

SOUTH AFRICA / JUDGMENT

Melato v Masilonyane Local Municipality (2458/2023) [2024]

ZAFSHC 215 (12 July 2024)

[2024] ZAFSHC 215

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

2458/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 2458/2023

In the matter between: RAPOPI MELATO Applicant and MASILONYANE LOCAL MUNICIPALITY
Respondent

CORAM:

VAN ZYL, J

HEARD ON: 25 JANUARY 2024

DELIVERED ON: 12 JULY 2024

[1] In this application (“the main application”) the applicant is seeking the following relief:

“1. Declaring the Applicant’s acting appointment as Director Corporate Services for the period 1st December 2020 to 28th February 2021 lawful.

2. Directing the Respondent to pay the acting allowance which was due and payable to the Applicant for the period, 1st December 2020 to 28th February 2021.

3. The Respondent to pay the costs of the application.

4. Further and/or alternative relief.”

[2] The respondent is not only opposing the main application, but also filed a counter-application (“the counter-application”) in terms whereof it is seeking the following relief:

“1. That the applicant is indebted to the respondent in the sum of R156 957.00; and

2. The applicant is ordered to pay the sum of R156 957.00 to the respondent within 60 days of this order; and

3. Payment of interest at the rate determined by the Minister of Finance from date of judgment until date of final payment on the aforementioned judgment debt;

4. Payment of interest at the rate determined by the Minister Finance from 1 November 2022 until date of final payment on the aforementioned judgment debt;

5. That the respondent pays the costs of this counter-application, including the costs associated with the appointment of counsel, as costs on party and party, in the event of opposition.”

The applicant’s factual version:

[3] On 12 June 2015, the respondent appointed the applicant as an Information Technology Manager: Directorate of Corporate Services. The letter of appointment is attached to the founding affidavit as annexure “RM2”.

[4] On 31 August 2020 the applicant was further appointed by the respondent as Acting Director: Corporate Services, for the period 1 September 2020 until 30 November 2020 (“the first acting appointment”).

[5] According to the applicant her acting appointment was made in terms of section 56 of the of the Local Government: Municipal Systems Act, 32 of 2000 (“the System`s Act”).

[6] It appears to be common cause between the parties that the remuneration for a manager acting in such a position is based on 60% of the total remuneration package payable to a manager who is permanently appointed in the particular position.

[7] The applicant further avers that the Basic Conditions of Employment Act, 75 of 1997; alternatively, the common law, is applicable to her acting appointment (as well as her permanent employment) in that as an employee of the respondent, she rendered/renders services as required of her by the respondent as employer and the respondent, as employer, in turn pays remuneration for services rendered.

- [8] On 17 November 2020 and unbeknown to the applicant at the time, the Member of the Executive Council for Corporate Governance and Traditional Affairs (“MEC: COGTA”) transmitted a letter to the mayor of the respondent stating that the applicant’s appointment in respect of his first acting appointment must be rescinded as he does not hold the relevant academic qualifications required of an incumbent to occupy the post. The said letter reads, inter alia, as follows:

“2. I have noted that Mr Melato holds a B. Tech degree in Project Manager and various diplomas in the IT field and is currently the IT Manager in the Municipality. It is important to note that the incumbent does not possess the relevant required qualifications (B. degree in Public Administration, Management Sciences, Law or and equivalent) for the post and accordingly concurrence for the acting appointment is not granted.

3. You are therefore requested, through the Speaker, to call an urgent Council meeting where the acting appointment of Mr Melato will be rescinded, and a suitably qualified official will be appointed. In the event that the municipality does not have suitably qualified officials to act as Director: Corporate Services, you are advised to request a secondment from COGTA for the duration of the vacancy.
4. Furthermore, the mayor is hereby requested to ensure that the recruitment and selection process for the vacant post are completed by the end of this calendar year.”
- [9] The applicant only learned of the aforesaid communication by the MEC: COGTA during May 2021.
- [10] In paragraphs 5.13 to 5.15 of the founding affidavit the applicant further avers as follows:

“5.13 Despite this communication from the MEC, on 22 December 2020, the Respondent’s Council resolved that my acting appointment be extended for a further three (3) months from December 2020 to February 2021, advising the municipal manager to consult the MEC on extension of my acting appointment. I attach the resolution marking it “RM5”. Again, as it will appear hereunder, it was not necessary for the Municipal Council to consult the MEC.

5.14 Important to note on “RM5” – is that – the Municipal Manager sought approval of my outstanding salary, together with extension of the acting appointment for a further three (3) months on the same terms and conditions as my initial acting appointment.

5.15 Therefore, the decision of the Respondent’s Council to extend my acting appointment was done in consultation with the municipal manager.”

- [11] I will return to the aforesaid annexure “RM5”.

- [12] The applicant therefore avers that on 22 December 2020, the respondent’s counsel, in consultation with its Municipal

Manager, resolved that the applicant be paid his acting allowance for his first acting appointment and that his acting appointment in the aforesaid position be extended by a further three months from 1 December 2020 until 28 February 2021 (“the second acting appointment”).

[13] It is common cause that on 28 January 2021 the respondent paid the applicable acting allowance for the first acting appointment in the amount of R156 957.00 over to the applicant, as also evident from a copy of his relevant payslip attached to the founding affidavit.

[14] Subsequent to the above resolution of 22 December 2020, the applicant was authorized to continue carrying out his duties as Acting Director: Corporate Services and the applicant duly and properly performed his duties as such until the end of February 2021.

[15] On 25 January 2021 the respondent’s mayor sent a report to the MEC: COGTA regarding the letter of the MEC: COGTA in respect of the rescission of the first acting appointment of the applicant, seeking his concurrence in respect of the first acting appointment of the applicant and also his concurrence in relation to the extension of the acting period, which concurrence was, according to the applicant not necessary.

[16] The applicant further avers as follows:

“5.18 I therefore submit that my appointment as Acting Director Corporate Services was lawful and valid for both periods starting from September 2020 to November 2020 and from 1 December 2020 to February 2021.

5.19 I duly tendered my services to the respondent in relation to both acting stints, without complaints from the municipal manager or council of the respondent. I therefore complied with the terms of my acting appointment as Director Corporate Services; alternatively, in terms of the common law I rendered services as required of me on the instructions of my employer (municipality).

5.20 The Respondent on the other hand failed to meet its obligations in terms of the acting appointment as it failed to pay my acting allowance for the period of 1 December 2020 to February 2021.

5.21 The Respondent’s conduct therefore amounted to breach of the agreement; alternatively, contrary to the dictates of the common law.”

[17] The applicant concludes as follows at paragraphs 10 and 11 of his founding affidavit:

“10. Finally, the representation made to me – to wit – my appointment as Acting Director Corporate Services, for an extended period until 28 February 2021, was lawfully and competently made by the Respondent’s council in consultation with the Municipal Manager.

11. The above assertion is premised on provisions of Section 56(a) of the Local Government: Municipal Systems Act, 32 of 2000. Section 56(a) provides that a municipal council after consultation of the municipal manager appoints a manager directly accountable to the municipal manager.”

The respondent’s case and the consideration thereof:

Jurisdiction:

- [18] According to the respondent this court lacks jurisdiction to entertain the main application, since the applicant’s case falls within the jurisdiction of the South African Local Governance Bargaining Council (“SALGBC”). In this regard Mr Masihleho, on behalf of the respondent, referred to the judgment of Apollo Tyres SA (Pty) Ltd v CCMA and Others (2013) 34 ILJ 1120 (LAC) and submitted that an acting allowance falls under the definition of a “benefit” in terms section 186(2) of the Labour Relations Act, 66 of 1995 (“the LRA”) and is therefore subject to the dispute resolution forums created by the LRA. He therefore submitted that the applicant should have referred the matter to the SALGBC in terms of section 191 of the LRA, being a forum established to determine unfair labour practice disputes.
- [19] Ms Ngubeni, on behalf of the applicant, submitted that in terms of the now trite principle set out in the matter of Gcaba v Minister for Safety and Security [2009] ZACC 26 at para [75] it is clear that an assessment of jurisdiction must be based on an applicant’s pleadings, as opposed to the substantive merits of the case:

“[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits

- must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. ...” (My emphasis)

- [20] In Baloyi v Public Protector 2022 (3) SA 321 (CC) at paragraph [31] the court reconfirmed the following principle:

“[31] The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of s 77(3) of the Employment Act and s 157(2) of the LRA adds to, rather than diminishes, their jurisdiction. In doing so, it affords litigants an additional right to approach either court where a dispute falls within the ambit of those sections.”

[21] Consequently, in my view, the mere fact that an acting allowance can also fall under the definition of a benefit in section 186(2) of the LRA, does not exclude the jurisdiction of the High Court. It is evident from the contents of the founding affidavit that the applicant's pleadings constitute the cause of action to be one of *ex contractu*, as described in section 73 of the Basic Conditions of Employment Act; alternatively the common law, for purposes of which this court does have jurisdiction to adjudicate the application.

Validity of the two acting appointments:

[22] In general I have to remark that in the answering affidavit the respondent mentions the requirements for a final interdict.

This is obviously not applicable in the present instance, since the applicant is not seeking a final interdict, but is seeking a declaratory order regarding a contractual right and consequential relief. This probably explains why the respondent did not persist with this argument in its heads of argument.

[23] The applicable parts of section 56(1)(a), 56(1)(b) and 56(2) of the Systems Act determine as follows:

“56 Appointment of managers directly accountable to municipal managers

- (1) (a) A municipal council, after consultation with the municipal manager, must appoint-
 - (i) a manager directly accountable to the municipal manager; or
 - (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.
- (b) A person appointed in terms of paragraph (a) (i) or (ii) must at least have the skills, expertise, competencies and qualifications as prescribed.
- (c) ...
- (2) A decision to appoint a person referred to in subsection (1) (a) (i) or (ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-
 - (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
 - (b) the appointment was otherwise made in contravention of this Act,

unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1) (b).”

- [24] According to the respondent the applicant was appointed to act in the position of Director Corporate Services whilst the applicant did not possess the relevant qualifications for the position. The respondent therefore avers that section 56(1)(b) was violated by the appointment of the applicant and that the first acting appointment, for purposes of the counterclaim, was null and void in terms of section 56(2).
- [25] This has the result, according to the respondent, that the payment of the acting allowance for the first acting appointment of the applicant by the respondent to the applicant was made without legal cause and should be repaid to the respondent as claimed in the counterclaim.
- [26] In this regard Mr Masihleho also relied on the judgment of *Moerane v Buffalo City Metropolitan Municipality and Others* (2020) 41 ILJ 1869 ECG where the court found that on a proper construction of S 56(2) the appointment of a person without the requisite expertise, competencies or qualifications as a permanent s 56 manager is null and void by operation of law.
- [27] By implication it appears that the respondent is also relying on this ground as one of the two grounds on which the main application should be dismissed since the applicant, according to the respondent, is not entitled to any remuneration for the second acting appointment.
- [28] It is furthermore the respondent's case that the appointment of the applicant for the second acting appointment, for purposes of the counter-claim, is null and void for the further reason that it constituted, in the absence of the concurrence by the MEC COGTA, a transgression of section 56(1)(c) of the Municipal Systems Act, which section determines as follows:

“(c) A person appointed in terms of paragraph (a) (ii) may not be appointed to act for a period that exceeds three months: Provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.”

Consideration of the merits of the application and the counter-application:

- [29] In response to the aforesaid, it is the applicant's case that the first acting appointment was validly made in terms of section 56(1)(a)(ii) since the appointment was made by the municipal council after consultation with the municipal manager, as determined by section 56(1)(a) of the Systems Act. The same pertains to the second acting appointment, including the fact that it was for a second period of three months.
- [30] In support of the aforesaid, the applicant is relying on annexure “RM5” attached to the founding affidavit, referred to earlier in this judgment. This document constitutes an extract from the minutes of an ordinary council meeting of the respondent held on 22 December 2020. The said document reflects the following:
1. Under the heading “Items” it states the following:

“Report of the Mayor to Council regarding the request for extension of appointment of the Acting Position of the Director Corporate

Services.”

2. Under the heading “Background” it states the following:

“In terms of section 56(1)(a) of the Municipal Systems Act, a municipal council, after consultation with the Municipal Manager must appoint –

(i) An acting manager directly accountable to the Municipal Manager under circumstances and for a period as prescribed.”

3. Under the heading “Discussion” the following is stated:

“It is however worth noting that COGTA, through MEC, Mr ST Nxangisa, cited that Mr Melato did not possess the required qualifications, and accordingly concurrence for the acting appointment was not granted. Subsequent to this, the Municipal Manager opted to have further engagement with COGTA on the matter since it was brought up towards the end of Mr Melato’s acting term. This late submission has led to the non-payment of Mr Melato’s acting allowance. The Municipal Manager is thus seeking the approval of council for the payment of outstanding salary to Mr Melato as well as the extension of the acting position of the Corporate: Services Director.” (My emphasis)

4. Under the heading “Resolution” the following is reflected:

“That council approve the payment of acting of allowance to Mr Melato for the month September to December 2020.

That council approved the extension of the appointment of Mr P Melato as the Acting Director Corporate Services for the period of three months from 1st December 2020 until 28th February 2021.

That Municipal Manager consult the MEC of COGTA regarding the appointment of Mr Melato for a period of three months from 1 December 2020 until 28 February 2021.”

[31] In the subsequent report of the mayor, dated 25 January 2021, addressed to the MEC, annexure “RM6” to the founding affidavit, the mayor, as political head of the municipality, requested the MEC COGTA to condone the appointment of the applicant despite him not having the prescribed qualifications and furthermore to concur with the extension of his acting term. According to the applicant no response was received in respect of this report. The respondent did not allege otherwise.

[32] As correctly pointed out by Ms Ngubeni, section 56(6) of the Systems Act determines as follows:

“(6) If a person is appointed to a post referred to in subsection (1)(a) in contravention of this Act, the MEC for Local Government must, within fourteen days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.”

- [33] It is common cause that the MEC COGTA raised the issue pertaining to the required qualifications of the applicant in the letter dated 17 November 2020, annexure “RM4” to the founding affidavit. Despite this objection, the MEC COGTA failed to take any steps in accordance with section 56(6), not in respect of the first acting appointment, nor with regard to the second acting appointment.
- [34] I agree with the contention by Ms Ngubeni that the opposition to the present application and the counter-application cannot constitute “appropriate steps” as determined in section 56(6), not with regard to the first acting appointment nor with regard to the second acting appointment. It appears that the respondent is by means of the opposition to the main application and the institution of the counter-application attempting to have those two contracts “set aside” or “reviewed”, but fatally incorrectly so. Firstly, the MEC is not a party to the present proceedings and in terms of section 56(6) the MEC is the party who should have taken steps within fourteen days after becoming aware of the two respective appointments, which, other for the letter, did not occur. Secondly, the respondent cannot act in the present proceedings in the stead of the MEC COGTA. Thirdly, there is no application for condonation for only now attempting to have the appointments set aside. See *State Information Technology Agency SOC Limited v Gijima Holding (Ptyd) Limited* [2017] ZACC 40 at para [54]. Fourthly, in terms of the resolutions by the municipal council, after consultation with the Municipal Manager, during the council meeting of 22 December 2020, approved payment of the acting allowance for the first acting appointment to the applicant and also

approved the second acting appointment for the months December 2020 until 28 February 2021.

- [35] In the circumstances I am of the view that the present matter is distinguishable from the Moerane-judgment.
- [36] The main application consequently stands to be granted, whilst the counter-application stands to be dismissed.

Costs:

- [37] There is no reason why costs should not follow the outcome.

Order:

- [38] The following order is consequently made:

A: In respect of the main application:

1. The applicant's acting appointment as Director: Corporate Services for the period 1 September 2020 to 30 November 2020 and again for the period 1 December 2020 to 28 February 2021 are declared to be lawful.
2. The respondent is directed to pay the acting allowance which is due and payable to the applicant for the period 1 December 2020 to 28 February 2021.
3. The respondent is ordered to pay the costs of the application.

B: In respect of the counter-application:

4. The counter-application is dismissed, with costs.

C. VAN ZYL, J

On behalf of Applicant: Adv TM Ngubeni Instructed by: Neumann van Rooyen Inc. C/o: Hill, McHardy & Herbst Inc BLOEMFONTEIN On behalf of Respondent: Adv PT Masihleho Instructed by: Motaung Attorneys BLOEMFONTEIN

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2024/215.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/melato-v-masilonyane-unknown-topic-afshc-2024--6a3ea5133b1caa912980aa81>

Prepared on 13 October 2026 · Esheria