

SOUTH AFRICA / JUDGMENT

South African Municipal Workers Union v Kheis Municipality and Others (908/2025) [2025] ZANCHC 44 (23 May 2025)

[2025] ZANCHC 44

COURT

Northern Cape High Court, Kimberley

BEFORE

Olivier AJ

CASE / FILE NUMBER

908/2025

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE

DIVISION, KIMBERLEY)

Case Number: 908/2025

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:

SOUTH

AFRICAN MUNICIPAL WORKERS UNION

APPLICANT

and

!KHEIS

MUNICIPALITY

1ST

RESPONDENT

THE

PREMIER OF THE NORTHERN CAPE

2ND

RESPONDENT

THE

EXECUTIVE COUNCIL FOR THE NORTHERN CAPE

3RD

RESPONDENT

MEC
OF THE NORTHERN CAPE: DEPARTMENT OF
CO-OPERATIVE
GOVERNANCE, HUMAN SETTLEMENT
AND
TRADITIONAL AFFAIRS (COGHSTA)
4TH
RESPONDENT
THE
NATIONAL MINISTER OF THE DEPARTMENT OF
CO-OPERATIVE
GOVERNANCE AND
TRADITIONAL
AFFAIRS
5TH
RESPONDENT
THE
NATIONAL DEPARTMENT OF CO-OPERATIVE
GOVERNANCE
AND TRADITIONAL AFFAIRS
6TH
RESPONDENT
THE
NATIONAL MINISTER OF FINANCE
7TH
RESPONDENT
Heard on
: 25
April 2025

Delivered on :

23 May 2025
Coram
:
Olivier AJ
Summary
: Urgent
application – declaratory and interdictory relief sought
against provincial and national executive in terms of section
139 of
Constitution – payment of salaries of members of applicant
sought from 1st respondent –
established principle confirmed – applicant must make out case
for urgency in founding papers –
application not urgent –
practical considerations and nature of application dictate that
application be dealt with nevertheless
– initial relief, bar
for non-payment of salaries, abandoned by applicant – new
relief sought in heads of argument
and during argument – new
relief, not canvassed in founding papers – applicant seeks

order for new relief in terms
of provisions of section 172 of
Constitution, alternatively in terms of further and/or alternative
relief – legal principle
confirmed – party not entitled
to relief under further and/or alternative relief if relief is not
clearly indicated in the
founding affidavits and is not established
by satisfactory evidence on papers – section 172 of
Constitution not be interpreted
as to afford a court carte blanche to
make orders for relief that is not canvassed in the founding papers –
court has jurisdiction
to deal with non-payment of salaries of
members of applicant – sufficient allegations made in founding
affidavit upon which
the jurisdiction of the court may be determined.

ORDER

In the result, the

following order is made:

1.
That the 1st
respondent is to immediately make payment of the salaries of the
members of the applicant for the months of February 2025 and March
2025 and to continue making payment of the salaries of the members of
the applicant as it falls due;
2.
That the applicant and the 4th
respondent are each to pay its own costs in this application, the
costs to be determined according to scale “B” as
referred
to in rule 69(7) read with rule 67A(3) of the Uniform Rules of Court.

JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. The main protagonists in this unfortunate saga involving a municipality that is, like so many others in our country, in financial distress, are the South African Municipal Workers Union (herein after referred to as “SAMWU” or “the applicant”), the !Kheis Municipality situated in Groblershoop, Northern Cape Province (herein after referred to as “the Municipality”), the Premier of the Northern Cape (“the Premier”) and the MEC of the Northern Cape: Department of Co-Operative Governance, Human Settlements and Traditional Affairs (“the MEC”).

I will henceforth and where necessary refer to the Department of Co-Operative Governance, Human Settlements and Traditional Affairs as “COGHSTA”.

2. SAMWU approached this court on an urgent basis with an application that was premised on the allegation that the Municipality was in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments as a result of a crisis in its financial affairs and that the Municipality was in serious and urgent need of rescuing.
3. The application was formally opposed by the MEC and initially also by the 5th and 6th respondents but at the commencement of proceedings on 25 April 2025, I was informed by Mr. Davis who appeared on behalf of these

respondents, that he was instructed to withdraw the opposition of the application on behalf of the 5th and 6th respondents.

4. The 1st to 3rd and 7th respondents did not oppose the application and argument was therefore heard on behalf of SAMWU and the MEC only.
5. Counsel for SAMWU and the MEC presented me with comprehensive heads of argument for which I am thankful.

THE RELIEF SOUGHT:

6. In its notice of motion which was filed on 9 April 2025, SAMWU alleges that the Municipality was in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments as a result of a crisis in its financial affairs and moved for an order which may be summarised as follows:

6.1 That it be declared that the 3rd respondent cannot, alternatively has not and does not, further alternatively has not and does not adequately exercise the powers, alternatively perform the functions referred to in section 139 of the Constitution of the Republic of South Africa, 1996 (herein after referred to only as “the Constitution”);

6.2 That it be declared that the failure of the national executive as contemplated in section 139 of the Constitution to intervene in terms of section 139(7) of the Constitution, constitutes a breach of section 139(7) of the Constitution;

6.3 That, pending the resolution of the financial crisis of the Municipality and the securing of the ability of the Municipality to meet its obligations, the national executive is directed to forthwith invoke section 139(7) of the Constitution in respect of the Municipality and to exercise the powers and perform the functions referred to in section 139(5) of the Constitution and in this regard to inter alia:

- 6.3.1 Implement a recovery plan aimed at securing the ability of the Municipality to meet its obligations to provide basic services;

6.3.2 Approve a temporary budget or revenue raising measures or any other measures to give effect to the above recovery plan; and

6.3.3 Assume responsibility for the implementation of the recovery plan;

6.4 That in the alternative to the above and pending the resolution of the financial crisis of the Municipality and the securing of the ability of the Municipality to meet its obligations, the 3rd respondent be directed to forthwith invoke and exercise the powers and perform the functions referred to in section 139(5) of the

Constitution, and in this regard to:

6.4.1 Implement a recovery plan aimed at securing the ability of the Municipality to meet its obligations to provide basic services;

6.4.2 Approve a temporary budget or revenue raising measures or any other measures to give effect to the above recovery plan; and

6.4.3 Assume responsibility for the implementation of the recovery plan;

6.5 That in the alternative to the above and pending the resolution of the financial crisis of the Municipality and the securing of the ability of the Municipality to meet its obligations, alternatively the successful and effective invocation of and exercise of the powers and functions by the 3rd respondent as envisaged in section 139(5) of the Constitution, further alternatively the successful and effective intervention of the National Executive as envisaged in section 139(7) of the Constitution, the 3rd respondent is directed to forthwith take all steps necessary and assume responsibility for the restoration of and the provision of basic municipal services to the community of the Municipality;

6.6 That in the alternative to all of the above and pending the resolution of the financial crisis of the Municipality and the securing of the ability of the Municipality to meet its obligations, the 3rd respondent, alternatively the national executive be ordered and directed to immediately appoint and instruct an administrator with such powers and duties to ensure that the Municipality complies with its financial obligations and to ensure the restoration of basic municipal services to the community of the Municipality;

6.7 That, in the event of the court finding that the above relief is for some or other reason not appropriate, the court shall grant an order that is just and equitable as envisaged in section 172 of the Constitution and which has the remedial effect of the restoration of basic municipal services to the community of the Municipality and thereafter the continued functionality of the Municipality, the resolution of the financial crisis in the affairs of the Municipality and the securing of the ability of the Municipality to provide basic services, alternatively that the court grant an order that is just and equitable as envisaged in section 172 of the Constitution which has the remedial effect that alleviates the constitutional infringements set out in the founding affidavit;

6.8 That the applicant be granted leave to supplement its founding affidavit, to amend its notice of motion and to seek such further relief as may be necessary should further breaches, and/ alternatively continued breaches, in relation to the provision of basic municipal services to the communities and/or employees and/or creditors of the Municipality occur after the granting of the order prayed for, alternatively should the applicant be of the view that the respondents have failed to comply with the order of court;

6.9 That the Municipality be ordered to immediately make payment to the members of the applicant of their salaries for the months of February 2025 and March 2025 and to continue making payment of such salaries as it falls due; and

6.10 That those respondents who elect to oppose the application, be ordered to pay the costs of same.

I will henceforth and only in an attempt to avoid possible confusion, refer to the above relief that was sought by way of SAMWU's notice of motion of April 2025, as "the Original Relief".

7. In his heads of argument on behalf of SAMWU, which were filed 2 (two) days prior to the application being heard, Mr. du Preez indicated that SAMWU will no longer be seeking the Original Relief, but will ask the court to consider affording them the following relief:

7.1 That it be declared that the Municipality, as a result of a crisis in its financial affairs, is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments and is unable to meet its obligations and financial commitments;

7.2 That the Premier be directed to forthwith take the steps prescribed by section 139 of the Local Government: Municipal Finance Management Act[1] (herein after referred to as "the MFMA");

7.3 That SAMWU be granted leave to supplement its founding affidavit, to amend its notice of motion and to seek such further relief as may be necessary should further breaches, and/ alternatively continued breaches, in relation to the provision of basic municipal services to the communities and/or employees and/or creditors of the Municipality occur after the granting of the order prayed for;

7.4 That the Municipality be ordered to immediately make payment to SAMWU's members of their salaries for the months of February 2025 and March 2025 and to continue making payment of such salaries as it falls due; and

7.5 That those respondents who elect to oppose the application, be ordered to pay the costs of same.

I will henceforth refer to the relief that the applicant seeks as referred to in its heads of argument, as "the New Relief".

8. Mr. Mthombeni who appeared on behalf of the MEC, unsurprisingly took umbrage with the above abandonment of the Original Relief and argued that the applicant is effectively attempting to advance a new case in its heads or argument and to develop this new case during argument on behalf of the applicant.

I will deal with the arguments on behalf of the respective parties in this regard herein below in more detail.

9. It should be noted that SAMWU did not file an affidavit in reply to the answering affidavit of the MEC, but at the commencement of the proceedings Mr. du Preez advised that he was happy to proceed with the matter sans a replying affidavit and that he will argue the case for SAMWU on the papers as it stood at the time.
10. I am required to determine the following

issues:

10.1 Whether this application is in fact urgent;

10.2 Whether it is competent for this court to make an order on the terms as set out in the New Relief;

10.3 Whether this court has the required jurisdiction to order the Municipality to see to the payment of the salaries of SAMWU's members; and

10.4 Whether SAMWU had made out a case for any of the relief that it seeks.

URGENCY:

11. It is common cause and warrants very little discussion that it is expected of any applicant in motion proceedings to make out a case for the relief that such applicant seeks in the founding papers[2] and that a court will only in exceptional circumstances allow an applicant to make out or to supplement its case in his/her replying

affidavit.[3]

12. The above holds equally true in the case of applications brought on an urgent basis where the uniform rules of court ("the Rules") provide that in every application brought on an urgent basis an applicant is supposed to (in his/her founding affidavit):

"... set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course."[4]

13. It was held in *East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others*[5] as follows:

"... the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent."[6]

14. In its founding affidavit and in support of its contention that this application is urgent, SAMWU relies on the following allegations:

14.1 That its members have received only one salary since January 2025 and

that the Municipality had been in breach of its obligations in this regard to its employees;

14.2 That SAMWU's members have been severely prejudiced by the Municipality's failure to make payments towards pension fund and medical aid contributions which may potentially prejudice its members;

14.3 That it cannot be expected of SAMWU members to continue to render services under these circumstances;

14.4 That, due to the above, the members of SAMWU are unable to provide for their families and also run the risk of having their vehicles and homes repossessed;

14.5 That the urgent remedial measures sought by way of the application are aimed at addressing and remedying institutional dysfunction which prejudices the members of SAMWU as well as the broader community; and

14.6 That none of the respondents stand to be prejudiced by the relief sought since the Municipality is unable to meet its financial obligations and urgent intervention is warranted.

15. It is apposite to mention at this stage that, in an attempt to resolve/solve its financial distress, the Municipality had adopted a financial recovery plan during January 2022 with the specific purpose of addressing the underlying and ongoing financial crisis at the Municipality.

16. The resolution taken by the council of the Municipality to adopt and implement a financial recovery plan as well as the financial recovery plan of January 2022 (herein after referred to as "the 2022 FRP") that was so adopted, were attached to the MEC's answering affidavit and it remains a mystery why it did not form part of SAMWU's founding papers and why the existence of the 2022 FRP was not mentioned in said founding papers.

The existence of the 2022 FRP was not denied by SAMWU.

17. SAMWU furthermore also failed to mention that they were in fact part and parcel of the process which lead to the adoption of the 2022 FRP which means that they must have been aware of the ongoing financial crisis at the Municipality since at least January 2022.

18. SAMWU also failed to mention that they had, by way of media statements in 2024 already, threatened to take the Municipality to court for the fact that salaries for December 2023 were not paid.

19. The above failures by SAMWU were pointed out in the answering affidavit deposed to by the MEC and sans a replying affidavit from SAMWU, these failures were never properly explained under oath by SAMWU.

20. Mr. Mthombeni argued that the matter was not urgent for the reason that SAMWU had known for quite some time of the financial difficulties experienced by the Municipality and of the fact that (specifically) pension fund contributions were not paid and he further argued, based on the afore-said, that any urgency that might exist, was in fact self-created.
21. Mr. Mthombeni urged me to consider that this application was lodged only on 9 April 2025 with extremely truncated time periods being set whilst SAMWU had been aware of the issues at the Municipality since 2022.

I have to agree with Mr. Mthombeni in this regard.

22. Although the fact that salaries of members of SAMWU were not paid for January to March 2025 (the employees did in fact receive their salaries for January 2025 but only during March 2025) could contribute to the application being considered urgent, this application could have and should have been brought at an earlier stage.

SAMWU did not provide any proper explanation why this application was not lodged during February 2025 or during early March 2025 if SAMWU viewed the non-payment of salaries in such a serious light and it appears that SAMWU only decided to approach this court when their members really started to feel the pinch.

23. I am consequently of the view that this application should in fact have been removed from the urgent roll with costs to be paid by SAMWU, but I align myself, in this instance, with the dictum in *Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others*[7] where the learned Brooks AJ held as follows:

“... I am of the respectful view that the very practical considerations of factors such as the incurring of unnecessary duplicated case

preparation and presentation procedures, with their concomitant increase in already substantial legal costs, and the undesirable

duplication of the requirement of the attention and preparation of more than one court ...must be weighed against any apparent

prejudice to a respondent who has been brought to court on a truncated timeframe.”[8]

24. It has been held fairly recently that where expediency calls therefore, a matter may be entertained despite a material non-compliance with the Rules.[9]
25. In view of the above I deem it unnecessary to burden another court with this application in circumstances where the papers have been read and where the parties have had the opportunity to fully present their cases on paper as well as during argument and I hold the view that practical considerations as well as the nature of the matter, dictate that this application be dispensed with.

THE NEW RELIEF SOUGHT:

26. Mr. du Preez argued that SAMWU is entitled to the New Relief based on the wording of prayer 4 of the notice of motion of April 2025 which states as follows:

“THAT in the event that the Court finds that the remedies sought by the Applicant are for any reason not appropriate, the Court grant an order that is just and equitable as envisaged in section 172 of the Constitution which has the remedial effect of the restoration of basic municipal services to the community of the Municipality and thereafter the continued functionality of the Municipality, the resolution of the crisis in the financial affairs of the Municipality and the securing of the ability of the Municipality to meet its obligations and to provide basic services, alternatively the Court grant an order that is just and equitable as envisaged in section 172 of the Constitution which has the remedial effect that alleviates the constitutional infringements set out in the founding affidavit hereto.”

27. Mr. du Preez submitted that the above prayer contained in the notice of motion, empowers this court to grant an order in terms of the New Relief sought if regards are also to be had to the provisions of section 172 of the Constitution.
28. It should be reiterated, at the risk of repeating myself, that the New Relief that SAMWU now seeks, is only referred to in their heads of argument and in essence boils down to an order which would compel the Premier to exercise the powers granted to him in terms of section 139 of the MFMA.

It should also be pointed out that the Original Relief does not refer to the Premier and no relief is sought against the Premier in his official or any other capacity in terms of the Original Relief.

29. Mr. Mthombeni argued that the court should not consider the New Relief now prayed for, since SAMWU always had the intention to approach the court with an application pertaining to the payment of its members' salaries and that the initial reliance on the alleged breach/violation of the provisions of the Constitution, was merely an attempt to get the application heard on an urgent basis.
30. Mr. Mthombeni contended that SAMWU should be held to its initial papers and that it should then be found that SAMWU had failed to make out a case for the Original as well as for the New Relief and that the application should be dismissed with costs on a punitive scale on that basis alone.
31. Section 172 of the Constitution deals with the powers of courts in constitutional matters and states as follows:

“(1) When deciding a constitutional matter within its power, a court –

- (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and

- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
- (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
- (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”
32. In its founding affidavit SAMWU refers the reader to various provisions of the MFMA as well as to various provisions of the Constitution, but fails to refer to or deal with section 172 of the Constitution and the powers of a court and specifically this court, to make an order as sought for by way of the New Relief in terms of the provisions of the said section 172 especially in circumstances such as these where the New Relief was only canvassed in SAMWU’s heads of argument and during argument on behalf of SAMWU.
33. Mr. du Preez, with reference to *D.D v I.L and Another*[10] intimated that I may also consider granting the New Relief under “further and/or alternative relief” as moved for in the notice of motion.
34. In *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality*[11] where the court was confronted with the right of a municipality to an order to further and/or alternative relief, it was held as follows:
- “Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion ... where that order is clearly indicated in the founding (and other) affidavits ... and is established by satisfactory evidence on the papers...Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefore has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the relief.”*[12] (My omissions).
35. In *Somali Association of South Africa and Others v Refugee Appeal Board and Others*[13] the learned Navsa ADP, in a unanimous judgment, refused to grant further and/or alternative relief, stating as follows:

“... it is unfair and unprecedented for a litigant to seek extensive substantive relief not foreshadowed in the notice of motion, especially when what is sought is not dealt with on affidavit, thus not providing an opponent an opportunity to deal with it.”[14]

36. I have already pointed out herein above that, in terms of the Original Relief as set out in the notice of motion, relief was primarily sought against the national and/or the provincial executive and that the Premier was not mentioned in either his official capacity or in any other capacity.
37. The applicant now, in terms of the New Relief, seeks substantive relief against the Premier which was not foreshadowed in the notice of motion and which was not dealt with in the founding affidavit of SAMWU.

This last-minute decision by SAMWU to actively involve the Premier in the proceedings without alerting the Premier to the fact, is in my view opportunistic and unfair towards the Premier.

38. The argument of Mr. du Preez that sufficient reference was made in the founding affidavit to the provisions of section 139 of the Constitution as well as to section 139 of the MFMA in order to justify the New Relief sought against the Premier does in my view not hold water.
39. I have already pointed out herein above that an applicant has the obligation to make out a case for the relief that he/she seeks by way of his/her founding papers and it is apposite to quote the learned Caney J where he stated in *Bayat and Others v Hansa and Another*[15] as follows:

“... an applicant for relief must (save in exceptional circumstances) make out his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion ... and is not permitted to supplement it in his replying affidavits ... still less make a new case in his replying affidavits.”[16]

40. The above, in my view, also holds true for an applicant attempting to make out a new case in his/her heads of argument and during the actual argument of the matter.[17]
41. I could furthermore find no authorities, nor was I referred to any, which authorises me to make an order for the New Relief sought in terms of the provisions of section 172 of the Constitution and I hold the view that section 172 of the Constitution should in any event not be interpreted as to afford a court carte blanche to make orders for relief that is not canvassed in the founding papers.
42. In view of the above, I am consequently not prepared to grant SAMWU the relief as is set out in paragraphs 7.1 to 7.3 herein above.

43. In as far as the payment of salaries to SAMWU's members is concerned, it is contended in the founding affidavit that the said members of SAMWU had not been paid their salaries for February and March 2025 (salaries for January 2025 were apparently paid during March 2025) which, as was already alluded to herein above, severely prejudices these members and their families.
44. It was never denied by the Municipality or by the MEC in his answering affidavit that the Municipality was experiencing financial difficulties (to put it mildly) and that salaries of members of SAMWU were not paid for February 2025 and March 2025.
45. My primary concern with the fact that SAMWU approaches this court (in terms of both the Original as well as the New Relief) for the payment of the salaries of the SAMWU members was whether this court has the necessary jurisdiction to make such an order, since the issue of jurisdiction was also not pertinently raised in SAMWU's founding papers and since the non-payment of employees' salaries is in essence a labour issue that should be dealt with in terms of the mechanisms created by the relevant labour laws.
46. I shared my concerns in this regard with Mr. du Preez who argued that this court may assume that it has the required jurisdiction in terms of the provisions of section 77 of the Basic Conditions of Employment Act ("the BCEA")[18].
47. It is trite that section 77(3) of the BCEA confers jurisdiction on the civil courts (concurrently with the labour court) "... 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."
48. Mr. du Preez argued that a reasonable inference may be drawn from the founding papers that the members of SAMWU who are employees of the Municipality and who have not been paid their salaries, do have valid contracts of employment with the Municipality, the terms of which were breached by the Municipality by reason of the non-payment of salaries and that it was therefore not necessary to specifically plead this fact in the founding affidavit.
49. Mr. du Preez furthermore contended that it is not necessary for an applicant to specifically plead the fact that a court has jurisdiction as long as the founding papers contain sufficient allegations upon which the jurisdiction of the court may be determined.
50. Mr. Mthombeni did not argue the possible lack of jurisdiction of this court to grant an order for the payment of salaries with any amount of vigour.
51. The question therefore is whether SAMWU has managed to satisfy the onus on it to establish that this court has jurisdiction to grant an order to the effect that the SAMWU members' salaries should be paid and whether sufficient facts were set out in its founding affidavit to justify a conclusion that this court indeed has this jurisdiction.[19]
52. In *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others*[20] the following was stated:

“It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court.”[21] (My underlining).

53. In its founding affidavit, SAMWU makes no mention of the jurisdiction of this court and sets out no grounds as to why this court is clothed with the necessary jurisdiction to hear the application and specifically deal with the issue regarding the non-payment of salaries to the members of SAMWU, but the following relevant allegations are made in the founding affidavit:

“... SAMWU represents at least 43 employees that work for the Municipality.”

and further:

“The Municipality has been unable to timeously and consistently pay employee salaries.”

“The principal obligation on an employer is to pay its employees its salaries. The Municipality has been in constant breach of this obligation.”(My underlinings).

54. The afore-said allegations made by SAMWU in its founding affidavit were not seriously denied by the MEC and it is interesting to note that the existence of employment contracts, alternatively valid employment contracts between the Municipality and the members of SAMWU was never denied.
55. I am consequently willing to accept, based on what has been stated in the founding affidavit and based on what has not been denied, that valid contracts of employment between the members of SAMWU and the Municipality do in fact exist.
56. Payment of remuneration for services rendered is an essential term of any contract of employment whether in writing or not and I am consequently willing to accept that the underlying facts as set out in the founding affidavit, in as far as the non-payment of salaries are concerned, do in fact support the argument by Mr. du Preez that this court does have the necessary jurisdiction to determine the issue pertaining to the non-payment of the salaries of the SAMWU members.
57. It is trite that, as long as an employee tenders his/her services to the employer, such employee is entitled to be paid his/her earnings and other benefits as and when they are due under the applicable contract, sectoral determination or collective agreement.[22]
58. The undisputed failure by the Municipality to make payment of the salaries of the SAMWU members in the present matter, despite continuous tendering of services by such employees, constitutes a breach of a material term of the employment contracts between the parties and should be frowned upon.
59. It is not acceptable to merely shrug your shoulders and argue, as was done on behalf of the MEC, that there is not sufficient money to pay these salaries and that salaries will, in terms of the 2022 FRP that is in place, be paid eventually but that it will take some time.

60. It is not in contention that the 2022 FRP has been in place to attempt to resolve the financial crisis at the Municipality since 2022 and I hold the view that it is time to revisit the 2022 FRP in order to avoid situations such as non-payment of salaries of employees.

COSTS:

61. In view of the order that I will be making, I am of the view that both parties have had success and failure in as far as the outcome of the matter is concerned and I am therefore not prepared to mulct one party with the costs of this application.
62. I am also of the view that, despite what has been argued on behalf of both parties, this application is not complex enough to warrant costs being determined on anything else by scale “B” as referred to in rule 69(7) read with rule 67A(3) of the Uniform Rules of Court.

ORDER:

63. In view of all of the above, I make the following order:
1. That the 1st respondent is to immediately make payment of the salaries of the members of the applicant for the months of February 2025 and March 2025 and to continue making payment of the salaries of the members of the applicant as it falls due; and
 2. That the applicant and the 4th respondent are each to pay its own costs in this application, the costs to be determined according to scale “B” as referred to in rule 69(7) read with rule 67A(3) of the Uniform Rules of Court.

A.D. OLIVIER

ACTING JUDGE

NORTHERN CAPE DIVISION

REPRESENTATIVES OF PARTIES:

For APPLICANT Adv. T. du Preez o.i.o Kramer Weihmann Inc. BLOEMFONTEIN c/o Van De Wall Inc. KIMBERLEY For 4TH RESPONDENT Adv. P. Mthombeni o.i.o Motlhamme Pino Attorneys KIMBERLEY For 5TH & 6TH RESPONDENTS Mr. C. Davis The State Attorney KIMBERLEY

[1] Local Government: Municipal Finance Management Act, Act 56 of 2003.

[2] Treasure Karoo Action Group and Another v Department of Mineral Resources and Others

[2018] 3 All SA 896 (GP), par 10. Also see Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd [1982] 1 All SA 1 (W) at 3-4.

[2] Treasure Karoo Action Group and Another v Department of Mineral Resources and Others

[2018] 3 All SA 896 (GP), par 10. Also see Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd [1982] 1 All SA 1 (W) at 3-4.

- [3] Skjelbreds Rederi, supra. Also see Pat Hinde & Sons Motors (Brakpan)(Pty) Ltd v Carrim and Others 1976 (4) SA 58 (T) at 63G-64A as well as Shephard v Tuckers Land and Development Corporation (Pty)Ltd (1) 1978
- (1) SA 173 (W) at 177G-178A.
- [3] Skjelbreds Rederi, supra. Also see Pat Hinde & Sons Motors (Brakpan)(Pty) Ltd v Carrim and Others 1976 (4) SA 58 (T) at 63G-64A as well as Shephard v Tuckers Land and Development Corporation (Pty)Ltd (1) 1978
- (1) SA 173 (W) at 177G-178A.
- [4] Rule 6(12)(b) of the Rules.
- [5] East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others [2012] JOL 28244 (GSJ).
- [5] East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others [2012] JOL 28244 (GSJ).
- [6] East Rock Trading, supra, par 6.
- [7] Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others [2013] ZAECMHC 14 (7 August 2013).
- [7] Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others [2013] ZAECMHC 14 (7 August 2013).
- [8] Windsor Hotel, supra, par 10.
- [9] See Magricor (Pty) Ltd v Border Seed Distributors CC: In re: Border Seed Distributors CC v Magricor (Pty) Ltd [2020] ZAECGHC 103, par 38.
- [9] See Magricor (Pty) Ltd v Border Seed Distributors CC: In re: Border Seed Distributors CC v Magricor (Pty) Ltd [2020] ZAECGHC 103, par 38.
- [10] D.D v I.L and Another [2024] ZAWCHC 215 (20 August 2024).
- [11] Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C).
- [11] Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C).
- [12] Port Nolloth Municipality, supra at 112D-F.

- [13] Somali Association of South Africa and Others v Refugee Appeal Board and Others [2021] 4 All SA 731 (SCA).
- [13] Somali Association of South Africa and Others v Refugee Appeal Board and Others [2021] 4 All SA 731 (SCA).
- [14] Somali Association of South Africa, *supra*, par 97.
- [15] Bayat and Others v Hansa and Another 1955 (3) SA 547 (N).
- [16] Bayat, *supra* at 553D-E.
- [17] My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31 (30 September 2015), par 177
- [17] My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31 (30 September 2015), par 177
- [18] Basic Conditions of Employment Act, Act 75 of 1997.
- [19] See Kritzinger v Newcastle Local Transitional Council and Others 2000 (1) SA 345 (N) at 352C- D.
- [19] See Kritzinger v Newcastle Local Transitional Council and Others 2000 (1) SA 345 (N) at 352C- D.
- [20] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T).
- [21] Titty's Bar and Bottle Store, *supra* at 368H.
- [22] John Grogan, *Workplace Law*, 13th Ed (2020) at 42.

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