

SOUTH AFRICA / JUDGMENT

Mothamaha and Another v Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs: Free State (LTA 23/2021) [2022] ZAFSHC 283 (25 October 2022)
[2022] ZAFSHC 283

COURT

Free State High Court, Bloemfontein

BEFORE

M Opperman, P Molitsoane

CASE / FILE NUMBER

LTA 23/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No.: LTA 23/2021

Reportable:

YES/NO

Of

interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

FUTHULI

PATRIC

MOTHAMAHA First

Applicant

MATHOLASE

JEMENA

MAZINYO Second

Applicant[1]

and

THE

MEMBER OF THE EXECUTIVE COUNCIL

FOR

THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE

AND

TRADITIONAL AFFAIRS:	FREE STATE[2] Respondent Coram: Molitsoane, J et Opperman, J Judgment by: Opperman, J Date of hearing: 19 August 2022. The application was disposed of without hearing oral argument and on the Heads of Argument filed on record on behalf of the parties.
Judgment:	25 October 2022. The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 25 October 2022. The date and time for hand-down is deemed to be on 25 October 2022 at 15h00.
Summary:	Application for Leave to Appeal - Review of appointments of Municipal Manager and manager directly accountable to the Municipal Manager whilst Municipality under Administration and Intervention in terms of section 139(5) of the Constitution of the Republic of South Africa, 1996 and section 139 of the Local Government: Municipal Finance Management Act, 56 of 2003; and in contravention of resolutions taken by the Municipal Council.

JUDGMENT

- [1] The grounds for leave to appeal are wide and cumbersome. It is uncertain if the applicants want for all the grounds to be adjudicated or if they have now curtailed it to the limited issues in their Heads of Argument. The Heads of Argument of the applicants concluded with:

CONCLUSION:

10.

10.1 As was stated in the initial Heads of Argument the case was always based upon a one-factual contention and that is that Mr Goliath did not agree with the salary afforded and agreed upon between the Municipality and the Second- and Third Respondents. He did so because he viewed it to be too much. That was the case, truly made – no matter what further pontifications were advanced in the Founding Affidavit and argument.

10.2 The court did not deal with it in this way, which means that – respectfully – the grounds mentioned in the opening stanza of this document are satisfied and the matter should go on appeal to the SCA.

10.3 The costs of this application should be costs in the appeal.

[2] On the above alone, the application for leave to appeal must be dismissed in totality. The statement in paragraph 10.1 is wrong and does not reflect the judgment a quo at all. The case was not adjudicated on the view of Mr Goliath. It was adjudicated on the facts presented in total and on the applicable law. This is the crux of the case:

1. On the resolutions of the Municipal Council the contracts and the resultant salaries contracted are illegal. This was shown in the 57 -page judgment and in detail. It is not the desires or wants of Mr Goliath or the MEC that the court regarded; but the law and the resolutions of the Maluti-A-Phofung Local Municipality and Council of the Maluti-A-Phofung Local Municipality; the real, undisputable and undisputed facts.
2. The law was depicted in detail and the facts applied. The facts applied stand beyond any doubt. There is not any other conclusion to be drawn.
3. A quo each and every issue raised by the two applicants and every twist and turn they took were dealt with in the utmost detail and the issue of the salaries more so.
4. The crucial crux is that the appointments were not effected on the terms of the resolutions of the Council of the Maluti-A-Phofung Local Municipality.
5. The resolutions adopted by the first respondent's council was unambiguous that the appointment of the second and third respondents

was subject to the current upper limits of salaries, which upper limits are prescribed in the Regulations, the ratification of the Administrator and the receipt of the concurrence from the MEC: Cogta.

6. The salaries were not in terms of the Regulations as the judgment showed.
7. It is common cause that the Administrator did not ratify the salaries.
8. It is common cause that the concurrence of the MEC: Cogta was not obtained.
9. The salaries were not even in accordance with the advertisement for the positions.
10. The judgment concluded as follows:

CONCLUSION

- [102] The applicant has appropriate locus standi to institute legal proceedings against the first respondent and is not non-suited by the provisions of the Intergovernmental Relations Framework Act, 2005. The Doctrine of Legality found application as ground for review.
- [103] The resolutions adopted by the first respondent's council was unambiguous that the appointment of the second and third respondents was subject to the current upper limits, which upper limits are prescribed in the Regulations, the ratification of the Administrator and the receipt of the concurrence from the MEC Cogta.
- [104] The Administrator had correctly made an offer of remuneration packages to the second and third respondents, which factored the variables prescribed in the Regulations, the Intervention, the resolutions and the Job Advertisements.
- [105] Consequently, the remuneration packages authorised by the first and fourth respondent as also represented by the second respondent and the resultant contracts between the impugned parties, are unlawful and irregular and must be declared as such and set aside. The second and third respondents must reimburse the overpayment.
- [106] This Court may not hinder the constitutional freedom of the parties to contract and may not force any contract upon them. The parties must be allowed to re-negotiate contracts that will comply with the local government legislative regime regulating the powers and functions of the Municipal Council and its resolutions that are subject to the salary determinations and authorization by the Minister of Co-operative Governance and Traditional Affairs in the Regulations. This Court will limit itself to the relief sought in the Heads of Argument of the Applicant in conclusion:
42. ... that the respondents' attitude of impunity will be deprecated and by extension, the unlawful increases of the second and third respondents' salaries/remuneration will be declared unlawful, irregular and fell to be reviewed and set aside. Remuneration drawn in excess to what was prescribed will be recoverable from the second and the third respondents.
- [3] The proven and real truth of the case is the following:[3]
- [29] The Municipality had by 2018, for a substantial period, been suffering a financial crisis and was in serious and persistent breach of its obligations to provide basic services or meet its financial commitments.
- [30] The residents of Maluti-A-Phofung suffered severely. Basic services that form the essence of their non-negotiable human rights such as water, electricity and infrastructure, were affected.
- [31] It is common cause and a matter of public record that the Municipality as governed by the Municipal Council were involved in numerous litigious matters in our courts.

[32] On 22 October 2018 the Municipality's failure and inability to meet its obligations due to mismanagement came to a head with a settlement agreement made an Order of Court in cases 1453/2018 and 1923/2018[4] that served in the Free State Division of the High Court.

[33] The record of a Cabinet Decision at a Cabinet Meeting of the Provincial Government on 19 June 2018 inveterate the Court Order.[5] The Municipality was effectively placed under Administration by Mandatory Intervention in terms of section 139(5) of the Constitution and section 139 of the Local Government: Municipal Finance Management Act, 56 of 2003.

[34] Mr. Amos Goliath was appointed as Administrator on 25 March 2020 and with effect from 1 April 2020 for the last period of the duration of the Intervention.[6] He succeeded one Mr. Blakes Mosley-Lefatola. While under Administration the Administrator and his Deputy were both at the same

time in office. Therefore, when the first Administrator vacated his office, his Deputy succeeded him in Administrator capacity and automatically. There was not any suspension of the Intervention and the Deputy automatically assumed the authority of the Administrator; immediately and in the interim.

[35] The second and third respondents[7] were appointed as the Municipal Manager and the Chief Financial Officer of the Maluti-A-Phofung Local Municipality; they are, ex officio, the very officials that have wide-ranging and detailed knowledge of the legality of appointments, salaries and the law and issues

relevant thereto.

[36] It is a fact beyond any doubt, undisputed by all the parties, that they were appointed and contracted with, without the knowledge,

involvement or ratification of the Administrator. This is illegal and ultra vires the Intervention.

[37] I quote from the Replying Affidavit[8] of the applicant as confirmed by both the Administrators.[9] This was in the reply to the affidavit of the third respondent and the evidence will show that it is true for both the second and third respondents.

57. Mr. Goliath advised me that he was never made aware of the contract the third respondent concluded with the second respondent.

58. As a result, he was unaware of the remuneration offered to the third respondent. He became aware of the remuneration discrepancy for the first time when he was preparing the salary run documentation.

59. The Court will note that the contract which the Administrator was unaware of, was concluded overnight on 26 March 2020 and the third

respondent commenced her duties the next day on 27 March 2020. All of this was done without the involvement of the Administrator. (Accentuation added)

60. I reiterate that Mr. Goliath was all along part of the administrator team. He was serving as Deputy Administrator and was always privy to the administration of the first respondent.

61. Mr. Goliath succeeded the Administrator, Mr. Blakes Mosley-Lefatola.

62. Consistent with the Administrator terms of reference, when Mr. Lefatola vacated his office and Mr. Goliath took over the Administrator office, his predecessor advised him to continue with and finalise the appointment of the staff including the appointment of the third respondent. There was never a vacuum left. I attach hereto the confirmatory affidavits of both Messrs Lefatola and Goliath marked Annexure RA 5(1) and (2).

[38] In support of the above is the fact that Mr. Lefatola, signed the 26 March 2020 – Municipal Council resolutions, that allowed the appointment of the second and third respondents; only on 14 April

2020. The then Acting Municipal Manager, one Mr. T.F. Mopeloa, signed the said resolutions on 7 April 2020.

[39] Thus, at the time (apparently between 26 and 30 March 2020)[10] when the contracts of employment were entered into by the Municipality as represented by the then Executive Mayor and the second respondent; and the second respondent with the third respondent; the resolutions were not signed and carried no authority. To add insult to injury; it will be shown later that the salaries on which the second and third respondents were appointed, were not in

accordance with the resolutions.

[40] The contracting was done when the parties to the contract were under the impression that there was not an Administrator in office. This was in the few days between when the resolutions by the Municipal Council were passed on 26 March 2020, and the time the Deputy Administrator took over as Administrator on 1 April 2020.

[41] It must be understood that the Administrator did not at the time “usurp” the functions of the Municipal Council but in terms of the powers and functions of the Administrator; he had to exercise oversight over the administration, including ratification of all decisions of the Municipal Council (fourth respondent), executive committees, committees and the Municipal Manager.[11]

[42] The contention of the second respondent in his affidavit at paragraph 8.12 is wrong in many ways when he stated that the Administrator had sought to “ratify” the decision by the Executive Mayor to appoint him and on the upper-level salary; and that lawfully the Administrator could not have been tasked to ratify any decision of the Municipal Council.

- [43] The obvious consequence of the fact that the contracts as a whole are unlawful, is that any salary or remuneration contracted will also be ultra vires and must be set aside.
- [44] The anarchy of the conduct in issue and the manner in which the contracts were executed caused the matter to, according to the third respondent, be referred to “the Hawks and the National Prosecuting Authority to investigate the incident.” She also had to address the Parliamentary Portfolio Committee of the Free State Provincial Government on their conduct.[12] Both the second and third respondents refused to accept the error of their ways.
- [45] As said, the second respondent denies any conduct ultra vires the Intervention or illegality of the employment contract and the consequential salaries. It is also the case of the third respondent.

The atmosphere of the second respondent’s case is that:

There simply is no basis for the relief the MEC seeks. Indeed, it would seem as if the MEC has resorted to grandstanding in the election year. I have been advised that the court need not come to a determining finding on this aspect and I refrain – for this reason only – to tender any further evidence on my inference.[13]

- [46] Added to the above is the unacceptable conduct of the Executive Mayor that summoned the Administrator to his office on 22 April 2020. The gist of the meeting was to be the discontent that the Administrator had signatory powers regarding the first respondent’s bank account. After the meeting, and on the same day, the Administrator was forcefully and unlawfully ejected from and denied access to the offices of the first respondent by private security personnel. This confirms the continued anarchy that I referred to above.[14]

- [47] The representative of the applicant, Mr. Dume,[15] went on to sketch some incidences that occurred in the background of the case. He referred to the fact that the second respondent

volunteered a Confirmatory Affidavit to the applicant as he admitted that the relief sought had to be granted. This was during a telephonic conversation with Mr. Duma. He, inexplicably, did not file his affidavit to confirm the application of the applicant and went on to oppose it.

- [48] The second and third respondents stated at a Portfolio Committee sitting on 25 August 2020, chaired by Ms. Faith Muthambi, where their employment contracts were the subject of discussion, that they would apply to Mr. Duma to ratify their contracts. They did not do so. They realised the error of their conduct but continued to carry on with the illegal contracts.

- [4] This is the Order made a quo:

[108] ORDER

1. The appointment of the second respondent as Municipal Manager by the first and fourth respondents and resultant contract in March 2020 and on a salary of R1 987 402.00 per annum, is declared to be unlawful and irregular and set aside.

2. The excess in the salary earned by the second respondent and pursuant to the contract in March 2020 and the salary authorised in the relevant Regulations, for the period ending March 2020 to date, are recoverable in full. The repayment by the second respondent to be made to the first respondent in full and within ninety (90) days of the date of this order.
 3. The appointment of the third respondent as Chief Financial Officer/a manager directly accountable to the Municipal Manager, by the second respondent and the resultant contract in March 2020 and on a salary of R1 596 747.00 per annum, is declared to be unlawful and irregular and set aside.
 4. The excess in the salary earned by the third respondent and pursuant to the contract in March 2020 and the salary authorised in the relevant Regulations, for the period ending March 2020 to date, are recoverable in full. The repayment by the third respondent to be made to the first respondent in full and within ninety (90) days of the date of this order.
 5. The respondents to pay the costs of this application; such costs to include that consequent upon the employment of two counsel by the applicant.
 - [5] The Heads of Argument must address the grounds for leave to appeal in detail. It cannot be appropriate to make sweeping statements and leave the court and the opposing party to sift through the bulky number of issues left hanging in the Notice of Application for Leave to Appeal. It might be that some of the issues are not alive anymore. The Heads of Argument of the applicants refer to all the grounds in the Notice but only addresses two of the issues:
- 1.3 the Court, with respect, having erred in the respects detailed in the grounds of appeal formulated in the Second- and Third Respondent's ("the Respondents") application for leave to appeal.
- [6] Counsel for Cogta correctly described the grounds for leave to appeal as it stands in the Notice of Application for Leave to Appeal as follows:
8. Notwithstanding the fact the notice of appeal, advances the grounds set out in the aforementioned paragraphs, which most are global and without form or shape, it seems the applicants heads of argument places premium on only two inter-related (sic), which we propose are the following:
- 8.1 That the essence of the main application was that the contracts of employment were illegal, founded on the contention that Mr Goliath did not agree with the salaries offered to the applicant, thus the process being a legality review.
- 8.2 In our rubric, this ground will fall under the extant approvals challenge as well as the powers of the administrator challenge.
9. Only some of the grounds for leave to appeal are pertinently addressed in the applicants' heads of argument. In paragraph 9 of the applicants heads of argument it is stated that the 'grounds of appeal are copiously set out in the notice of application'.

10. We are (sic) can only reply to those arguments addressed in the heads of argument. This is the only sensible and fair approach, every other approach is perilous.[16] (Accentuation added)
- [7] The issues of the “extant approvals challenge” and the “powers of the administrator challenge” are addressed in the judgment above and were correctly depicted in the Heads of Argument of Cogta.
- [8] The final word was spoken recently in the Supreme Court of Appeal in Ramakatsa and others v African National Congress and another [2021] JOL 49993 (SCA) in March 2021 on the tests for courts to apply when confronted with an application for leave to appeal:
- [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still

enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important

question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly

added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist. (Accentuation added)

- [9] The test for leave to appeal excludes the applicants from succeeding in this application. There is not any prospect of success. The matter is simple and straightforward; the contracts were not entered into in compliance with the regulatory framework and council resolutions.

[10] ORDER

The application is dismissed with costs.

M OPPERMAN, J

I concur

P MOLITSOANE, J

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[1] “The applicants”/ “Mr. Mothamaha” & “Ms. Mazinyo”.

[2] “Cogta”/ “respondent”/ “MEC”.

[3]

Judgment

a quo.

[4] “FA4” Pages 53 to 63.

[5] “FA7” at pages 85 to 87.

[6] Page 52 and page 26 at paragraph 48.

[7] Now the applicants for Leave to Appeal.

[8] Pages 176 to 177.

[9] Annexures “RA5(1)” and “RA5(2)” at pages 203 to 208.

[10] The documents that were made available to the Court by the third respondent are signed but not dated. See the letter of appointment

dated 30 March 2020 “OP2” at page 132 and the Performance Agreement at page 133 “OP3” as well as the

Performance Plan “OP4” at page 153.

[11] Paragraph 57.2 on page 29 of the record.

[12] Page 128 at paragraph 28.1.2.

[13] Page 217 at paragraph 6.6.

[14] Page 37 at paragraph 96.

[15] Pages 234 to 242.

[16] Heads of Argument for Cogta dated 9 August 2022.

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