

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

<u>CASE NO</u>	D908/09
<u>HEARD</u>	11 MARCH 2010
<u>FURTHER SUMISSIONS</u>	18 March 2010
<u>DELIVERED</u>	24 MARCH 2010
<u>EDITED</u>	5 MAY 2010

In the matter between	
ANTONIE WILLEM HEYNEKE	APPLICANT
and	
UMHLATUZE MUNICIPALITY	RESPONDENT

JUDGMENT

PILLAY D. J.:

Introduction

1. This case typifies how not to conduct investigations and discipline. It is yet another instance in which a public employer has put one of its senior managers off work on full pay¹ for a protracted period pending investigation. Many such cases do not endure the scrutiny of courts often because public employers pay generous amounts to settle disputes.² This case challenges the legality of special leave on full pay for a protracted period.

The Parties and the Evidence

¹ E.g. *Diadla v Council of Mbombela Local Municipality & Another (1)* (2008) 29 ILJ 1983 (LC); *Hugh Mbatha v Ehlanzeni District Municipality* (unreported) Case No: J1392/2007

²E.g. The dispute between South African Airways and its former CEO Khaya Ngqula (<http://www.engineeringnews.co.za/article/saa-ceo-ngqulas-employment-terminated-2009-03-10>; <http://www.moneyweb.co.za/mw/view/mw/en/page62093?oid=279732&sn=Detail>) and the South African Broadcasting Commission and its CEO Dali Mpfu (www.sabc.co.za)

2. The applicant employee is the Municipal Manager of the respondent. The respondent is Umhlatuze Municipality, a municipality established in terms of the Local Government Municipal Structures Act 117 of 1998 (the MSA 1998). Its principal place of business is in Richards Bay. Although the court refers to the respondent as “the municipality”, it does so guardedly.
3. The municipality consists of its political structures and administration.³ Political structures include the council of a municipality, committees and collective structures established in terms of the MSA 1998.⁴ A council consists of elected representatives of political parties.⁵ As a result of the system of proportional representation⁶ the council has representatives from the African National Congress (ANC), the Democratic Alliance (DA), the Freedom Front (FF) and the Inkatha Freedom Party (IFP). The employee heads the administration.⁷
4. The council of the municipality is divided along party lines about the treatment of the employee. The majority in the council, represented mainly by the ANC aligned Chief Whip, Councillor M V Gumbi, and the Speaker Elphas Felokwakhe Mbatha, are the principal protagonists against the employee. Within the administration, the Corporate Services Manager, Ms M T B Ndlovu, and the current Acting Municipal Manager, Mr N P Nhleko, who also holds the position of Deputy Municipal Manager, are antagonistic towards the employee.
5. Where Mayor A Z Mngayi stands is contested. The employee alleges

³ Section 2(b) of the Municipal Structures Act No. 32 of 2000 (MSA 2000)

⁴ Section 1 of MSA 2000 – definition of “political structures”

⁵ Section 157(1) of the Constitution of the Republic of South Africa Act 108 of 1996; paragraph 31, page 212 of the respondent’s supplementary Opposing Affidavit

⁶ Section 157(2) and (3) of the Constitution

⁷ Section 55(1) of the MSA 2000

that the Mayor and the Speaker are from “warring factions”.⁸ The Speaker denies this.⁹ He contends that he and the Mayor are from the same political party and the Mayor has been “part and parcel of the resolutions”.

6. Oddly, however, the Mayor delivers no affidavit in opposition to this application. He is by definition the employer.¹⁰ The contract of employment is between the employee and the former Mayor as representative of the municipality. In terms of the regulations¹¹ the Mayor may grant the employee special leave. The regulations also entitle the Mayor to terminate the employee’s services.¹² Although the contract calls for prior council approval of examinations and conferences, it is silent on who may grant the employee special leave to attend such events. Consequently, the regulations apply. In terms of the regulations, read with the contract and the MSA 2000,¹³ the Mayor is responsible for the employment of a municipal manager. As such he should have put the employee on special. He should also be testifying in this application.
7. Furthermore, chapters 7 and 8 of the Municipal Finance Management Act No 56 of 2003 (MFMA) impose particular responsibilities on mayors and accounting officers. Even though the employee is accountable to the Mayor and to the council,¹⁴ section 52(b) requires

⁸ Page 10 paragraph 8 of the Founding Affidavit

⁹ Page 208 paragraph 20 of the Respondent’s Supplementary Opposing Affidavit

¹⁰ Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006: “ ‘(E)mployer’ means the municipality employing a person as a municipal manager....as represented by the mayor....”

¹¹ Regulation 15(6) of the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006

¹² Regulation 17(2) of the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006

¹³ Paragraph 17 of the contract empowers the council to suspend the employee whereas regulation 16 entrusts this responsibility on the “employer” i.e. the Mayor. Section 60 of the MSA 2000 restricts delegations by the council to an executive committee or executive mayor if they relate to the determination or alteration of the conditions of service of the municipal manager.

¹⁴ Section 61(1)(b) of the MFMA

the Mayor, not the Speaker, to monitor and oversee the employee, and to do so without interfering in the employee's exercise of his responsibilities.

8. The MSA 2000 is also at pains to demarcate the council from the administration of municipalities.¹⁵ To that end it prescribes separate codes of conduct for councillors¹⁶ and for municipal staff¹⁷. Significantly, the code for councillors prohibits them from interfering in the management or administration of any department of the municipality unless mandated by council.¹⁸
9. For reasons that the Speaker chooses not to disclose to the court, he and the Chief Whip interfere in the management of the municipality. Without evidence from the Mayor, the court cannot accept the Speaker's evidence that the Mayor supports the decision to place the employee on special leave. He attaches an extract from the minutes of the council meeting of 3 February 2010¹⁹ as proof. The extract is *prima facie* proof of nothing more than the fact that the Mayor attended the meeting at which the council resolved to charge the employee. Significantly, the Speaker does not testify that the Mayor was one of the councillors who voted to put the employee on special leave.
10. The Speaker acknowledges that there may have been "internal squabbles" between the employee and senior managers.²⁰ Irrespective of whether the conflict is pitched as high as "warring factions" or as low as "internal squabbles" it is common cause that there is conflict within the municipality, the difference of opinion being

¹⁵ Section 53 of the MSA 2000

¹⁶ Section 54 of the MSA 2000

¹⁷ Section 69 of the MSA 2000

¹⁸ Regulation 11(a) of the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006

¹⁹ Page 231 of the pleadings Annexure OO

²⁰ Page 104 paragraph 65 of the Opposing Affidavit

only one of degree. In these circumstances to refer to the municipality as a homogenous, unified whole is a misnomer. Hence the court's qualified use of the term "municipality" in referring to the respondent.

11. Another consequence of the conflict is that it could impair the reliability of the evidence, located as it is in the context of a political milieu. The propensity for mendacity to serve party political or even shameless self interest cannot be discounted.
12. Surprisingly and unhelpfully, the Speaker is the only deponent for the entire municipality. On some issues the Mayor and the Chief Whip would have been better qualified to testify. The Speaker is also a protagonist in the conflict.
13. The minority parties support the employee. They resisted the motion to put him on special leave. That the employee might be sympathetic or politically aligned to some or all of the minorities can also not be discounted. He could also be in an unhealthy alliance with the Mayor.
14. In this context the court has to tread carefully through the evidence, to look beyond the given to what might actually be.

The Facts

15. The employee is contracted to the municipality from October 2006 to September 2011. As its Municipal Manager he currently earns about R70 000 per month.²¹
16. On 23 September 2009 the Chief Whip wrote to the council of the municipality requesting that it resolve to place the employee on paid leave pending an investigation into causes of a cash crisis and other

²¹ His contract of employment dated 6 September 2006, allows for annual salary recorded then as R776 000 per annum to be topped with cost of living increases. Page 41 of the pleadings bundle, annexure A

concerns at the municipality.²² After the Speaker consulted him he agreed to being placed on paid special leave on the understanding that it would be for a short period.

17. The special leave resolution did not enjoy a smooth passage. Councillors Harvey, Kubone, van Zyl, Viljoen and Hastings opposed the resolution on procedural and substantive grounds. Van Zyl and Viljoen protested that the motion was “a political plot” and that “political structures were interfering in the administration of the municipality” by removing the employee, “an efficient manager” and “a man of impeccable repute” who loyally owed the council 10 years.²³

18. When the Speaker put the matter to a vote, the DA and the IFP refused to be party to the decision. Twenty-eight councillors left the meeting. The local newspaper reported it as a “storming out” and “walk out” of the council meeting.²⁴ Thirty-one councillors remained to vote in favour of the resolution.²⁵

19. At the same meeting, the council reviewed and declared unlawful and invalid two decisions of the employee, namely to appoint the human resources and administrative managers because he allegedly exceeded his authority as he had delegated the power to appoint to the Deputy City Manager.

20. Notwithstanding the allegedly unlawful and invalid appointment by the

²² Page 51 of the pleadings annexure B: The Chief Whip wrote: “ I request council to place on paid leave the municipal manager pending investigation into land sales. The request is based on the cash crisis in uMhlatuze municipality and the fact that the municipal council has resolved to investigate land sales and deviations from council policy, and further that the municipal manager has resisted to report to council contents of a forensic investigation by Nexus Forensic Services fraud totalling R160000 by employees of Parks, Sport and Recreation.

The reason for this request is to ensure that this investigation is not interfered with and that it gives a true picture of the causes of the cash crisis.”

²³ Page 57 of the pleadings

²⁴ Page 65 of the pleadings Annexure E to Founding Affidavit.

²⁵ Page 58 of the pleadings

employee the municipality did not charge the employee for misconduct immediately. Instead, it put him on special leave but persists that the special leave was unrelated to charges of misconduct against him. The Speaker even criticised the employee for conflating the subsequent disciplinary procedure with the special leave. The two were “separate and distinct” he persisted.²⁶

21. The meeting was a special meeting called specifically to pass these three resolutions.²⁷ It started at 17.10 and ended 30 minutes later at 17.40.

The Employee’s Case

22. Ms Nel submitted for the employee that the special leave is unlawful because the municipality is abusing it as if it were a suspension pending discipline. The investigations underpinning the special leave also founded misconduct charges against the employee. In fact, a disciplinary hearing is already underway. The special leave is therefore tainted by the ulterior purpose of suspending and charging the employee for misconduct.

23. She disputes that the employee’s agreement to be put on special leave could ever be elevated to a contract of the kind that varied his conditions of service, which is the effect of the special leave. Nor did he agree to be put on special leave that continues for a long time. The special leave is therefore a breach of his conditions of employment. As an administrative act, the municipality also did not comply with basic principles of administrative law.

The Municipality’s Defence

²⁶ Page 209 of the pleadings

²⁷ Page 27 of the pleadings

24. The thrust of the municipality's defence is that the employee had consented to being placed on special leave, which is authorised by the MSA 2000, its regulations and the municipality's leave policy.²⁸ Mr Madonsela submitted that at the time the employee was placed on special leave the municipality had not contemplated charging him for misconduct. His special leave is not motivated by any purpose other than to investigate the three issues in the special leave resolution. To suggest that the municipality has an ulterior purpose implies that the municipality acts dishonestly or in bad faith. Accordingly, the municipality denies that it is motivated by any ulterior purpose.

Issues in Dispute

25. The principal issue is whether the special leave is lawful. The employee seeks a declarator and reinstatement. To get to those outcomes, however, the court has to make findings along the way on the lawfulness of the special leave, whether the employee agreed to be put on special leave pending investigations and the legality of the special leave, given the challenge to the motives underpinning it. Liability for costs also has to be carefully determined, especially as public funds are involved. Challenges to urgency and jurisdiction fell away by the time the court delivered its judgment.²⁹

²⁸ Page 87 paragraph 9 of the Opposing Affidavit

²⁹ The court heard this application six months after the employee had been placed on special leave. As the pleadings did not explain the long period of paid special leave satisfactorily, the court invited the parties to deliver further affidavits and submissions. On receipt of these documents, the court proceeded to prepare the judgment without hearing the parties again. Whilst writing the judgment, the judge decided to canvass the views of the parties on two orders it considered making in terms of its mandate to grant "further and/or alternative relief". These orders were firstly, to direct those responsible for the special leave resolution to show cause why they should not be ordered to pay the costs of the application, and secondly, whether the Commission for Conciliation Mediation and Arbitration (CCMA) should be ordered to conduct an investigation and report to the court on terms of reference determined by the court to resolve the dispute finally. As it transpired, the parties also recognised that the best outcome was to settle the dispute.

Immediately before the court reconvened to deliver judgment, both Counsel informed the judge in chambers that the parties had agreed on the terms of settling the dispute and that they awaited the council's approval. The judgment would still be relevant, they said, because they could not agree costs. The judge expressed concern that whatever the terms of the settlement were it had to be in the public interest; any settlement could not be a waste of public funds. For this reason too the judge agreed that the reasons for its judgment would be relevant.

The Law on Special Leave

26. Under the common law employers have no obligation to grant leave and employees have no right to leave.³⁰ The right to leave arises from international law, in particular, the paid leave conventions of the ILO,³¹ legislation and agreement. The Basic Conditions of Employment Act 75 of 1997 (BCEA) prescribes annual, sick, maternity and family responsibility leave. Special leave is not prescribed in the BCEA. Individual and collective agreements and other legislation regulating employment usually cater for this deficiency in the BCEA.

27. The position in this case is that the employee's contract of employment must be read in combination³² with legislation and regulations.³³ In terms of his contract of employment special leave granted to the employee is always at his instance or with his consent.³⁴ The agreement limits the amount of leave the employer

³⁰ Wallis *Labour and Employment Law* 17

³¹ Conventions No 52 of 1936, No 101 of 1952, No 132 of 1970, No 140 of 1974; Recommendations No 47 of 1936, No 93 of 1952, No 98 of 1954, No 148 of 1974

³² Preamble to the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006

³³ Page 40 of the pleadings, paragraph 1 of the employment contract provides: "Subject to the terms and conditions set out herein and to the provisions of the Local Government Municipality Systems Act 32 of 2000" and in particular the responsibilities in terms of section 55 of the Systems Act as well as the Local Government Municipal Systems Finance Management Act (Act 56 of 2003) and any other legislation imposing obligations on the Municipal Manager that the council hereby appoint the employee and the employee agrees to be appointed by council as Municipal Manager of the Umhlatuze Municipality."

³⁴ On special leave his contract provides as follows: (Page 42 of the pleadings, annexure A to the Founding Affidavit)

"7. Special leave.

7.1 Special leave on fully paid salary shall be granted to the employee when he:

7.1.1 sits for an examination prescribed or approved by the council.

7.1.2 is to remain in quarantine on the instruction of a registered medical practitioner,

7.1.3 has been arrested or is to appear in court on a criminal charge and is later acquitted or the charge is withdrawn.

7.1.4 is attending a meeting or conference approved by the council.

7.1.5 testifies in court in response to a summons having been served on him.

7.1.6 applies for compassionate leave to a maximum of five working days per calendar year in order to attend the funeral, birth, or illness of a member of the employee's family or a close relative.

may grant, not only to prune the employee's expectation of the amount of special leave on full pay he is entitled to, but also to protect public interest.

28. Regulation 15 of the Local Government Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 deals with leave. Sub-regulation 1 to 5 couch leave in the terminology of an entitlement to, and not an imposition on the employee. Sub-regulation 6 deals with special leave as follows:

“The employer may grant the employee special leave with or without pay for a reasonable number of days with approval in terms of the relevant special leave policy of the municipality.”

29. This terminology is in the form of a privilege (“with approval”) actionable at the employee's instance. The word “grant” presupposes a request from the employee. Sub-section 6 also prunes the privilege to “a reasonable” number of days.

30. As regards the municipality's policy on special leave, paragraph 12.5 reads:

“Special leave may be granted to an employee under exceptional circumstances for any purposes not provided for in this policy and for such period and such conditions as the council may prescribe by resolution.”³⁵

7.2 Special leave on full pay may be granted to the employee in order to enable him to prepare for an examination referred to in clause 8.1.1 provided that the number of working days leave granted for study purposes shall not exceed the number of days of which the employee is actually sitting for examination.

7.3 Special leave on full pay not exceeding three (3) working days per events may be granted to the employee to enable the employee.

7.4 To enable the employee to take part as a contestant in a *bona fide* sports event at provincial and higher level.

7.5 Special leave granted in terms of 8.1, 8.2 and 8.3 above shall include any time actually and necessarily taken up by travelling for the purposes for which the leave is granted.”

³⁵ Page 134 of the Opposing Affidavit

31. The policy reaffirms that leave is “granted to” and not “issued against” or imposed upon employees. The council may “prescribe” the period and conditions of special leave but not the special leave itself. Like the employment contract and the regulations, the policy limits the period and the conditions curb employees’ expectations and the cost of granting special leave.
32. In order to interpret what “exceptional circumstances” are in the context, the court takes its cue from the other purposes for which the policy provides special leave to conclude that every purpose has to be for the benefit or privilege of employees. “(E)xceptional circumstances” must therefore mean such extraordinary, unusual, special circumstances that necessitate employees being put off work for their own good; and if a condition of such leave is that employees be paid, the circumstances have to be particularly exceptional.
33. Special leave that is imposed on employees is effectively a suspension in the hope of subverting the residual unfair labour practice provisions of the Labour Relations Act No. 66 of 1995 (LRA) and all the time and other constraints that accompany suspensions.
34. To discharge its onus of proving the fairness and lawfulness of the special leave the municipality has to show that the special leave was at all times at the instance of the employee and with his consent, that it was not imposed on him, that exceptional circumstances existed and that the special leave resolution was adopted in good faith, and that it was rational, reasonable, proportionate and in the public interest.

Consent to Special Leave?

35. As indicated above, the idea to place the employee on special leave originated amongst the councillors, in particular the Chief Whip. The Speaker invited the employee to comment on the proposal. Whatever

discussion ensued between the Speaker and the employee resulted in the employee acquiescing to be put on special leave. Knowing that decisions giving rise to the cash crisis due to the land sales did not involve him but various committees on which he did not serve, he had “no problems” and “no objection” to being put on special leave.³⁶ Nor did the Nexus Forensic Services Report (Nexus report)³⁷ implicate him in any wrong doing.³⁸

36. Neither the Speaker nor any of the councillors could reasonably have believed that the employee’s memorandum to the special meeting agreeing to be put on special leave amounted to an immutable binding contract with the municipality of the kind that if he attempted to terminate his special leave the municipality could hold him in breach.

37. As special leave can only be at the instance of the employee or with his consent, enabling special leave at the instance of the municipality would amount to a variation of his employment contract. To acquire binding force regulation 19 requires such variation to be in writing and signed by both parties.³⁹ Without such variation, the court finds that the employee merely acquiesced to being put on special leave for such a short period that it had no impact on his contract of employment. At most his acquiescence amounted to an indulgence, right or privilege to the municipality to initiate special leave.⁴⁰ In terms

³⁶ Page 29 of pleadings paragraph 53 of Founding Affidavit; paragraph 18 of the Applicant’s Replying Affidavit

³⁷ See Chief Whips’ motivation to put employee on special leave above @ fn 22

³⁸ Page 151 of the pleadings, paragraph 19 of the Applicant’s Replying Affidavit

³⁹ Regulation 19 of the Local Government Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Manager, 2006 provides: “Variation: The employment contract must provide that no addition to or variation or mutually agreed cancellation or novation of the contract and no waiver of any right arising from the contract or its breach or termination shall be of any force or effect unless reduced to writing and signed by and on behalf of both parties.”

⁴⁰ Regulation 20 of the Local Government Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Manager of 2006 provides: “No indulgence: The employment contract must provide that no latitude, extension of time or other indulgence may be given or allowed by the employer to the employee in respect of the performance of any obligation in terms of the contract and no delay or forbearance and enforcement of any right of any party arising from the contract, and no single and partial exercise of any right by any party under the contract shall in any circumstances be

of regulation 20, such indulgence does not constitute a waiver of his rights, nor does it preclude him from enforcing strict compliance with the terms of the employment contract. Regulations 19 and 20 are incorporated into the contract.⁴¹

38. If the councillors believed that the basis of the special leave resolution was the employee's agreement to be put on leave, the short answer to the objections from the minority parties in the council would have been that the employee had agreed to being put on special leave. In passing the resolution the council did not rely on an agreement with the employee.⁴²

39. Subsequently in correspondence⁴³ the municipality referred to an "undertaking" by the employee. Treating his acquiescence as an "undertaking"⁴⁴ conflicts with the concept of leave as being a right or privilege exercisable or not exercisable at the instance of the employee.

40. In the circumstances, the court finds that the high water mark of any agreement to be put on special leave was the employee's acquiescence to be placed on such leave for a short time. He withdrew such acquiescence the moment he asked to return to work. After the employee launched this application the municipality could have had no doubt about his unwillingness to remain on special leave.

construed to be an acquired consent or election by such party or operate as a waiver or a novation of or otherwise affect any of the parties' rights in terms of arising from the contract, or estoppel (*sic*) or preclude any such party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term thereof."

⁴¹ Page 40 of the pleadings, paragraph 1 of the employment contract.

⁴² The extract from the minutes reads (Annexure FF page 121 of the pleadings):

"Discussion

It was agreed that the City Manager should be placed on special paid leave..."

That could only have been a reference to an agreement amongst the 31 councillors who voted for the ensuing resolution because the managers, including the employee, were asked to recuse themselves from the meeting (Page 57 of the pleadings Annexure C to Founding Affidavit).

⁴³ Page 77 of the pleadings, Annexure L to the Applicant's Founding Affidavit

⁴⁴ Page 77 of the pleadings

41. Without any request from the employee for special leave and without his consent to remain on special leave, the special leave is not authorised by legislation, the contract of employment or the policy. As such, the special leave is a breach of the employment contract.
42. As the employee pleads that the special leave is being used for an ulterior purpose or ulterior motive, the principle of legality is also implicated.

The Stated Purpose of the Special Leave

43. The municipality's stated purpose of the special leave is determinable from the common cause facts and the Speaker's affidavits. The Speaker narrates the circumstances leading to the council's resolution to put the employee on special leave. His version is that the Nexus report unravelled corruption within the municipality. The employee did not table the Nexus report to the full council, but reported orally to the executive committee of the municipality (EXCO) and the Speaker.
44. The Speaker instructed an official, Mrs Pienaar, to table the Nexus report before the Standing Committee on Public Accounts (SCOPA). The employee countermanded this instruction. He became intransigent. The Speaker took umbrage.⁴⁵ The "discreet fashion" in which the employee dealt with what were in the Speaker's opinion, very serious financial affairs or corrupt practices unravelled by the Nexus report "simply caused a great deal of discomfort".⁴⁶ Although the Speaker does not disclose who experienced such discomfort, the court must assume that he must be attesting to his own discomfort.
45. On 4 August 2009 the employee approached the council with what

⁴⁵ Page 89 of the pleadings, paragraph 17 of the Respondent's Opposing Affidavit

⁴⁶ Page 90 of the pleadings, paragraph 18 of the Respondent's Opposing Affidavit

was in the Speaker's view "a most startling verbal request"⁴⁷ for approval of a loan of R100 million to rescue the municipality. The council scheduled a special meeting for 11 August 2009 to discuss the request. The employee did not attend the meeting. This did not augur well with the councillors, the majority of whom allegedly "harboured considerable doubt as to whether the employee was managing the financial affairs of the respondent properly".⁴⁸

46. As a result the ANC Chief Whip called for the employee to be placed on leave while the investigations took place.⁴⁹

47. In addition, the employee attempted to appoint staff when he did not have the authority to do so, as that authority had been delegated to a Deputy City Manager.⁵⁰

48. On 27 November 2009 the Speaker personally lodged a complaint against the employee on four issues discussed below.⁵¹ This complaint resulted in the disciplinary proceedings against the employee. On these facts the Speaker contended that the investigations underpinning the special leave were "separate and distinct" from the misconduct proceedings.

49. In short, according to the Respondent's Opposing Affidavit the stated purpose of the special leave was to conduct investigations on two issues, namely, the cash crisis and the duty to table the Nexus report. Suspending the employee pending discipline was not within the municipality's contemplation at the time, allegedly.

50. The Speaker's version changes dramatically in the Respondent's Further Opposing Affidavit in which he is emphatic that the purpose of

⁴⁷ Page 90 of the pleadings, paragraph 19 of the Respondent's Opposing Affidavit

⁴⁸ Page 92 of the pleadings, paragraph 27 of the Respondent's Opposing Affidavit

⁴⁹ Page 92 of the pleadings, paragraph 28 of the Respondent's Opposing Affidavit

⁵⁰ Page 104 of the pleadings, paragraph 67 of the Respondent's Opposing Affidavit

⁵¹ Page 96 of the pleadings

the special leave was to conduct investigations into the cash crisis.⁵²

Ulterior Purpose or Motive

The Principle of Legality

51. The common law principle of legality demands that public power be exercised reasonably, in good faith, in the public interest⁵³ and not be misconstrued.⁵⁴ The exercise of public power is legitimate only if it is lawful.⁵⁵ The rule of law as a founding constitutional value⁵⁶ and an element of the principle of legality elevates legality to a constitutional principle. As a constitutional principle, legality governs the use of all public power. Legality is not confined to administrative law.⁵⁷ Therefore, irrespective of whether an act falls within the ambit of administrative or labour law, the principle of legality applies.

52. Under administrative law, section 6(2)(e)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) subjects action taken for an ulterior purpose or motive to judicial review. Sections 6(2)(e)(v) and (vi) bring actions taken in bad faith, arbitrarily or capriciously under judicial review.

53. Under labour law, employment is a contract. Like all contracts it implies good faith.⁵⁸ This common law position is fortified by the constitutional right of “everyone” to fair labour practices⁵⁹ and

⁵² Para 4-8 of Respondent’s Further Opposing Affidavit

⁵³ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276

⁵⁴ Cora Hoexter *Administrative Law in South Africa* Juta 2007 275 fn 312; Lawrence Baxter *Administrative Law* 1996 301

⁵⁵ Cora Hoexter *Administrative Law in South Africa* Juta 2007 117

⁵⁶ Section 1© of the Constitution of the Republic of South Africa Act 108 of 1996

⁵⁷ Cora Hoexter *Administrative Law in South Africa* Juta 2007 117; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 59; *S v Mabena* 2006 SCA 132 (RSA)

⁵⁸ Martin Brassey *Employment and Labour Law* Vol 1 C:26

⁵⁹ Section 23 of the Constitution of the Republic of South Africa Act 108 of 1996

equality⁶⁰. Consequently, the duty to exhibit good faith is mutual, weighing as much on employers as it does on employees.

54. For the purposes of this case therefore, diagnosing whether the acts of the municipality fall in the realm of administrative law, labour law or contract law is unnecessary. In so far as a diagnosis is necessary, the special leave resolution would be a matter for determination under labour law as it arises in the context of employment.⁶¹ Furthermore, putting an employee on special leave is not a matter regulated under the LRA as an unfair labour practice but as a review of an act by the state as employer under section 158(1)(h)⁶² or as a breach of contract under section 77(3) of the BCEA. An act of an employer does not have to be “administrative action” for legality to be invoked as a constitutional principle.⁶³ However, the application of the principle of legality under administrative law over decades offers valuable lessons for the newly recognised constitutional principle of legality. Such extension of the principle of legality into labour law can only benefit human rights.

55. The authorities distinguish between ulterior purpose and ulterior motive. Hoexter explains:

“‘Purpose’ is an objective concept, whereas ‘motive’ (especially when coupled with the adjective ‘ulterior’) suggests the presence of hidden, subjective and possibly sinister aims”

56. An ulterior purpose exists when power given for one purpose is used for another purpose.⁶⁴ The organ must have intended the act and, if it was aware that the purpose was not authorised, it will have acted in

⁶⁰ Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996

⁶¹ *Gcaba v Minister for Safety and Security* Case CCT 64/08 para 56-58, 66, 70

⁶² *Ntshangase v MEC Finance:KZN* (2009) ZASCA (13 September 2009)

⁶³ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 59

⁶⁴ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276 fn 314

bad faith.⁶⁵ Bad faith exists if the organ claims to be acting for one purpose but knowingly acts for another private or public interest out of, say, spite or ill will, or to benefit the organ or its relations.⁶⁶ Wiechers observes that a blatant failure to comply with a requirement for validity to the extent that it suggests that the organ must have known that its act was invalid is a serious dereliction of duty.⁶⁷ Bad faith, he says, can be presumed on a balance of probability if the evidence clearly indicates that the organ not only misconceived its powers and misjudged the facts, but should also have realised or did in fact realise that it was performing an invalid act.⁶⁸ The organ may rebut this presumption by adducing facts that place it above suspicion.

57. It is easy to see then why ulterior motive and bad faith sometimes overlap.⁶⁹ Actions undertaken for ulterior purposes have always been unlawful.⁷⁰

58. Elements of ulterior motive and bad faith range from fraud, dishonesty, arbitrariness, irrationality, a failure to apply one's mind, negligence, disinterest and a failure to comply with requirements for validity, to honest mistakes and mere stupidity,⁷¹ or perhaps even ignorance,⁷² naiveté, inexperience, improper influence⁷³ or political pressure. The basis of the bad faith or motive is irrelevant, its mere existence being sufficient to violate the principle of legality. Even an altruistic motive cannot confer legitimacy on the exercise of public power for an unauthorised purpose.⁷⁴

⁶⁵ Marinus Wiechers *Administrative Law* Butterworths 1985 232-233

⁶⁶ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 175

⁶⁷ Marinus Wiechers *Administrative Law* Butterworths 1985 255

⁶⁸ Marinus Wiechers *Administrative Law* Butterworths 1985 257

⁶⁹ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 175

⁷⁰ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276 fn 314

⁷¹ Cora Hoexter *Administrative Law in South Africa* Juta 2007 278, 280; Marinus Wiechers *Administrative Law* Butterworths 1985 254

⁷² Marinus Wiechers *Administrative Law* Butterworths 1985 254, 256, 233

⁷³ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 175

⁷⁴ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276

59. In most cases bad faith accompanies other grounds of review.⁷⁵

However, a bad reason will not invalidate an otherwise valid act.⁷⁶

60. Reasonableness is as much an independent test for legality as it is an indicator of motive and bad faith. It imports elements of rationality and proportionality.⁷⁷ For the purposes of this judgment, the reasonableness test need be pitched no higher than that no reasonable organ could have made the decision.⁷⁸

61. Rationality, also an independent test for and a principle of legality and the rule of law, an indicator of motive and bad faith, is elevated to a statutory ground in PAJA⁷⁹, which sets the test out as follows:

“Rationality is connected to-

- (aa) the purpose for which it (action) was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator”.

62. Proportionality is another principle for testing legality. De Ville summarises the test thus:⁸⁰

- a. Is the measure suitable to achieve its aim?
- b. Is the measure necessary in that no other less invasive measure is possible?
- c. Is the measure nevertheless an excessive burden on the individual or disproportionate to the public interest at stake?

63. The existence of an ulterior motive and bad faith is an invitation to

⁷⁵ Cora Hoexter *Administrative Law in South Africa* Juta 2007 279; Marinus Wiechers *Administrative Law* Butterworths 1985 255. Hoexter disagrees with Wiechers who, writing in the pre-democracy era, argued that bad faith is not an independent ground of invalidity; section 6(2)(e)(v) of PAJA has since settled the debate.

⁷⁶ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 177

⁷⁷ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 197

⁷⁸ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 196

⁷⁹ Section 6(2)(f)(ii) of PAJA

⁸⁰ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 203

courts to prescribe invasive remedies to correct the invalidity, without entrusting that task to the organ.⁸¹

Standard of Proof

64. Employers have a duty to ensure that their employment decisions are fair and lawful. Consequently, they bear the burden of proving the fairness and lawfulness of their decisions.⁸² Employees who challenge their employer's decisions bear the burden of rebuttal. Employees who allege bad faith or ulterior motive on the part of the employer bear the burden of proving such allegation. By discharging this onus they also rebut the employer's claim that its decision is fair and lawful. However, the overall onus of proving the lawfulness and fairness of its decisions remains with the employer.

65. To determine whether the councillors and officials in the municipality had an ulterior purpose or ulterior motive when they placed the employee on special leave, the court must find that the stated purpose or motive was in fact not the true purpose or motive of the special leave. As the stated purpose of the special leave was to conduct investigations, the employee will succeed in proving an ulterior purpose if he establishes that the purpose of the special leave was in fact to suspend him pending misconduct proceedings. Effectively, he has to show that the municipality used its power to grant special leave for a purpose not authorised by law. That is sufficient for the employee to rebut the municipality's stated reason for the special leave resolution. It is also sufficient to rebut the claim that the special leave resolution was fair and lawful.

66. If the employee goes further to establish that the municipality was or ought to have been aware that the special leave was unlawful, or that the misconduct proceedings was not an end in itself, but the means to

⁸¹ Marinus Wiechers *Administrative Law* Butterworths 1985 257

⁸² LH Hoffmann, DT Zeffertt *The South African Law of Evidence* 4th Edition 495

dismiss him, he will establish that it also had an ulterior motive or acted in bad faith or with some similar subversive sentiment or reason.⁸³

67. For the true purpose and motive of the special leave the court analyses the stated purpose of the special leave against the sequence of events and seven documents⁸⁴ culminating in misconduct charges against the employee.

The sequence of events

68. On 23 September 2009 the Chief Whip submitted a motivation for the special leave resolution. (the Chief Whip's motivation)⁸⁵

69. On 29 September 2009⁸⁶ the council resolved at its special meeting to put the employee on special leave in the following terms: (the special leave resolution)

“The City Manager be placed on special leave with effect from 1 October 2009 until the investigation has been completed on the cash crisis in the Umhlatuze Municipality and the fact that the municipality council has resolved to investigate land sales and deviations from council policy, and further that the Municipal Manager has resisted to report to council the contents of a forensic investigation by Nexus Forensic Services, fraud by employees of the Parks Board and Recreation section.”

70. On 13 October 2009 the Assistant Municipal Manager motivated for a resolution from the council for an investigation to support the special leave resolution.

⁸³ Marinus Wiechers *Administrative Law* Butterworths 1985 257

⁸⁴ 1.the Chief Whip's motivation for the special leave, 2.the special leave resolution, 3.the Acting Municipal Manager's motivation for the terms of reference for the special leave investigation,4.the terms of reference for the special leave investigations, 5.the Speaker's complaint against the employee, 6.the resolution to charge the employee, 7.the subsequent charges for misconduct.

⁸⁵ Page 51 of the pleadings annexure B

⁸⁶ Footnote page 59 annexure C

71. On 3 November 2009, the council adopted the terms of reference for the special leave investigation,⁸⁷ with one significant difference.

72. On 27 November 2009 the Speaker complained as follows:

“(1) Refusal to table findings of a report by Nexus Forensic Services into fraud and corruption by staff of Parks Board and Recreation to council and clearly failure to action its recommendations in contravention of section 63 of the Municipal Systems Act of 2000, a letter of refusal attached for ease of reference. (2) Failure to report in writing the impending shortfalls in budgeted revenue and overspending of municipality’s budget in contravention of section 71(a) of Municipal

⁸⁷ “Cash flow problems in the city”

(1) To determine whether the serious cash flow problems currently being experienced is as a result of delays in the recovery of land sales revenue and in some cases the non recovery of such revenue altogether.

(2) To determine whether all land sales have been strictly in accordance with council’s land sales policies and procedures and if not, whether this has had a direct impact on the cash flow problems currently being experienced.

(3) To determine whether official/s of the municipality are accountable in the above regard and if so, whether such action constitute gross financial misconduct in the performance of their duties resulting in possible criminal charges as provided for in terms of the Municipal Financial Management Act 56 of 2003.

(4) To determine whether any officials of the municipality were negligent in the performance of their duties in budgeting for an unrealistic income insofar as land sales are concerned, given the current economic climate and/or being aware of imminent cash flow problems that may be experienced in this regard and not reporting such timeously to council/taking adequate appropriate preventative measures/interventions to address the situation.

(5) To determine whether the cash flow problems of the municipality are also the result of other irregularities pertaining to non compliance with of proper policies and procedures, particularly relating to contract management/formal tender processes not being followed and, if so, who is accountable in this regard.

Duty to report

(6) To determine the status of the forensic investigation report prepared by Nexus Forensic Services and whether council was adequately consulted/approached for the necessary prior to this investigation being commenced.

(7) To determine whether or not the said forensic report was presented to council for actioning at any stage in terms of the recommendations in the report and if not, whether the non consideration of this report at this stage by council is grounds for a charge of gross financial misconduct against any official/s of the municipality as catered for in terms of the Municipal Financial Management Act 56 of 2003.

In the event of their being a failure to action the recommendations of the Nexus report at this stage, recommendations being provided as to how this process can be undertaken in the least possible time, taking into account possible criminal, civil recovery and disciplinary actions that may stem from this report. Furthermore, whilst not forgetting adequate actions to address internal control deficiencies identified in the report to prevent a recurrence of irregularities identified.”

Management Finance Act of 2003. Extract of minutes of a council meeting attached. (3) Interfering with the investigation into land sales by giving instructions to a staff member to make amendments to the policy while the investigation is proceeding (e-mailed report attached). (4) Attempting to appoint/recruit staff on 22 September 2009 without following the recruitment policy of the municipality.”⁸⁸

73. On 19 January 2010 the council resolved to charge the employee.

74. On 17 February 2010 the municipality charged the employee with misconduct. Counts 1 to 8 arise from his appointment of staff purportedly because he did not have the authority. Count 9 relates to his countermanding the Speaker’s directive to table the Nexus report before the council. The final count is for bringing the council into disrepute following counts 1-9 and this application.

Reasons before decision

75. The sequence of events show that the municipality decided to put the employee on special leave before it adopted the terms of reference for the investigation. As a general principle of the rule of law and legality, employers should formulate reasons before they make decisions⁸⁹ to guard against arbitrary,⁹⁰ irrational decisions⁹¹ or contriving reasons after the fact.⁹² Reasons are the lynchpins upon which the reasonableness of decisions turns; reasonableness of the exercise of power is the cornerstone of the principle of legality.⁹³

76. The failure to formulate the terms of reference for the investigation before putting the employee on special leave is a procedural

⁸⁸ Page 127 and 128 Annexure II to the Opposing Affidavit

⁸⁹ Lawrence Baxter *Administrative Law* 1996 231-233

⁹⁰ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 198

⁹¹ Lawrence Baxter *Administrative Law* 1996 78

⁹² Lawrence Baxter *Administrative Law* 1996 233

⁹³ Lawrence Baxter *Administrative Law* 1996 301

irregularity which the analysis below confirms, also results in substantive unreasonableness and irrationality.

Failure to Apply its Mind

77. Manifestly, the municipality did not apply its mind to the terms of reference for the investigation before deciding to put the employee on special leave.

78. Alarming, the special leave resolution plus the alleged unauthorised appointments resolutions were adopted after a mere 30 minute discussion. Much of that time was devoted to fending off the minority parties' opposition to the resolution. Nowhere is there any evidence that the council considered or debated the expense and consequences of putting off from work the administrative head of a large municipality, or indeed the lawfulness, fairness, reasonableness and rationality of its decision. Furthermore, if the council had been told that the special leave was unrelated to misconduct by the employee, comprehending and rationalising the purpose of the special leave would have been a tortuous enterprise in the search for logic.

79. In these circumstances and without affidavits from councillors who supported the special leave resolution, the court cannot determine what went through the mind of each councillor. On the available evidence, the probabilities are that some did not even know or appreciate the import of their decision. They might have voted in favour of the resolution without understanding it, out of party loyalty, time or political pressures, or simply because it was the option of least resistance. Whatever their reasons, altruistic or malicious, they are immaterial to the legality of the special leave.⁹⁴ It could be relevant to their motives and consequently the remedy. However, altruistic reasons may not attract penalties, whereas malice could.

⁹⁴ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276

80. Based on the sequence of events and the content and brevity of the council meeting, the councillors could not have applied their minds properly to the special leave resolution and the reasons for the investigations underpinning it before they put the employee on special leave. If they did apply their minds, they would have had trouble reconciling the purported purpose of the special leave with the alleged absence of intention to discipline the employee. Given the findings below of the interconnectedness between the special leave and the misconduct charges, they would or ought to have realised then that the municipality's decision was at the very least morally wrongful, even if they were unaware of the legal niceties of special leave and breach of contract.

81. Accordingly, the court finds that the council did not apply its mind to the special leave resolution.

Bad Faith

82. The special leave resolution has more than a whiff of an ulterior motive. Manifestly, it is couched in the terminology of a precautionary suspension with full pay pending misconduct investigations.

83. Simultaneously with adopting the special leave resolution, the council adopted the two alleged unauthorised appointments resolutions.⁹⁵ On its own, or considered in the context of these two resolutions, the legitimacy of the stated purpose for putting the employee on special leave falters even more as the connection between the Chief Whip's motivation, the special leave resolution and the contents of all the subsequent documents fortify the ulterior motive claim.

⁹⁵ Page 58 of the pleadings, Annexure C to the Applicant's Founding Affidavit

84. Turning to the first connection, the special leave resolution refers to investigating “the cash crisis”. So do the motivation and the terms of reference for the investigation itself. The Speaker’s complaint refers to “shortfalls in budgeted revenue and overspending”. All three documents identify “land sale(s)” as a problem.
85. The second connection is the employee’s resistance to disclosing the Nexus report. It surfaces in the Chief Whip’s motivation, the special leave resolution, the terms of reference for the investigation,⁹⁶ the Speaker’s complaint⁹⁷ and count 9 of the charges.⁹⁸
86. The motivation for the special leave investigation expressly refers to “resistance by the Municipal Manager to report and table the forensic investigation report.”⁹⁹ This explicitly connects the employee to count 9 of the charges. The significant difference between the motivation for the special leave investigation¹⁰⁰ and the terms of reference for the special investigation is that the former implicates “the Municipal Manager” whereas the latter waters this down to “(o)fficials”.
87. The third connection starts with the alleged unauthorised appointments resolution accompanying the special leave resolution, and continues in the Speaker’s complaint and the resolution to institute disciplinary proceedings. Although the Speaker baldly asserts that the unauthorised appointments resolution is “monumentally irrelevant” to the special leave, it forms the substance of counts 1 to 8 of the 10 counts to the charges.
88. The municipality must have anticipated charging the employee for misconduct when they put him on special leave. When the municipality put the employee on special leave the employee’s

⁹⁶ Under the heading “Duty to Report”

⁹⁷ Page 127 of the pleadings, annexure II, paragraph 1 of the complaint

⁹⁸ Annexure A to the Supplementary Replying Affidavit

⁹⁹ Page 124 of the pleadings, Paragraph 2.1 of Annexure GG to the Respondent’s Opposing Affidavit

¹⁰⁰ Page 124 of the pleadings Annexure GG to Respondent’s Opposing Affidavit

resistance to tabling the report before the council was well known. So was the Speaker's unhappiness with the employee's conduct.¹⁰¹ Furthermore, the municipality was confident enough of the unlawfulness of his staff appointments that it set them aside forthwith during the 30 minute meeting. Although the employee is not charged for the cash crisis and land sales issues, the Speaker has a "strong suspicion" that the employee was not administering the affairs of the municipality as required by law.¹⁰² He is also unhappy about the employee's "interference with the investigations" relating to the land sales.¹⁰³

89. Lastly, the first three of the Speaker's complaints fall squarely within the scope of the investigations for which the employee was placed on special leave. He testifies that the employee's "attempt to appoint some members of staff ... amount to serious misconduct for which he can be charged and/or disciplined."

90. In these circumstances, the evidence establishes beyond doubt the link between placing the employee on special leave, the special leave investigations and the charges for misconduct that he now faces.

91. The special leave is a façade for suspending the employee pending misconduct proceedings. To deny in these circumstances that the municipality did not contemplate charging the employee for misconduct when it put him on special leave is false. Such blatant falsehood suggests that the speaker, if not the municipality, must be aware of the moral and legal impropriety of the special leave. By putting the employee on special leave and persisting with it, knowing that it is for the purpose of effectively suspending him is bad faith.¹⁰⁴ Bad faith transforms ulterior purpose into ulterior motive.

¹⁰¹ Page 96 of the pleadings paragraph 39 of the Opposing Affidavit

¹⁰² Page 96 of the pleadings paragraph 39 of the Opposing Affidavit

¹⁰³ Paragraph 3 of the complaint

¹⁰⁴ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 175; Cora Hoexter *Administrative Law in South Africa* Juta 2007 278, 280; Marinus Wiechers *Administrative Law* Butterworths 1985 254

92. Effectively, the municipality used a power aimed at benefiting employees as a weapon against the employee. It misconstrued and misused its power for a purpose not authorised in law, and continues to do so despite this application alerting it to the illegality. Misuse of power is a reviewable illegality.¹⁰⁵ Continued misuse of power is bad faith. Bad faith and the breach of the employee's contract of employment automatically strip the special leave of legitimacy.¹⁰⁶

Reasonableness, Rationality and Proportionality of the Special Leave

93. No municipality, acting reasonably, in the public interest, can put an employee on special leave on full pay for a long time, not even if such employee agrees. Such an agreement is against public interests and public policy, for it can never be public policy to waste resources. Paying for services that are not rendered is wasteful.

94. Putting the employee on special leave on full pay pending investigations for six months or longer is especially not reasonable when precautionary suspension in terms of regulation 16¹⁰⁷ pending misconduct investigations is restricted to 60 days.

95. Protracted leave or suspension on full pay pending investigations or disciplinary action is a prevalent practice, especially in publicly funded entities. This practice is a sign of weak, indecisive management that cannot diagnose problems and find solutions efficiently. These inefficiencies impact on both taxpayers and shareholders alike, and not on the private pockets of the management of public organisations; consequently, the incentive to finalise investigations and disciplinary procedures is weak. This practice has to stop.

¹⁰⁵ Cora Hoexter *Administrative Law in South Africa* Juta 2007 275 fn 312; Lawrence Baxter *Administrative Law* 1996 301

¹⁰⁶ Cora Hoexter *Administrative Law in South Africa* Juta 2007 117

¹⁰⁷ Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006)

96. Apart from management inefficiencies delaying processes, internal procedures such as meetings and mandating systems of organisations counter the expeditious dispute resolution system envisaged in the LRA. Critics are quick to blame the LRA for delays but closer scrutiny in cases such as this shows that fault lies mainly in the internal systems of organisations and the way investigators and managers practice labour law. In public employment political factionalism also delays conflict resolution. This case has all three ingredients that typically result in unreasonable delay.

97. Under oath the Speaker states:

“The investigations contemplated between the parties are continuing. There has been progress too.”¹⁰⁸

98. The court does not share his optimism. On 13 October 2009 SCOPA formulated the terms of reference for the investigations. On 3 November 2009, after another month's salary became payable to the employee, the council approved the terms of reference. On 10 November 2009 the municipality reported to the provincial department to elicit its financial assistance. Four months later the provincial department has not indicated whether it supported the investigations. The municipality charged the employee for misconduct only on 17 February 2010.

99. The timeframe in which these events occurred are unjustifiable. This municipality, which is in a cash crisis, unreasonably incurs the expense of six months salary at the rate of approximately R70 000 per month without receiving any service in return.

100. Such wastage could have been avoided. Controversy about tabling the Nexus report and land sales had been going on since at least 17

¹⁰⁸ Page 95 paragraph 37 of the Respondent's Opposing Affidavit

October 2008,¹⁰⁹ if not before. Why it suddenly became imperative to put the employee on special leave on barely a day's notice,¹¹⁰ and before formulating the terms of reference, securing the assistance of the provincial department and conducting an investigation, is not evident. Why the municipality did not apply standard dispute resolution procedures is also not explained.

101. As regards rationality, because the special leave is intended to benefit employees, an employer who uses it to conduct investigations acts irrationally.¹¹¹

102. Furthermore, a bald assertion by an employer that it is conducting investigations is not an explanation for putting employees off work. There has to be a rational connection between conducting the investigation and the need for the employees' absence from work. Usually it is to prevent employees from interfering with investigations.

103. Although the Speaker testifies that the employee interfered with investigations relating to land sales,¹¹² he sets out no factual basis for this claim. The employee denies that there were any investigations into land sales with which to interfere.¹¹³ In fact, the Speaker contradicts himself in Respondent's Further Opposing Affidavit.

104. In the Respondent's Further Opposing Affidavit the Speaker emphasizes that the reasons for the special leave and the purpose of the special leave resolution is to investigate the cash crisis to which the council was alerted for the first time on 4 August 2009. He cites the Chief Whip's motivation and the special leave resolution¹¹⁴ as proof.¹¹⁵ This is manifestly false. Both documents premise the request

¹⁰⁹ Pages 109 to 110 of the pleadings Annexure AA to Opposing Affidavit

¹¹⁰ Page 172 of the pleadings para 45.1 of Replying Affidavit

¹¹¹ Section 6(2)(f)(ii) of PAJA

¹¹² Page 96 of the pleadings, para 39 of the Opposing Affidavit

¹¹³ Page 168 of the pleadings, para 41.3 of the Replying Affidavit

¹¹⁴ Page 51 and 59, annexures B and C to the Founding Affidavit

¹¹⁵ Para 4-8 of the Respondent's Further Opposing Affidavit;

for investigation on not only the cash crisis but also land sales, deviations from council policy (presumably a reference to the alleged unauthorised staff appointments) and tabling the Nexus report before the council.

105. The Speaker changes tack at this stage of the litigation because the connection between the special leave and the charges is unmistakable. Only the cash crisis is omitted from the charges. Hence by emphasising the cash crisis, the Speaker tries to distance the special leave from the charges.

106. The municipality gave the employee every reason not to interfere in the investigation. It assured the employee that the investigations were not into his conduct, a stance that the municipality maintains throughout this application.¹¹⁶ The Speaker assured the public via the media that “Heyneke was not suspended or dismissed”, that the municipality was not “investigating his activities, but certain important matters”¹¹⁷. The Mayor publicly acknowledged that “(t)here is no indictment against Heyneke.”¹¹⁸ Therefore, the employee had no reason to interfere with the investigation.

107. Looking into the subjective state of mind of the employee, he had no reason to interfere in the investigations also because he knew that he did not serve on the committees responsible for decisions that formed a part of the special leave investigations. He made his views known about the Nexus report and was prepared to defend them before an independent adjudicator, if necessary. As section 55(1)(e) of the MSA vests the responsibility for appointing staff in him as Municipal Manager, delegation of that authority did not divest him of the responsibility.¹¹⁹ Furthermore, section 57(2)(c) of the MSA 2000 read

¹¹⁶ Para 11 of the Respondent's Supplementary Opposing Affidavit

¹¹⁷ Page 177 of the pleadings, Annexure AH1 to Applicant's Replying Affidavit

¹¹⁸ Page 193 of the pleadings, Annexure AH7 to Applicant's Replying Affidavit

¹¹⁹ Page 135 of the pleadings, Annexure MM to the Opposing Affidavit

with the regulations¹²⁰ confers on him the role of employer of managers accountable to the municipal manager. As he had delegated his power to appoint, he could recall that delegation.¹²¹

108. Another anxiety for the employee as accounting officer under section 60 of the MFMA is that his specific responsibilities for proper administration are entrusted to the Acting City Manager, who does not meet the minimum prescribed requirements for the job.¹²² The job requires the incumbent to have at least a Bachelor's degree; the Acting City Manager has standard nine schooling and a certificate in human resources.

109. The municipality has not made out any case to justify the employee's absence from the workplace. Without such justification, the special leave disproportionately prejudices the employee and the public. This prejudice is compounded by the reputational damage caused by the special leave operating as a suspension pending misconduct proceedings. Furthermore, if the municipality had suspended him it would not have been able to do so beyond 60 days. Disproportionate too is its adverse impact on the public interest as the cost to the municipality versus the reasons for the special leave does not justify such expense.¹²³ Accordingly, the special leave was unreasonable, irrational, disproportionate, and therefore also unlawful.

The Reasonableness, Rationality and Proportionality of the Special Leave Investigation

¹²⁰ Regulation 1 and 3 of the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 in GG 29089 of August 2006:

¹²¹ Page 172 of the pleadings, para 45.2 of Replying Affidavit, page 174 of pleadings para 48 of Replying Affidavit

¹²² Regulation 38 of the Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006 (GN R805 GG 29089 of 1 August 2006; page 143-144 of the pleadings, para 12.9 of the Replying Affidavit

¹²³ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 203

110. The need for the special leave investigation is questionable. Equally perplexing is the municipality's quest for special funds for that purpose from the Department of Co-operative Governance and Traditional Affairs (the provincial department). It does not explain either in the motivation to the provincial department, in the Opposing Affidavit or the Respondent's Further Opposing Affidavit why it needs an investigation into the cash flow problems when such investigations fall squarely within the ambit of the SCOPA's ongoing monitoring and auditing function.

111. As regards the duty to report issues (the Nexus report), the municipality wants to investigate questions for which answers are common cause, irrelevant, known or ascertainable by standard procedures.

112. Given its history, the disclosure of the Nexus report remains, startlingly, the subject of an investigation a year after the dispute about it arose and was apparently resolved. On 10 June 2008, the council had authorised the employee to deal with the Nexus report and to pursue criminal charges. On 17 October 2008 the Speaker requested the employee to table the Nexus report. In reply on 2 February 2009 the employee explained the steps he took in response to the Nexus report as follows:

“(D)ecisive action was taken against the two main perpetrators in the investigation and they both are no longer working for this municipality. The matter was also reported to the South African Police Service with reference to these two officials and the member of the public who participated in the irregularity. The amount of money involved in this irregularity is minute in comparison to the expenditure of this municipality, not only in that specific year but over many years of activities.”

113. In his memorandum dated 29 September 2009 to the special meeting the employee reported again to the council that two officials

who had been implicated in the report had resigned.¹²⁴ He reminded the council that it had previously resolved as follows:

- “1. the committee noted the report of the Chief Executive Officer and that the matter will be dealt with accordingly by his office.
2. possibility of laying criminal charges be pursued.”

114. Others who were implicated in the Nexus report fell outside the municipality’s jurisdiction because they were not its employees.¹²⁵ Following the employee’s referral of the complaint for criminal investigations, a Captain Buthelezi from the South African Police Service had also reported to the council.¹²⁶

115. Manifestly therefore, in both his reply on 2 February 2009¹²⁷ and his memorandum dated 29 September 2009, the employee refused unequivocally to table the report before council, giving his reasons. As accounting officer under section 60 of the MFMA, he accepts responsibility for not tabling the report. If his decision constitutes misconduct then he is guilty. The troublesome question for the municipality is: is it misconduct?

116. The obvious and rational way for any reasonable employer to answer this question is firstly to debate the status of the report with the employee to determine the merit of his views.

117. Other than being “discomforted” by the discreet manner in which the employee dealt with the Nexus report, the Speaker offers no other evidence as to whether he or any other official constructively debated the status of the report with the employee. Nor does he make out any case in law in these proceedings for better disclosure of the report.

118. If the Speaker, in good faith, is unsure of the status of the Nexus

¹²⁴ Page 120 of the pleadings, Annexure EE to the Opposing Affidavit

¹²⁵ Page 155 of the pleadings, paragraph 25.5 of the Applicant’s Replying Affidavit

¹²⁶ Page 155 paragraph 25.4 of the Replying Affidavit

¹²⁷ Pages 114 to 116 to the pleadings Annexure BB to the Opposing Affidavit

report, then all he requires is legal opinion, not the investigation. Alternatively, because the Speaker contends that the council is entitled to the report, which the employee disputes, the municipality can have this dispute determined. The employee has already offered to submit to such a determination by an independent third party.¹²⁸

119. If the municipality is satisfied that the employee's refusal to table the report is misconduct, then it should have charged him long before they put him on special leave. No investigation on the Nexus report is necessary. The delay in charging the employee is as much an indicator of the council's ulterior motives as it is an independent ground of judicial review.¹²⁹

120. That is not the end of the municipality's woes in relation to the charges against the employee. To succeed in proving misconduct against the employee for not tabling the report, the municipality has to explain cogently why only the Speaker and none of the other councillors accepted the employee's invitation¹³⁰ to visit his office if they wanted full access to the Nexus report, and why his contention that tabling of the report before council would open the municipality to legal action is unfounded. The municipality has to say in what respect his reports to the council and to EXCO, and the steps he took to pursue criminal, civil and disciplinary actions were so deficient that they warrant investigation.

121. The municipality's woes also extend to the special leave investigation. It must motivate why the amount of money involved in the irregularity uncovered in the Nexus report, which the employee describes as "minute", would justify the expense of an investigation of such magnitude that provincial department authorisation and financial

¹²⁸ Page 116 of the pleadings

¹²⁹ Cora Hoexter *Administrative Law in South Africa* Juta 2007 276

¹³⁰ Paragraph 24.4 page 155 of the pleadings, paragraph 25.4 of the employee's Replying Affidavit

assistance is needed. It must explain why it rejected¹³¹ the employee's medical certificate to substantiate his absence from the 11 August 2009 meeting to discuss the R100m loan which he had requested on behalf of the Chief Financial Officer, who did attend the meeting.¹³²

122. The municipality's reaction to these challenges is central to determining its motives and establishing at least a moral high ground in acting against the employee. The employee questioned its motives in the Founding Affidavit. He therefore put the municipality on terms at the outset to tender some explanation to successfully disprove his claim that it had an ulterior motive. The municipality fails to offer *prima facie* explanations to these challenges.

123. Another aspect of the investigation into the Nexus report is whether the council was adequately consulted before the Nexus report was commissioned.¹³³ This question must now be academic because the municipality values the Nexus report and has acted on it. In so far as it remains an issue, the answer must be within the exclusive knowledge of the (ex)councillors and in council records. A costly investigation for which funds must be raised is not required.

124. The special leave investigation is unnecessary and therefore unreasonable.

125. The Acting City Manager's request for assistance from the provincial department and the Premier is so vague that neither can be expected to react rationally to it without better information. He does not expressly ask the provincial department for financial assistance;¹³⁴ he does not state what assistance the municipality needs;¹³⁵ he does not

¹³¹ Para 5-6 of the Respondent's Further Opposing Affidavit

¹³² Page 162 of the pleadings, para 26.12 of the Replying Affidavit

¹³³ Paragraph 6 of the terms of reference for the investigation

¹³⁴ The court is alerted in Para 10.2 of Respondent's Further Opposing Affidavit that the nature of the assistance it sought was for funding the municipality's special leave investigation because it was cash-strapped.

¹³⁵ Page 126 of the pleadings, annexure HH to the Respondent's Opposing Affidavit.

conceptualise how the investigation should be conducted, who should conduct the investigation, how long the investigation is likely to take and what the estimated costs of the investigation would be. These facts are the bare minimum that the provincial department and the Premier would require to enable them to exercise their discretion rationally and in the public interest.

126. The exchanges between the municipality and the provincial department following the request for assistance confirms that the on the information the municipality provided the Member of the Executive Council (MEC) had to seek “legal opinion on the adequacy of the request”. Furthermore, the MEC cannot make up her mind whether to conduct an investigation under section 106 of the MSA concerning non-performance and maladministration, or in terms of the KwaZulu-Natal Commissions Act No 3 of 1999.¹³⁶

127. This unreasonable and irrational request for assistance is also another cause of delay. The consequence of the municipality’s inability to diagnose problems and generate solutions, its attempt to deflect or divert decision making to the province and into an investigation, in short, to manage, is that the end to the special leave investigations is nowhere in sight. Delay in ending the special leave is as much an indicator of an ulterior motive as the delay in charging the employee.

128. The bases for finding that the special leave investigations are unreasonable and irrational also constitute bases for holding that the investigations are disproportionate. The terms of reference for the investigation are contrived in an effort to justify the municipality’s earlier resolution to put him on special leave, a consequence typical of putting the cart before the horse. The municipality has not demonstrated that the special leave investigation is suitable,

¹³⁶ Para 11-13 of Respondent’s Further Opposing Affidavit

necessary, less invasive and less costly than other procedures. Like the special leave itself, the investigation is disproportionate to the potential damage to the employee's reputation. It will also be disproportionate to the public interest as standard procedures can achieve the purpose of the investigations more efficiently.

129. Consequently, the municipality fails to discharge the burden of proving that the terms of reference for the special leave investigation are reasonable, relevant, rational and proportional.¹³⁷ In turn, these findings vitiate the reason for the special leave.

Findings

130. In summary, the court's findings are as follows:
- a. The special leave is unlawful because the employee's contract read with the legislation and policy on special leave do not allow the municipality to impose leave on him.
 - b. The employee did not agree to being put on special leave for a long time.
 - c. The municipality's stated purpose of the special leave, namely to conduct investigations, is not the true purpose.
 - d. Those responsible for the decision to put the employee on special leave have an ulterior motive for the following reasons:
 - i. The municipality decided to put the employee on special leave pending investigations before determining the reasons for such investigations.
 - ii. The municipality did not apply its mind to the special leave resolution.
 - iii. The interconnectedness between the special leave and the disciplinary proceedings evidences bad faith.

¹³⁷ JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 203

- iv. The special leave is unreasonable, irrational and disproportionately prejudicial to the employee and the public interest.
 - v. The special leave investigation is unreasonable, irrational and disproportionately prejudicial to the employee and to the public interest.
 - vi. The municipality delayed in ending the special leave and in charging the employee.
- e. The ulterior motive is to discipline and probably dismiss the employee.

131. The employee discharges his burden of proof and rebuts the municipality's claim that the special leave is lawful. The court need not enquire into other ulterior motives, such as whether the municipality wanted to undermine the employee and the Mayor or to employ no Whites or Indians.¹³⁸ These motives, if they exist, are better resolved through mediation.

132. The court makes no findings on the conduct of the employee. However, the findings cast serious doubt the municipality's motives for charging the employee. The illegality of the special leave contaminates the misconduct charges, if it otherwise has merit.

133. The court also does not make any pronouncements on how the provincial department should respond to the request for assistance or whether and how it should intervene in resolving the conflict at this municipality.

First Alternative Relief: Section 176(2) Municipal Finance Management Act 56 of 2003.

¹³⁸ Page 152 of the pleadings, paragraph 21 of the Applicant's Replying Affidavit

134. Those responsible for putting the employee on special leave and sustaining this litigation must be held accountable for their actions.¹³⁹

135. Having found that their conduct is both unlawful and tainted by an ulterior motive, the court turns to consider what remedy would be appropriate.¹⁴⁰ The ulterior motive is underpinned bad faith. Bad faith and unlawfulness are grounds that entitle a municipality to recover any loss or damage it suffers from political office bearers and officials.¹⁴¹

136. As the court has already found bad faith and unlawfulness, all that remains for the municipality to establish is the following:

- a. which councillors and officials were responsible for the decision;
 - b. whether the council mandated the Speaker to act as he has done, especially in defending these proceedings;
 - c. whether the Speaker has breached the Code of Conduct for Councillors,¹⁴² as alleged by the employee;¹⁴³
 - d. the extent of each person's responsibility for the special leave resolution;
 - e. the amount the municipality should recover from each person;
- and

¹³⁹ At this point the court adjourned after inviting the parties to discuss with them in chambers the order it intended to grant in view of its findings.

¹⁴⁰ The court had considered calling on those responsible for the decision to show cause why they should not be ordered to pay the costs of the application. However, both parties urged the court not to do so and referred it instead to section 176(2) Municipal Finance Management Act 56 of 2003.

¹⁴¹ 176 Liability of functionaries exercising powers and functions in terms of this Act

(1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.

(2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.

¹⁴² Schedule 1 of the Municipal Systems Act 32 of 2000

¹⁴³ Page 154 of the pleadings, paragraph 25.3 of the Applicant's Replying Affidavit

f. the reasons for electing not to recover from any person.

137. Even though those who voted to put the employee on special leave constitute a majority in the council and as such may be unenthusiastic about recovering losses from themselves, they are publicly accountable for the decisions they make in terms of section 176 of the MFMA. Furthermore, they could be in contempt of this order.

Second Alternative Relief: Investigation and report in terms of section 158(1)(d) of LRA

138. Granting or refusing an order declaring the special leave unlawful will not end the intense conflict amongst members of the council, amongst the administrative officials and between the council and the administrative officials or at least some of them. More importantly, it is unlikely to stop the wasteful expenditure of public funds in conducting investigations, discipline and possibly further litigation, including appeals. Most importantly, the municipality experienced a financial crisis even before the employee was put on special leave. That must have deepened over the six months that he has been off work. This conflict and the cost of this litigation must also impact adversely on service delivery.

139. It is the business of labour dispute resolution institutions such as the Labour Court and the CCMA to resolve conflict in employment substantively and, as far as possible, finally. To achieve this, the causes and nature of the conflict needs to be diagnosed, its impact on employment and consequently on the delivery of services have to be assessed. Finally, a lasting solution has to be developed, preferably by consensus.

140. Weighing these concerns, the court contemplated and consequently canvassed the parties about making an order in terms of section 158(1)(d) of the LRA requesting the CCMA to investigate and report

to it on certain matters. Although there is a bargaining council having jurisdiction over the local government industry, in terms of section 158(1)(d) the court has the power to request only the CCMA to conduct such an investigation to assist it and to submit a report to it.

141. Independently of and additional to this request, the CCMA has powers to resolve disputes through conciliation,¹⁴⁴ through arbitration¹⁴⁵ and in exceptional circumstances.¹⁴⁶ In attempting to resolve disputes the CCMA has powers to subpoena witnesses, to enter and inspect premises and documents, demand the production of documents and take statements.¹⁴⁷ It may also give advice and assistance.¹⁴⁸ First, the parties have to consent to the CCMA invoking these powers. Consequently, in requesting the investigation and report, the court urges the parties to use the CCMA's independence and extensive powers to resolve the conflict insofar as they pertain to employment, which includes service delivery.

Costs

142. The special leave has cost the municipality almost R420 000 plus the costs of this litigation, for which both parties have engaged attorneys and counsel. These are wasteful expenditures that were incurred as a result of the ill-considered special leave resolution of the council taken over 30 minutes.

143. Furthermore, the municipality had an opportunity to reconsider its position when, by letter dated 15 October 2009, the employee invited the Acting Municipal Manager to uplift the special leave. Even if the employee had consented to being placed on special leave in September, from the moment the municipality became aware that the

¹⁴⁴ Section 133 and 135 of the LRA

¹⁴⁵ Section 141 of the LRA

¹⁴⁶ Section 147 of the LRA

¹⁴⁷ Section 142 of the LRA

¹⁴⁸ Section 148 to 149 of the LRA

employee did not want to remain on special leave, the special leave ceased to be at the employee's instance and was therefore unlawful. Instead of retracting, the council dug its heels in deeper and resolved to investigate and later charge the employee.

144. The municipality must therefore pay the costs.

ORDER

PILLAY D, J The order I make is the following.

1. The decision of the respondent to place the employee on special leave was unlawful and is set aside.
2. The respondent is directed to accept the employee's tender of services forthwith.
3. The respondent is directed to pay the costs of this application.
4. The council of the respondent is directed to investigate and determine whether in terms of section 176 (2) Municipal Finance Management Act 56 of 2003 the costs ordered above should be recovered from any political office bearers and officials.
5. The Commission for Conciliation, Mediation and Arbitration (CCMA) is requested to investigate and report to the court on the following terms of reference:
 - (a) the cause and nature of the conflict within the respondent;
 - (b) the impact of the conflict on employment and consequently the delivery of services;
 - (c) if the CCMA is unable to resolve the conflict, it must report to the court and include recommendations on how to resolve the conflict;
 - (d) if the CCMA does not resolve the dispute, it must report to the court on the way forward in resolving disputes between the employee and the municipality;

- (e) any other matter within the discretion of the CCMA that will assist the court and the parties.
6. The order granted in paragraph 5 above is suspended subject to paragraph 7 below.
7. If the dispute is not settled substantively and finally by 29 March 2010, the legal representatives of the employee shall report to the court and serve on the senior convening commissioner of CCMA, KwaZulu Natal, a copy of this order and the judgment when it becomes available.¹⁴⁹

Pillay D, J

APPEARANCES

For Applicant Adv CA Nel
Instructed by Botha Inc.

For Respondent Adv TG Madonsela
Instructed by Strauss Daly Inc.

¹⁴⁹ The dispute was settled.