, that he was entitled to a hearing prior to the termination of the employment contract; secondly, that the municipality was not entitled to abruptly terminate the employment contract; and thirdly, that only the second respondent had the authority to terminate the employment contract. The appeal must accordingly be dismissed.

[29] At the commencement of the hearing of the appeal, the court was required to consider the appellant's application to adduce new evidence and to amend his notice of motion in terms of such new evidence, if allowed. The effect of the new evidence was that the municipality terminated the mayor's services on 21 September 2022. The effect thereof was that, if the appeal was upheld, the appellant would have been entitled to payment of his full salary and other benefits from the date of the termination of the employment contract to 21 September 2022, when the mayor's services were terminated. The respondents gave notice of their intention to apply for the striking out of various paragraphs from the appellant's affidavit which was used in support of the application to adduce new evidence, primarily because those paragraphs are repetitive and deal with the merits of the appeal.

[30] In my view, it was necessary for the appellant to inform this court of the developments of 21 September 2022, since the mayor was still employed by the municipality when the application was heard by the court a quo. Whether it was necessary to make an application based on a 17-paged affidavit with a 14-paged annexure is debatable. There was accordingly merit in the respondents' criticism of the way in which the appellant sought to inform this court of the developments of 21 September 2022. Despite such criticism, I would nevertheless grant the application to admit the evidence that the mayor's services were terminated on 21 September 2022 and allow the amendment that the appellant sought in respect of the notice of motion to reflect that he no longer sought an order that he be reinstated, but an order that the municipality

pay his full salary and other benefits until 21 September 2022. It would, in the circumstance, be appropriate for each party to pay his, her or its own costs occasioned by the application to adduce new evidence and the application to strike out certain paragraphs in the affidavit used in support of the application to adduce new evidence.

[31] Regarding the costs of the appeal, both parties employed the services of two counsel in the court a quo. Before us Mr Ndamase appeared alone, albeit that the appellant's heads of argument were prepared by two counsel. Two counsel appeared before us on behalf of the respondents. It appears to have been a necessary precaution.

[32] In the result, it is ordered that:

32.1. The appellant's application to lead new evidence be and is hereby granted.

32.2. Each party shall pay his, her or its own costs occasioned by the application to adduce new evidence and the application to strike out certain paragraphs in the affidavit used in support of the application to adduce new evidence.

32.3. The appeal is dismissed.

32.4. The appellant shall pay the respondents' costs of the appeal, such costs to include the costs of two counsel, where so employed.

GH BLOEM

Judge of the High Court

I agree.

JGA LAING

ZZ MATEBESE

ACTING Judge of the High Court

Appearances

For the appellant: Mr B Ndamase,
instructed by Mgangatho Attorneys, Makhandla.

For the respondents: Ms N Msizi with Ms M Pango,
instructed by McWilliams and Elliot Inc, Gqeberha and NN Dullabh Attorneys, Makhandla.

Date of hearing: 4 September 2023.

Date of delivery of judgment: 19 September 2023.

[1] Old Mutual Ltd and Others v Moyo and Another (2020) 41 ILJ 1085 (GJ) para 67.

[2] South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA) para 43.

[3] SA Municipal Workers Union obo Tswaing Local Municipality and Others (2022) 43 ILJ 2754 (LAC) para 15.

[4] McKenzie above n 2 para 11.

[5] City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO 2006 (3) SA 488 (SCA) para 19.

[6] E C Chenia and Sons CC v Lamé and van Blerk

[2006] ZASCA 10; 2006

(4) SA 574 (SCA) par 8.

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