REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2106 / 2013

In the matter between:

SAMWU **First Applicant**

OBO MEMBERS **Second and Further Applicants**

and

THABA CHWEU LOCAL MUNICIPALITY **First Respondent**

THE MUNICIPAL MANAGER –

JOSEPH MISHACK MNISI **Second Respondent**

Heard: **15 October 2014**

Delivered: **11 February 2015**

Summary: Contempt of Court – non compliance with Court Order – principles of contempt stated and considered – conduct not mala fide – contempt of Court not shown – contempt application dismissed

Practice and procedure – service of Court Order – principles considered – proper service not shown

Rescission – application is rescind default order – principles stated and considered – rescission application granted

Condonation – condonation for late filing of rescission application – principles stated and considered – condonation application granted

Rescission and condonation – explanation provided considered – proper explanation for failure and default found to exist

Prospects of success – contention that agreement invalid or unlawful and thus can be ignored – principled stated and considered – agreement and conduct remains valid and binding until applied for to be set aside

Prospects of success – does not require final determination of the merits – case of applicant for rescission, if true, provides proper defence to compliance with agreement – if agreement invalid on grounds raised there exists proper defence – prospects of success shown

Practice and procedure – determination of rescission on grounds deemed fit – opportunity to file review application granted – enforcement stayed pending such review application

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter is unfortunately yet another illustration of the unacceptable state of employment relations in the public service, in particular at the level of local municipalities. I have come across several of these kinds of matters in my tenure at the Labour Court and more often than not, the reading provided by way of the pleadings is distressing. And true to form, this case is one of those. As an opening remark, it is unfortunate that this Court must time and time again become involved in trying to remedy the mess that comes out of dysfunctional municipalities. But, until there is competent management at senior level in municipalities and a relationship of mutual respect, co-operation and trust between employees and trade unions on the one hand and such municipalities on the other, I am afraid that the determination of these kind of needless applications will be the lot in life for many a Labour

Court Judge.

[2] Having said the above, I will now disembark my soap box and get to grips with this matter. It all started in October 2013 with an urgent application by the applicants to enforce agreements concluded at the first respondent and to stop the first respondent from advertising and filling certain positions, based on the contention by the applicants that there was a failure by the first respondent to comply with the individual applicants' contracts of employment, and unlawful interference by the first respondent with such contracts of employment. The applicants obtained an order on an unopposed basis, granting them the relief sought. What then followed was a contempt application by the applicants, a rescission application by the respondents, various supplementary affidavits and substitution applications and multiple Court appearances. But ultimately, and on 20 May 2014, the matter came before Shai AJ and the following order was made by agreement between the parties:

> '1. Joseph Mishack Mnisi is substituted as the Second Respondent in the contempt Application.
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> 2. The Contempt Application is postponed for argument to the 15 October 2014.
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> 3. The application in the rescission application is to serve and file replying papers on or before 27 May 2014.
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> 4. The parties will file heard of argument in the rescission application in terms of the practice manual.
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> 5. The rescission application is postponed for argument to the 15 October 2014.
>
> 6. Costs reserved for argument on the 15 October 2014.' (sic)

[3] Therefore, when this matter came before me on 15 October 2014, I was left to decide two applications; the first being the applicants' contempt application and the second being the respondents' rescission application. Fortunately, the background relating to the determination of both applications is the same and

I will, therefore, first set out what constitutes the common background facts in this matter.

Background facts

[4] The first applicant is the representative trade union in the first respondent and the individual applicants are its members. The first respondent is a municipality established under the Municipal Systems Act[1] ('the Systems Act').

[5] From the pleadings, it appears that there was a long standing dispute between the applicants and the first respondent about the proper placement of the individual applicants in the first respondent. At the heart of dispute is in essence the benchmarking of the individual applicants, in that they demanded to be placed in positions at the proper grading level, commensurate to the work that they are doing and of course be remunerated accordingly. Also from the pleadings, it appears that there were several instances of unprotected strike action by the individual applicants about this in the past, as well.

[6] At the end of 2012/beginning 2013, the first respondent's municipal manager was one Burton Shole Koma ('Koma'). It was common cause that on 5 December 2012, what was termed to be a 'Settlement Agreement' was concluded between the applicant and the first respondent, with Koma entering into the agreement on behalf of the first respondent (hereinafter referred to as 'the agreement'). The salient terms of the agreement were:

> '1. To finalize the placement of staff before the end of January 2013. The commencement date for this agreement is 1 December 2012.
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> 2. The employer party will provide cost implications of the staff movement as a result of the placement process.
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> 3. The employer party will in an absence of Job Evaluation of posts benchmark against a municipality of a similar size.
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> 4. The employer party is committed to ensure that all factors around the

[1] Local Government: Municipal Systems Act 32 of 2000.

placement process are handled with objectivity and in good faith.

5. The parties agree that all negative and positive factors, comparison with other municipalities as best practice will be taken into consideration.

6. Should the Employer party fail to honour this agreement the employee party will exercise its rights.

7. All placement letters will be issued on the 3rd of January 2013.' (sic)

[7] How this agreement actually came about is in dispute. The respondents contend that the issue of the placement of the individual applicants was serving before a placement committee in 2012, comprising all relevant stakeholders and it was the function of this committee to facilitate discussion with the view to achieve consensus on how the individual applicants should be placed in the first respondent. The idea was that the placement committee would prepare a report once its work was completed and this would be placed before the first respondent's council for deliberation and hopefully approval. According to the first respondent, when discussions deadlocked in this placement committee, the individual applicants embarked upon unprotected strike action on 5 December 2012 and simultaneously disconnected water and electricity supplies to communities. The first respondent contended that the individual applicants refused to cease their unlawful conduct unless their proposal before the placement committee was accepted and Koma, being left between a rock and a hard place, then entered into the agreement, on 5 December 2012, under coercion.

[8] On the other hand, the applicants contend that all that transpired in 2012 and leading up to the conclusion of the agreement on 5 December 2012 was wage negotiations. These wage negotiations were successfully concluded, leading to the agreement. The applicants say that Koma was never coerced to conclude the agreement.

[9] The aforesaid is, however, not the only issue relating to the agreement. A further controversy is whether Koma had the authority to conclude the agreement in the first place. According to the first respondent, Koma was

never authorised by the first respondent's Council to enter into the agreement, which was required, and as such he concluded the agreement without the requisite authority. This meant, according to the first respondent, that the agreement is invalid and unenforceable. According to the applicants, on the other hand, Koma was authorised to conclude the agreement in terms of the powers delegated to him by law and as such, the agreement is valid and binding. I will specifically deal with this issue later in this judgment.

[10] The individual applicants were indeed then issued with placement letters by Koma in terms of the agreement but only on 11 January 2013. In terms of these placement letters, the individual applicants were all appointed into new and higher level positions, with a commensurate increase in salary and benefits. It is clear that these increases in salary and benefits would place a substantial further financial burden on an already struggling municipality that was, as from the end of 2012, desperately seeking to reduce costs.

[11] It is common cause that Koma did not honour these appointments made pursuant to the settlement agreement and the placement letters. The first respondent contends that it was actually entitled not to honour the same, as the settlement agreement was unlawfully concluded and as such, the appointments were equally unlawfully made. This argument will be discussed further later.

[12] On 3 April 2013, the individual applicants again embarked on an unprotected strike to compel Koma to comply with the appointments made. On this occasion, Koma proceeded to issue an ultimatum, threatening dismissal of the individual applicants. The affidavits, unfortunately, do not say what the outcome of this ultimatum was and at what point did the individual applicants cease their strike action.

[13] The next event in the chronology is a referral of a dispute to the bargaining council by the applicants, citing the dispute as one of 'mutual interest'. The dispute was set down for conciliation on 15 May 2013 and in fact settled on that date on the basis that the first applicant unconditionally withdrew the dispute.

[14] In the interim, in April 2013, Koma was dismissed by the first respondent and Mr S D Maebela ('Maebela') was appointed as the acting municipal manager. According to the first respondent, one of the reasons for the dismissal of Koma was the unlawful conclusion of the December 2012 settlement agreement and consequent January 2013 appointments made by him.

[15] Following the appointment of Maebela, he was advised by the executive mayor of the first respondent that the council never approved the settlement agreement concluded by Koma, and the appointments made by him. Having been so advised, Maebela equally did not honour the agreement and appointments and proceeded to advertise all the vacant posts in the first respondent in terms of the first respondent's recruitment policy.

[16] The advertising of the positions by Maebela then sparked the urgent application by the applicants, brought on 3 October 2013 only against the first respondent, which was set down on 8 October 2013. It is common cause that, at the time, the application was never opposed by the first respondent. On 8 October 2013, Van Niekerk J, on an unopposed (default) basis, granted a final order in the following terms:

> '1. The failure by the respondent to act in terms of the individual applicants' contracts of employment, effective from the 1st of December 2012 is unlawful;
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> 2. The conduct of the respondent in interfering with the individual applicants' contracts of employment by advertising for and interviewing persons to fill some of the positions in which the individual applicants are incumbent and in failing and/or refusing to desist from such conduct in relation to the individual applicants is unlawful;
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> 3. The respondent is ordered to:
>
> 3.1 comply with the individual applicants' contracts employment;
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> 3.2 Make immediate payment of all monies owed to the individual applicants in terms of their contracts of employment, together with interest calculated at the prescribed rate of interest, less any lawful deductions;

3.3 Make immediate payment of the employer and employee contributions to the individual applicants' Pension and Medical Air funds and of the housing subsidy where relevant, retrospectively to the 1st of December 2012.

4. The respondent is interdicted and restrained from conducting itself unlawfully in interfering with the individual applicants' contract of employment by inter alia advertising and interviewing prospective employees for any of the positions in which the individual applicants are incumbent.' (sic)

[17] The order granted by Van Niekerk J on 8 October 2013 was properly served on the first respondent on 15 October 2013. It is undisputed that the order was not complied with when served on the first respondent. Despite the order not being complied with, it is clear that the first respondent must have sought legal assistance once the order was served on it. This is evident from the fact that on 12 November 2013, the first respondent's attorneys wrote to the applicants' attorneys and stated that they had been instructed to note either an appeal or rescission; and that they needed time to obtain the pleadings (which these attorneys did not have) so as to act on these instructions. On 14 November 2013, the applicants' attorneys answered that they would proceed with a contempt application and that no indulgence would be afforded. This contempt application was then brought on 19 November 2013 and set down for 6 December 2013. The contempt application cited Koma as the municipal manager and the second respondent, in his representative capacity.

[18] The contempt application was dealt with *ex parte* and on 6 December 2013, Cele J granted the following order:

'1. The second Respondent, the Municipal Manager of the first Respondent, Burton Shole Koma is to appear in the Labour Court on the 12 February 2014 to show cause why he should not be found guilty of contempt of court for failing to comply with the order of this court dated 08 October 2013.

2. The second Respondent is to explain its conduct by way of affidavit on the date of the hearing or before that date (although this will not excuse

them from being present in court).

3. The second Respondent is found is found guilty of contempt for failing to appear in court despite being properly served to provide and explanation to the satisfaction of the court.

4. The second Respondent is to be incarcerated for such period as the Court deems appropriate, or is to be fined in an amount the court deems appropriate, or other alternative relief.

5. The service of this order is be effected personally on the second Respondent, the first Respondent's Municipal manager, Burton Shole Koma.' (sic)

At the time when this order was granted, Koma had, however, long since been dismissed (in April 2013). As a result, this order was never personally served on Koma.

[19] It does not appear from the pleadings when this order of Cele J was served on the first respondent but it must have been, because on 11 February 2014, the day before the 12 February 2014 appearance date reflected in the order the first respondent's attorneys formally entered the fray. Firstly, an explanatory affidavit was filed to explain the conduct of the first respondent as directed by the order of Cele J which affidavit recorded that Koma was no longer employed by the first respondent and that the first respondent itself was simultaneously filing an application for the rescission of the order of Van Niekerk J granted on 8 October 2013. The first respondent then indeed also filed the rescission application on 11 February 2014.

[20] The matter then came before Basson J on 12 February 2014 and the following order was granted:

'1. The Second Respondent, Burton Shole Koma, is substituted with the Third Respondent, Nkathi Godfrey Nkosi, as a party in these proceedings.

2. The contempt application instituted against the Second Respondent, Burton Shole Koma, under the above case number is applicable to the

Third Respondent, Nkathi Godfrey Nkosi, as if he were a party to the proceedings from the commencement thereof and all steps validly taken prior to the delivery of this notice shall continue to be of full force and effect.

3. The order dated 6 December 2013 is extended to 16 April 2014.

4. The Applicant is ordered to re-serve the order of 6 December 2013 on the First and Second Respondents (as substituted in terms of this order).'

[21] On 11 April 2014, Nkosi, who was substituted for Koma as a second respondent by way of the order of Basson, J on 12 February 2014, filed his own explanatory affidavit. On 16 April 2014, the applicants' attorneys filed a replying affidavit to the respondents' explanatory affidavits in the contempt proceedings and an answering affidavit to the first respondent's rescission application, all in one affidavit.

[22] The matter then came before Molahlehi J, on 16 April 2014, who postponed it to 20 May 2014 to the opposed roll.

[23] A flurry of further affidavits followed. On 16 May 2014, the first respondent filed a replying affidavit to the applicants' answering affidavit in its rescission application. This prompted a supplementary affidavit by the applicants on 20 May 2014, followed by a supplementary replying affidavit by the first respondent filed on 4 June 2014. And in the interim, on 20 May 2014, the matter came before Shai AJ who made the order referred to above and all this then came before me for final determination, which I shall now proceed to do.

<u>The contempt application</u>

[24] Pursuant to the order of Shai AJ, I will firstly determine the contempt application of the applicants. Fortunately, it can be disposed of with relative ease. The simple truth is that for the reasons that follow, the respondents simply cannot be in contempt of Court.

[25] In deciding this issue, the actual principles relating to the determination of

contempt applications must first be established. An applicant in a contempt application has the onus to prove the existence of contempt and, in discharging this onus, the applicant must show this existence of contempt of Court beyond reasonable doubt.[2]

[26] The actual test to determine whether contempt indeed exists was dealt with in *Fakie NO v CCII Systems (Pty) Ltd*[3] where the Court said:

> 'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and *mala fide*. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements - that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

[27] Therefore, in terms of the ratio in *CCII Systems*, for this Court to be satisfied that a respondent, in a contempt application, is indeed in contempt of Court, the Court must be satisfied beyond reasonable doubt that: (1) there was a refusal to comply with the order; (2) this refusal was willful (deliberate); and (3) the deliberate refusal to comply must be mala fide, in other words there must be a complete absence of any kind of *bona fide* justification for the refusal to comply (even if this justification relied on is ultimately found to be objectively unreasonable or unsustainable). Crystalised down to its simplest terms, a

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[2] See *National Union of Metalworkers of SA and Another v Total Service Station and Others* (2002) 23 *ILJ* 1835 (LC) at para 18; *Building Industry Bargaining Council Cape of Good Hope (Boland Area) v Hatlin t/a the Homestyles Co* (2001) 22 *ILJ* 1143 (LC) at para 17; *Food and Allied Workers Union and Others v Scandia Delicatessen CC and Another* (2001) 22 *ILJ* 1781 (SCA) at para 40; *Ntombela v Herridge Hire and Haul CC and Another* (1999) 20 *ILJ* 901 (LC) at para 24; *SA Forestry Co Ltd v Africa Wood and Allied Workers Union and Others* (1999) 20 *ILJ* 1928 (LC) at para 14.

[3] 2006 (4) SA 326 (SCA) at para 22.

respondent is in contempt where the respondent knows and understands the terms of the order and what is required to be done to comply with the order but then without any cause or justification deliberately does not comply. This is what the Labour Court in fact held in *National Union of Mineworkers and Others v B K H Mining Services CC t/a Dancarl Diamond Mine and Others,*[4] where it was said:

> '…. What must be proved according to that standard is: (a) that an order of court was granted against the respondents, (b) that the respondents were aware of the order and its terms, (c) that the respondents were in fact in breach of the order and, if so, (d) that their failure to comply with the order was wilful.'

[28] The Court in *CCII Systems* added another dimension to the contempt enquiry, where the Court said:[5]

> '…. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt…'

Thus, in a contempt application, it is the respondent that must provide evidence to the Court that even though it did not comply with the order, the respondent's non compliance was not wilful and/or *mala fide*. It is, therefore, not just all up to the applicant to prove contempt.

[29] Where the person against whom the order was made is a corporate entity or statutory body, the applicant in a contempt application must show that the relevant proprietors, members, functionaries or directors had actual knowledge of the order, by way of the fact that the order was served on such person(s), compliance was demanded and that it was such person(s) now brought before Court that were then responsible for non compliance. In

[4] (1999) 20 *ILJ* 885 (LC) at para 4.
[5] Id at para 42.

Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another,[6] the Court said:

> 'A director of a company who, with knowledge of an order of Court against the Company, causes the Company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the Company to be in breach of the order of Court against the Company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order. ….'

The point is that despite the order not being made against the individual person that is the requisite functionary of the corporate entity against which the order was indeed made, that individual person can nonetheless be in contempt of Court in his or her capacity as such functionary, where it is shown that such person was responsible to ensure compliance by the corporate entity and caused such entity to disobey.

[30] The Court, in *Muthwa and Others v Allifa Spices,*[7] specifically dealt with the issue as to when orders have made been made against corporate entities, and said, with specific reference to contempt proceedings:[8]

> '…. then these proceedings must be brought with proper regard to the provisions of s 332 of the Criminal Procedure Act 51 of 1977.
>
> Those provisions appear frequently to be ignored in contempt proceedings brought in this court….'

The Court then proceeded to set out in details the provisions of section 332, with particular reference to subsection (2), which reads:

> 'In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question….'

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[6] 1978 (3) SA 202 (W) at 203C-E.
[7] (2006) 27 ILJ 2390 (LC).
[8] Id at paras 16–17.

The Court concluded that the person in his representative capacity must be joined to the proceedings in that capacity. I agree with the above reasoning.

[31] Accordingly, where a contempt application is brought in respect of an order made against a corporate entity or statutory body, it is important to cite the relevant functionaries of such entity or body that is responsible to ensure compliance with such an order, as a party to the contempt proceedings in the capacity of representative of the entity or body, and not personally.

[32] When the functionary of the corporate entity or statutory body is then actually cited in the contempt proceedings in the capacity as representative of such entity or body and where the original order has only been granted against the entity or body, there is another obstacle in the way of this cited functionary being able to be competently held to be in contempt of court in the event of non compliance with the order. In *Minister of Health and Another v Bruckner,*[9] the Court said:

> 'In the present case, the Department of Health was cited as the employer party in the arbitration proceedings and the arbitration award (which was made an order of the Labour Court) ordered that department to reinstate Ms Brückner. *No order was then made against the minister or the director-general*, as being the persons capable of bringing about the reinstatement of Ms Brückner, to do whatever was necessary to achieve that purpose. In my view, what Ms Brückner ought to have done was to have applied for a mandamus compelling the minister and/or the director-general to take the steps necessary to effect her reinstatement as Deputy-Director: Medicines Registration. Without first obtaining such a mandamus it was not, in my view, competent for Ms Brückner to seek an order for the committal of the minister and the director-general to gaol for contempt of court.'

Even accepting that the evidence shows that the cited functionary was at all times fully responsible to ensure compliance with the order by the entity or

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[9] (2007) 28 *ILJ* 612 (LAC) at para 46.

body against which it was made, it still does not take the issue of being in contempt any further. As the Court concluded in *Bruckner*:[10]

> 'Ms Brückner's counsel relied heavily on the fact that in the contempt proceedings in the court a quo the appellants were cited by name in the body of the founding affidavit and upon the admission by the appellants in the court a quo of para 26 of Ms Brückner's founding affidavit in which she alleged that: "The second and third respondents are the functionaries who are responsible to ensure compliance by the first respondent, with the court order.' What Ms Brückner's counsel's submissions overlook is the fact that the citing of the appellants by name first took place in the contempt proceedings. Furthermore, whilst the admission by the appellants that they are the functionaries who are responsible to ensure compliance by the department with the court order, would obviously have been relevant in an application brought against those parties for a mandamus, the admission alone could not have rendered the appellants guilty of contempt of an order which was not made against them personally.'

What the above simply means is that before an applicant, in a contempt application where an order was made against a corporate entity or statutory body only and then not complied with, starts down the road of the contempt proceedings, that applicant should first seek to identify the functionaries responsible to ensure compliance with that order, and first bring an application to compel such functionaries to take whatever steps are necessary and required to bring about compliance with the order. Only if, despite being so compelled, the order is still not complied with, then there should be no difficulty in holding the functionaries to be in contempt of Court.

[33] Therefore, in summary, for an applicant in an application for contempt of court to succeed in such an application, the Court must be satisfied of the following:

33.1 The order must have been granted against the person sought to be held in contempt;

[10] Id at para 48. See also *Ngobeni v CEO: Mpumalanga Parks Board* (2007) 28 *ILJ* 2290 (LC) at paras 11–12.

33.2 The order has been properly served on the person against whom it has been made;

33.3 The person must aware of the terms of the order and what must be done to comply with the order;

33.4 In the case of an order granted against a person that is a corporate entity or statutory body, the functionaries responsible to ensure compliance with the order must first have been compelled to take reasonable steps to ensure compliance with order by such entity or body and still there has been no compliance. Such functionaries must then also be cited as parties to the contempt application in the capacity as representative(s) of such entity or body;

33.5 The person against whom the order was made has refused to comply with the order;

33.6 The refusal to comply with the order must be wilful or deliberate; and

33.7 The refusal to comply with the order must be *mala fide*, meaning there must be a complete absence of any kind of *bona fide* justification for the refusal to comply.

[34] Applying the above principles to the facts *in casu*, the applicants fall short in several respects, in establishing the existence of contempt of Court, which respects I will now set out.

[35] The first problem that I have is with service of the order. Whilst I am satisfied that the order of 8 October 2013 was properly served on the first respondent, I am not satisfied that the order was served on a functionary responsible to ensure compliance with the order. It appears from the pleadings that the applicants were pursuing Koma to procure compliance with the order but Koma had left in April 2013, some six months before the order was granted. Finally, on 20 May 2014, when the current municipal manager Joseph Mnisi was substituted as the second respondent, there is no evidence that the order was actually served on him personally with a demand for compliance.

[36] Secondly, and more importantly, the order of 8 October 2013 was made against the first respondent only. With the first respondent being a statutory body in the public service, the applicants should have first brought proceedings against the responsible functionaries to take reasonable steps to ensure that the order be complied with by the first respondent. In fact, in the contempt application filed on 19 November 2013, the applicants seek an order committing Koma to prison when no order was ever made against him, he was never compelled to ensure compliance with the order by the municipality once the order was made, and finally, he was not even employed at the municipality when the contempt application landed. In my view, the facts of the matter *in casu* illustrate precisely why the prior proceedings compelling compliance are so important before just resorting to a contempt application seeking imprisonment of an individual person. Even though Mnisi, as the current municipal manager and proper functionary, has now been joined in the proceedings before me and is the person indeed responsible to ensure compliance, the application of the ratio in *Bruckner*[11] means that even this cannot assist the applicants and there is still no order against Mnisi and no attempt to compel him to take reasonable steps to ensure the first respondent complies with the order.

[37] Thirdly, whilst it is true that has been said in pleadings in no uncertain terms, on behalf of the first respondent, it would not comply with the order and with this meaning that there exists a refusal to comply which is willful. I am not satisfied that the refusal to comply was *mala fide*. This is not a case of the first respondent showing a deliberate and intentional violation of the Court's dignity, repute or authority as referred to in the judgment of *CCII Systems.*[12] The first respondent has also not sat idly by and let the applicants languish in frustration and unfulfillment whilst the first respondent procrastinates and does not even indicate why it does not comply and what it intends to do about the order. The first respondent (though its attorneys) have said even prior to the filing of the contempt application that it would seek rescission of the order. The first respondent then applied for rescission. For the purposes of avoiding

[11] *Bruckner supra.*
[12] *CCII Systems supra.*

being held in contempt, I must just be convinced that this rescission application is *bona fide* and considering all the issues raised therein. I accept this to be the case. Accordingly, at the point of the contempt application now coming before me for final determination, there actually exists a proper and *bona fide* rescission application in which the first respondent seeks rescission of the order granted on 8 October 2013, which was indeed granted on an unopposed basis. I conclude that the first respondent has discharged the evidentiary burden on it to show that its conduct is not *mala fide*, as it has brought a proper and *bona fide* rescission application.[13]

[38] In short, the applicants' contempt application falls to be dismissed for want of proper service of the order, for failing to first compel the proper functionaries to take reasonable steps to comply with the order and lastly, due to the fact that the first respondent's refusal to comply was not *mala fide*.

The rescission application

[39] Pursuant to the order of Shai AJ I have referred to above the first respondent's rescission application is also before me for consideration. It is now properly opposed by the applicants. There is also an issue with regard to condonation for the late filing of the rescission application. In the consideration of this rescission application, I will firstly start with the applicable legal principles in deciding such an application.

[40] In *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others*[14] it was said that 'It is so that not only judgments (or awards) granted by default can be rescinded….' *In casu*, that is indeed the case. The order by Van Niekerk J on 8 October 2013 was indeed granted on a default basis. Rescissions in the Labour Court are regulated by Rule 16A,[15] which provides that orders granted by default can be rescinded by the Court

[13] See also *National Union of Mineworkers and Others v H and S Oprigters GK and Another* (2010) 31 *ILJ* 2970 (LC) at paras 7–8.
[14] (2012) 33 *ILJ* 1154 (LC) at para 22.
[15] Rule 16A(1)(b) reads: 'The court may, in addition to any other powers it may have… on application of any party affected, rescind any order or judgment granted in the absence of that party.' Rule 16A(2)(b) then provides that: 'Any party desiring any relief under- …. subrule 1*(b)* may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.'

on good cause shown on terms the Court may deem fit.

[41] As to what is contemplated by 'good cause', the Court in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[16] explained the requirements of good cause thus:

> '…. The civil courts have always retained discretion to grant rescission of a judgment on good cause shown. In *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1024F Trengove AJA explained the position as follows:
>
> > "Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by *Kersteman (op cit sv* defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, I having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the court, *inter alia*, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default…"'

The Court concluded:[17]

> 'The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a prima facie defence. In *Northern Province Local Government Association v CCMA and Others* (2001) 22 *ILJ* 1173 (LC); [2001] 5 BLLR 539 (LC) at 545 para 16 it was stated:
>
> > "An applicant for the rescission of a default judgment must show good

[16] (2007) 28 *ILJ* 2246 (LAC) at para 28.
[17] Id at para 35.

> cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims."'

[42] Similarly and in *Superb Meat Supplies CC v Maritz,*[18] it was held as follows:

> 'The applicant must give a reasonable explanation of his default; his application must be made *bona fide*; he must show that he has a bona fide defence to the plaintiff's claim. This needs to be shown *prima facie* only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out facts which, if established at the trial, would constitute a good defence. The defence must have existed at the time of the judgment.
>
> In determining whether or not good cause has been shown, the court is given a wide and flexible discretion in terms of rule 31(3)(b). When dealing with words such as 'good cause' and 'sufficient cause' the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. The court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

[43] In short, and for me to decide that good cause indeed exists for rescission to be granted, I have to be satisfied that the first respondent has provided a reasonable explanation for not opposing the applicants' application of 3 October 2013. I further have to be satisfied that at least on a *prima facie* basis, the first respondent has a *bona fide* defense to the applicants' application, simply meaning that if this defense was shown to be true, it would defeat the applicants' application. And overall, I have to mindful of considerations of justice and fairness to both parties.

Condonation

[44] In terms of Rule 16A, a rescission applicant must bring the application within 15 days' of becoming aware of the order. The evidence shows that the order

[18] (2004) 25 *ILJ* 96 (LAC) at paras 21 and 22.

was served on the first respondent on 15 October 2013. This means that the first respondent's rescission application had to be served and filed by 5 November 2013. It was only filed on 11 February 2014 and is thus more than three months' late. Condonation is therefore required.

[45] Where it comes to deciding condonation application, the law in this regard is well settled and laid out clearly in the case of *Melane v Santam Insurance Co Ltd*[19] as follows*:*

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[46] The Court in *Academic and Professional Staff Association v Pretorius NO and Others*[20] said:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. …. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

I agree with this reasoning and will follow suit *in casu*.

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[19] 1962 (4) SA 531 (A) at 532C-E.
[20] (2008) 29 *ILJ* 318 (LC) at paras 17–18.

[47] As to how the explanation must be presented by an applicant in an application for condonation, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[21] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay….'

[48] Considering that I have determine this condonation application along and in conjunction with the rescission application, the following ratio in *Lumka and Associates v Maqubela*[22] provides some guidance where it was held:

> 'In the Labour Court applications for condonation in relation to breaches of that court's rules are governed by rule 12 of the Labour Court Rules which provides that the court may extend or abridge any period prescribed by the rules on application and on good cause shown. The rescission of the Labour Court's orders is regulated by s 165 of the Act and rule 16A. The latter rule also requires proof of good cause for rescission of an order granted in the absence of the applicant.
>
> The phrase 'good cause' is not defined in the Labour Court Rules. However, it is well-known that the phrase consists of two requirements, namely, a reasonable explanation for the delay in the case of condonation or a reasonable explanation for the default in the case of rescission and, on the merits, a *bona fide* defence which, *prima facie*, carries some prospect of success….'

The Court, in the end, endorsed the approach that because of this overlap in consideration requirements, it is competent to consider both these kind of applications together and in conjunction with one another. Once again, I shall follow suit *in casu*. In fact, and as will be addressed below, the actual same explanation applies in this case in respect of both the rescission and the

[21] (2010) 31 *ILJ* 1413 (LC) at para 13.
[22] (2004) 25 *ILJ* 2326 (LAC) at paras 21–22.

condonation applications and the issue of prospects of success is clearly the same. I will thus address both these issues under the headings of 'Explanation' and '*Bona Fide* Defence' in respect of both the condonation and the rescission applications.

[49] As to the remaining two condonation consideration requirements, being the length of the delay and prejudice, I do accept that a delay going on three months' is a protracted one and would mitigate against the granting of condonation. As a general principle, the longer the delay, the better the explanation must be. I, however, consider the intervening December holiday period in this count,[23] and based on what is left, conclude that the delay is not so lengthy to the extent of requiring what can be termed an excellent explanation. As to the issue of prejudice and considering the issues at stake, I believe this to be a neutral factor. The issues at stake have very important and significant consequences to both parties. I do not believe the applicants would be prejudiced more than the first respondent should condonation be granted. In my view, the success or failure of the first respondent's rescission (and accompanying condonation application) is entirely dependent on the issues of the explanation for the defaults and the bona fide defence. I will now proceed to deal with these two issues in turn.

The Explanation

[50] What is patently apparent from the explanation submitted by the first respondent is that administration and management at the first respondent is nothing else but a sorry state of affairs. The first respondent, in the founding affidavit in the rescission application, actually describes itself as 'dysfunctional'.

[51] In terms of the Systems Act, much of the day to day administration and management of a municipality such as the first respondent is tasked to the municipal manager.[24] The first respondent explained that for about a year preceding September 2013, there was no continuity in the tenure of municipal

[23] See *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1528 (LC) at para 3.
[24] See section 55 of the Systems Act.

managers and these managers often changed, leading to instability and maladministration. This case in itself illustrates the latter point; considering that in the course of 2013 to the date when this application was heard, there were four different municipal managers. Further to make matters even worse, Koma, the municipal manager responsible for all the events giving rise to this case, was dismissed in April 2013.

[52] The situation at the first respondent was such that the Provincial Government of Mpumalanga intervened in September 2013 and took over strategic control of the first respondent. The Provincial Department then seconded Mr T G Ratau as acting municipal manager on 30 September 2013.

[53] On 1 October 2013, at a special council meeting, the first respondent resolved to formally call for the assistance of the Provincial Government. Reasons given in the resolution for this call was the shortage of skilled personnel as well as serious financial difficulties experienced by the first respondent. The first respondent was unable to pay its major creditors and had cash flow problems. It was recorded that there was a 'magnitude' of outstanding work to be done in order to bring the first respondent to a state of recovery. There was also no corporate services manager in place. The resolution records that for a minimum of three months and a maximum of six months, 'much needed' support was necessary.

[54] On 25 October 2013, Nkosi replaced Ratau as acting municipal manager. Nkosi explained that he found the first respondent's legal department to be in disarray, that the department had a lack of qualified personnel, had failed to defend a number of court cases and/or instruct service providing attorneys.

[55] It is significant that the applicants' enforcement application, which was served on 3 October 2013 and set down on 8 October 2013, hit virtually in the middle of what can be described as this intervention and transitional period. It is quite reasonable to accept that during this time, very little was being properly managed, administered and even attended to in the first respondent. Nkosi explains that the application was indeed not opposed because of the dysfunctional state of affairs at the first respondent.

[56] Nkosi explained further that after he took over as acting municipal manager, he discovered that there were numerous default judgments against the first respondent. The order *in casu* was clearly one of these. Nkosi conceded that the order was served on the first respondent on 15 October 2013 but says that he only became aware of it on 6 November 2013 and then he instructed the first respondent's current attorneys of record. This explanation by Nkosi is substantiated by the letter from such attorneys to the applicants' attorneys on 12 November 2013, referred to above.

[57] It appears that the first respondent could not even brief its attorneys with the pleadings and the attorneys had to resort to the Court file to get the same. Since the first respondent's attorneys are situate in Johannesburg, such attorneys came to Lichtenburg to consult on 14 and 15 January 2014, in order to prepare Court papers. There were also difficulties experienced in this regard, in that there was no filing system in place and supporting documents could not be found. Ultimately, the attorneys were instructed to proceed without most supporting documents. It bears reiteration that Koma who personally dealt with almost everything giving rise to this matter had long since gone.

[58] In short, at the heart of the entire explanation of the first respondent is the dismal state of affairs of the first respondent which included frequent changes in management (municipal managers), shortage of skilled personnel and a complete lack of proper administration. All of this is compounded by a severe financial predicament and intervention by the Provincial Government. This all caused the first respondent to be incapacitated from attending to and defending this case as it should have done.

[59] Ms Edmonds, appearing for the applicants, argued that I should not accept this explanation offered by the first respondent. Ms Edmonds submitted that this kind of dysfunction existing at the first respondent is just not a proper explanation. According to Ms Edmonds, this Court has often rejected explanations by trade union using such unions' internal structural and administration failures as excuses, no doubt referring to the judgments of *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo*

Africa Ltd)[25] and *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society For The Aged,*[26] There is indeed some substance in this submission by Ms Edmonds. But I cannot ignore what is the reality of the situation *in casu*. I cannot think of one situation where a trade union has sought an indulgence because its affairs had deteriorated to such an extent of having no skilled personnel, being dysfunction and having frequently rotating management followed by the intervention by a higher authority. If that happened in the case of a trade union, then there would be no reason why this Court could not equally come to the union's assistance. I therefore do not agree, as Ms Edmonds contends, that the explanation is unacceptable *per se*. Such an explanation must always be considered based on the facts of every case and could serve to provide a proper explanation for default.

[60] I, accordingly, accept that in reality, the circumstances at the first respondent were such as to have rendered it incapacitated to properly attend to defending the applicants' claim. The first respondent was inundated with serious difficulties, spanning far wider than just this case but without the resources to remedy them. And added to this, the applicants' application could not have come at a worse time, being right in the middle of the Provincial Department's intervention and transition to a Provincial Department appointed municipal manager. In the answering affidavit to the rescission application, the applicants have not really taken issue with the substance of the explanation offered by the first respondent, other than to contend that the explanation is unacceptable *per se* (which I have already dealt with and rejected). I, therefore, do not believe the first respondent's failure is willful. I believe external circumstances dictated events and this is inconsistent with contended willful behaviour by the first respondent with regard to the current matter now before me. Overall, I am satisfied that the first respondent has offered a proper explanation for its failures in this case and is not in willful default. I thus accept the explanation on offer by the first respondent as being an acceptable explanation.

[25] (2011) 32 *ILJ* 2206 (LC) at paras 12, 20–21 and 25–26.
[26] (2011) 32 *ILJ* 1959 (LC) at paras 9 and 24.

Bona Fide Defense

[61] Turning to the substance of the first respondent's defense, I point out that this is where the majority of the argument in Court before me was focused on. It was never disputed that Koma has signed the agreement that the applicants sought to rely upon and issued the individual applicants with the appointment letters pursuant to such agreement. The first respondent, in a nutshell, had two answers to the agreement, both of which answers, according to the first respondent, led to the agreement being null and void. The first defense is that Koma was coerced into signing the agreement by way of misconduct by the individual applicants. The second defense is that Koma was never authorised to conclude the agreement in the first place rendering it invalid.

[62] As to the facts on which these contentions are based, I have set these out above. Suffice to say, it became clear during argument that this had nothing to do with the recruitment or appointment of employees, but was in essence an issue of so-called 'benchmarking', meaning that it was all about the placement of employees at the proper post levels, of course with commensurate benefits, relating to the actual work that these employees were doing.

[63] Added to the above facts is, however, the truth that the issue of the placement of employees never came before the council. It was never considered or debated in the council and in particular, never approved by the council. According to the first respondent and as referred to above, the individual applicants embarked upon unlawful strike action on 5 December 2012 and this included the complete disruption of all municipal services. Under pressure from the community and residents and being unable to convince the individual applicants to stop their unlawful conduct and give the Placement Committee a proper chance to complete its work, Koma felt compelled to conclude the agreement, which he then did.

[64] According to the applicants' answering affidavit to the rescission application, what had actually happened was that wage negotiations were held in 2012 and that the settlement agreement was entered into as a result thereof. This contention seems to fly in the face of Ms Edmond's submissions in Court that

it was all about benchmarking. But the applicants did not offer a detailed alternative version to the events, in the terms as set out above by the first respondent, giving rise to the conclusion of the agreement, other than a bald denial that Koma was ever pressurised to conclude the agreement.

[65] Considering then the issue about the authorisation of Koma to conclude the agreement, the first respondent contended that Koma did not have such authority. According to the first respondent, the agreement was concluded contrary to the provisions of the Council Promotion and Transfer Policy Resolution A51/2006 ('the Transfer Policy'). The first respondent submitted that in terms of section 55 of the Systems Act, all appointments made by the municipal manager (Koma at the time) were always subject to policy directions of the council and the Transfer Policy was such a direction. Accordingly, insofar as the case of the first respondent goes, the conclusion of the agreement by Koma in a manner that was inconsistent with the Transfer Policy meant that Koma exceeded his powers under section 55 of the Systems Act. In addition, on reply, the first respondent added that the placements of the individual applicants was contrary to the SALGBC Placement Policy, which was actually a collective agreement to which the applicants were bound, and thus equally invalid for this reason.

[66] The case of the first respondent as to the authority of Koma had a second leg as well. The first respondent further contended that the issue forming the subject matter of the agreement could in any event not be delegated and was an issue that had to first serve before the council and be approved by the council before any agreement could be concluded. In this matter the council never considered or resolved in favour of the conclusion of the agreement. Accordingly, what Koma did was unauthorised and thus invalid.

[67] Because, according to the first respondent, the conclusion of the agreement by Koma was therefore invalid and/or unlawful, the first respondent was entitled to 'resist' the agreement by refusing to comply with it, which is simply what it did.

[68] The applicants, in turn, had three answers to the lack of authority case of the

first respondent. The first contention was that the agreement remained valid and had to be complied with, even if its conclusion was unlawful, unless the first respondent took steps to have it set aside in the form of any appropriate legal proceedings. As far as the applicants were concerned, this was never done by the first respondent and as such, it was simply not competent for the first respondent to now seek to disavow the agreement and still remained compelled to comply. The second contention was that the conclusion of the agreement fell squarely within the delegated powers of Koma, which delegated powers were approved by council. The applicants provided a document containing the council approved delegated powers applicable in the first respondent in support of this contention. Finally, the applicants stated that there was no contravention of the Transfer Policy, which simply did not apply as the matter at hand had nothing to do with promotion.

[69] I will first deal with the applicants' contention that the first respondent should have sought to challenge the agreement by way of available legal avenues and could not just simply refuse to comply with it. No doubt, this contention of the applicant is based on the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[27] where the Court said:

> '…. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid

[27] 2004 (6) SA 222 (SCA) at para 26.

consequences for so long as the unlawful act is not set aside.'

This *ratio* in *Oudekraal Estates* has been consistently applied over the last decade,[28] and was equally applied by Molahlehi J in the Labour Court in *Taung Local Municipality v Mofokeng.*[29]

[70] Most recently, however, the Constitutional Court was specifically asked to reconsider the *Oudekraal Estates* principle in *MEC for Health, Eastern Cape and Another V Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute.*[30] The majority of the Court, by way of Cameron J, held as follows:[31]

> 'The argument mistakes the nature of the mandate the Constitution entrusts to public officials. This does not require them to act without erring. On the contrary, the Constitution anticipates imperfection, but makes it subject to the corrections and constraints of the law. The task of public officials is thus to act in accordance with the law and the Constitution, which includes being subject to correction when they err.
>
> By corollary, the department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration.'

The Court in *Kirland Investments* then made it clear what needs to be done about any such invalid action, and said the following,[32] with specific reference to PAJA:[33]

> '…. the statute's definition of 'decision' embraces 'any decision of an

28 See *Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA) at para 17; *Kouga Municipality v Bellingan and Others* 2012 (2) SA 95 (SCA)*; Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para *62; Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at para 14.
29 (2011) 32 ILJ 2259 (LC) at paras 27 – 30.
30 2014 (3) SA 481 (CC).
31 Id at paras 88 – 89.
32 Id at paras 94 – 96.
33 Promotion of Administrative Justice Act 3 of 2000.

> administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision'. That a decision 'required to be made' can be reviewed means that, under PAJA, a decision may exist if an administrator is required to decide but as a matter of fact has not decided.
>
> In addition, some of PAJA's grounds of review expressly target cases where an administrator has not considered a decision properly or at all. Thus, a decision affected by bias is administrative action that is liable to be set aside on review. So is action not authorised by the empowering provision, taken for a reason not authorised by the empowering provision, for an ulterior purpose or motive, or for irrelevant considerations or in disregard of relevant considerations…
>
> Pertinent to this case, PAJA provides that decisions taken because of the unauthorised or unwarranted dictates of another person or body constitute administrative action that is reviewable. If this court were to hold that a decision taken under dictation is not a decision at all, and has no effect even before it is set aside, then there would be no need for PAJA. This provision of PAJA exists precisely because a decision taken under dictation is nevertheless a decision, and must be reviewed and set aside just like any other unjust administrative action.'

The Court concluded as follows:[34]

> 'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality… For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.'

[71] The above principles of law are clearly a final and definitive answer to the first respondent's case that it was simply entitled to refuse to implement the provisions of the agreement because it considered the same invalid. This kind

[34] Id at para 103.

of conduct is clearly the same kind of 'self-help' that the Court in *Kirland Investments* is so critical of. It is equally clear from what the Court said in *Kirland Investments* that even where the conclusion of the agreement by Koma was unauthorised by council, in breach of policy provisions or outside the parameters of his powers permitted by statute or policy, the first respondent was simply not entitled to simply negate or disregard it. The conduct of Koma complained of by the first respondent would constitute conduct as contemplated by PAJA and as such, the first respondent is compelled to bring an application in terms of PAJA to have the agreement set aside if it considered such conduct to be invalid or unlawful. Until the first respondent does so, it remains by law obliged to comply with the agreement. This being the case, the first respondent simply cannot defend the applicants' application by seeking to make out a case, in an answering affidavit, that it need not comply with the agreement because it is invalid or unlawful. The first respondent's argument in this regard is entirely misplaced and without substance.

[72] But this does not mean the first respondent has no prospect of success when it comes to the issue of rescission and is now doomed to fail? For the reasons to follow, I do not think so. It is clear that the first respondent at all times laboured under the misapprehension that it was entitled to refuse to implement and comply with the agreement because Koma, when concluding it, acted unlawfully. And considering the situation at the first respondent during this time, especially considering the shortage of skilled personnel to provide proper guidance and lack of financial resources to seek it elsewhere, its views are understandable. As the fact remains that the first respondent must approach the Court to set aside the conduct of Koma and consequently the agreement on the basis of its causes of complaint, the question I must decide in this rescission application is simply whether the first respondent should now be afforded the opportunity to do so.

[73] What is clear from the evidence before me is that the first respondent is in a state of financial crisis. Documents presented to me show that as at November 2012, being around the time the agreement was concluded, one of

the primary objectives in the first respondent was drastic cost curtailment. In effect, the first respondent was no longer financially viable. A moratorium was placed on the appointment of new personnel and conclusion of new contracts, and measures were considered to reduce expenditure by 60%. It is against this backdrop that the agreement, which was concluded on 5 December 2012, must be considered. The agreement resulted, in simple terms, in substantial remuneration increases for 98 individual employees. This kind of situation is in my view impossible to reconcile with the cost reduction measures being pursued by the first respondent's council immediately (and actually simultaneously) preceding the conclusion of the agreement by Koma. On a *prima facie* basis, the conclusion of the agreement by Koma makes no financial sense of any kind considering the situation of the first respondent. Added to that, there is no indication that the impact and consequences of this agreement was ever placed before the council for consideration or approved by the council. In my view, based on what is before me, it would appear that the implementation of this agreement would be disastrous for the first respondent and the community it must provide services to. But I need not in these proceedings finally decide whether this is indeed the case. The point is that if this situation is ultimately found, in proper legal proceedings to follow, to be true, then the first respondent would have a proper foundation to ask the Court to set aside the conduct of Koma in concluding the agreement and with it, the agreement itself.

[74] In addition to the above, there is clearly a dispute between the parties as to the application of the policy provisions of the first respondent's council in this case. It was undisputed that the powers of Koma were always subject to the policy regulations by the first respondent's council and to this effect both parties relied on the same delegation of powers document as approved by the first respondent's council in support of their respective cases. I have considered this document and cannot find any provision specifically empowering Koma as municipal manager to make a placement of all the individual applicants, *en masse*, to new and higher post levels with added remuneration as a result. The applicants have submitted that the delegated power provisions in this document in terms of which the municipal manager

had the power to (1) determine the remuneration, benefits or other conditions of service of employees appointed on a contract basis; (2) sign any contract or documents on behalf of the council; (3) second personnel from one post to another; and (4) confirm staff appointments, would empower Koma to have concluded the agreement *in casu*. The first respondent argued that none of these listed delegated powers referred to by the applicants found application in this case and that an approval by the first respondent's council was always required for such an agreement to be concluded, which approval never happened. In *Manana v King Sabata Dalindyebo Municipality,*[35] the Court said (referring to the Systems Act):

> 'In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority - which includes the authority to appoint staff - in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.'

Again, I do not have to finally decide this issue as to whether council approval was still required or there was proper complete delegation to Koma, which was actually not fully dealt with in evidence on the papers. Suffice it to say, if the first respondent's contentions are true and correct, it would have a proper case to challenge the conclusion of the agreement by Koma when asking the Court to set it aside.

[75] In *Khumalo and Another V MEC for Education, Kwazulu-Natal,*[36] the Court referred to section 195[37] of the Constitution and said:

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[35] (2011) 32 *ILJ* 581 (SCA) at para 17.
[36] 2014 (5) SA 579 (CC) at paras 35 – 37.
[37] The relevant part of the section reads: '(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: *(a)* A high standard of professional ethics must be promoted and maintained; *(b)* Efficient, economic and effective use of resources must be promoted; *(c)* Public administration must be development-oriented; *(d)* Services must be provided impartially, fairly, equitably and without bias; *(e)* People's needs must

'Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues… Read in the light of the founding value of the rule of law in s 1*(c)* of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.

Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of s 7(2) of the Constitution, to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.

In the context of public-sector employment, this is fortified by s 5(7)*(a)* of the PSA which provides:

> "A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission."

Section 5(7)*(a)* undoubtedly includes the possibility of a functionary seeking recourse in the courts.'

Based on the above reasoning, the Court concluded:[38]

'In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia, by seeking the redress of their departments' unlawful

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be responded to, and the public must be encouraged to participate in policy-making; *(f)* Public administration must be accountable…'

[38] Id at para 45.

> decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.' (emphasis added)

[78] In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC,*[39] the Court considered section 217 of the Constitution, and held:

> '… it is necessary to recall that s 217(1) of the Constitution, couched in peremptory terms, provides inter alia that an organ of State in the local sphere (such as a municipality) which contracts for goods and services 'must do so in accordance with a system which is fair, equitable, competitive and cost-effective' (my emphasis). This constitutional imperative is echoed in both the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 (the Financial Management Act) ….'

The Court concluded:[40]

> '… This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: see *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) ([2003] 3 All SA 21) at para 10. Consequently, in *Rajah and Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407D - E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in *Transair (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H - 793G this court held that an administrative body, which held wide powers of supervision over air services to be exercised in the public interest, had the necessary *locus standi* to ask a court to set aside a licence it had irregularly issued. Finally, in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*, *supra*, Schutz JA concluded in giving the unanimous judgment of this court that 'the province [the appellant] was under a duty not to submit

[39] 2010 (1) SA 356 (SCA) at para 11
[40] Id at para 23. See also *Groenewald No and Others v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA) at para 3.

> itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement.'

[79] In my view, what the above shows is that there is in general terms fact a duty on the first respondent to challenge the agreement and not just leave matters be. Considering the issues raised, there exists a Constitutional obligation on the first respondent and its functionaries to challenge the agreement. If it is true what the first respondent says about the agreement being concluded as a result of coercion and/or the conclusion of the agreement being unauthorised or unlawful, then these are issues that are flowing from the Constitutional imperatives referred to above must be properly considered and determined by this Court. And this being the case, the first respondent must be allowed the opportunity to properly place this before this Court. As was said in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home:*[41]

> 'It is clearly in the interests of justice that this kind of case be heard, particularly when appellants are able to support their submissions regarding the prospects of success with a statement of respondent's policy given on affidavit…'

[80] Insofar as it may be suggested that considering the general nature of delegation of authority to the municipal manager[42] where it comes to the running of the affairs of the first respondent, this has the effect that the first respondent would be estopped from suggesting that Koma had no authority and was acting unlawfully, the simple answer is what the Court said in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd,*[43] where it was held:

> '… failure by a statutory body to comply with provisions which the legislature has prescribed for the *validity* of a specified transaction cannot be remedied

[41] (2004) 25 *ILJ* 2195 (LAC) at para 25.
[42] See for example *SA Municipal Workers Union and Others v Kannaland Municipality* (2010) 31 *ILJ* 1819 (LAC) at para 56 where it was said: '…. the Structures Act and Systems Act assign a hands-on administrative role to the municipal manager. It is evident from the above quoted sections that a municipal manager is empowered to appoint, manage, effectively utilize and train staff; maintain discipline; promote sound labour relations; to account for all income and expenditure of the municipality….'
[43] 2008 (3) SA 1 (SCA) at para 13

> by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires….'

The Court concluded:[44]

> '…. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (*Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H - 412B), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality (*Hoisain v Town Clerk, Wynberg* 1916 AD 236).'

Estoppel thus cannot operate *in casu*, as it would give legality to something that may well be unlawful and to the detriment of the very community the first respondent must serve. This would simply not be in the public interest.

[81] I wish to make a final comment about the issue whether the placement of the individual applicants in terms of the agreement would constitute a promotion. The first respondent suggested that this was the indeed the case, whilst the applicants said it had nothing to do with promotion but was just about benchmarking conditions of employment. In my view, the agreement indeed has nothing to do with promotion and in this respect, the submissions by the applicants has substance. But even if the policies relating to promotion do not apply; this does not mean the agreement is lawful and valid. I have recently had the opportunity to consider the issue of the nature of such kind of 'placements' relating to position benchmarking, in the judgment of *Newcastle Local Municipality v SAMWU and Others.*[45] As I held in that judgment, salaries and conditions of employment in the case of all municipalities can only be collectively bargained at a central level in the Public Sector bargaining council because of the existence of a collective agreement stipulating bargaining levels applicable to all municipalities and with the first applicant *in casu* equally being a party to such collective agreement.[46] Considering the applicants' own contention in the answering affidavit to the rescission application that the agreement and the consequent 'placements' of individual

[44] Id at para 16
[45] Unreported case number (D 448/2014) [2014] ZALCD 36 (12 August 2014).
[46] See *Newcastle Local Municipality*, *supra*, at paras 38 and 42.

applicants was arrived at following a wage negotiation, the conclusion of this agreement may well fall foul of this collective agreement and thus be unlawful. I concluded as follows in *Newcastle Local Municipality*:[47]

> '…. The fact is that if this kind of conduct is permitted, chaos will reign in the sector, as the first respondent would be entitled to move from municipality to municipality, depending on its influence, and demand that employees simply be moved to higher post levels and so procure further increases for them whilst they are still doing exactly the same work, against the treat of protected strike action if the respective municipalities do not comply. All of this will take place whilst the first respondent still enjoys the overall protection and guarantees provided by the sector (national) collective agreement. This surely would be entirely incompatible with orderly and prescribed centralised bargaining at a sectoral level ….
>
> …. By determining wages and salaries by collective bargaining at a national level only, the situation of different municipalities paying different salaries for the same work is eliminated. Parity is ensured. The situation of public service employees moving from municipality to municipality simply in pursuit of better wages for the same work is mitigated. In fact, the events *in casu* illustrate the difficulty caused by allowing workplace bargaining, which the SALGA representative sought to explain in the meeting. To illustrate – if the first respondent is allowed to collectively bargain at workplace level in the applicant for a change in post level of employees in general, a general worker in the applicant could for example be at post level 9 whilst all other general workers in all other municipalities are at post level 12. This is precisely what is sought to be avoided by the dispensation agreed to by all the parties in the public sector and completely undermines consistency and parity in the sector.'

Again, I make no definitive finding whether the above situation is indeed the case *in casu*. But on a *prima facie* basis, it does seem to be so, and if it is indeed so, it would be a proper ground to set aside the agreement concluded by Koma.

[82] For all the reasons as set out above, I conclude that the first respondent has shown that it has a proper case to present in seeking to set aside the

[47] Id at paras 47–48

agreement signed by Koma on 5 December 2012 and as a result, not comply with it. It has, in simple terms, a *bona fide* defense against having to comply with the agreement. Considering the fact that the first respondent, however, needs to institute the requisite legal proceedings to launch a proper challenge to the validity and lawfulness of the agreement, it is my view that it should be afforded the opportunity to do this.

[83] In the circumstances, I am of the view that the first respondent has made out a proper case for the granting of its rescission application and with it, the granting of condonation for the late filing of its rescission application. The first respondent has provided an acceptable explanation for its default and has illustrated the existence of the requisite prospects of success (*bona fide* defense)

Conclusion

[84] I thus conclude that based on the reasons as set out above, the applicants' contempt application falls to be dismissed and the first respondent's rescission application must be granted. This being the case and considering the fact that I am entitled to determine the rescission application on such terms as I deem fit, I also now intend to direct how these proceedings and further proceedings, considering the important nature of the issues at stake in this matter, must be conducted going forward.

[85] As stated above, the first respondent, if it wants to rely on a case that the agreement of 5 December 2012 was concluded unlawfully or invalidly, must bring an application in terms of PAJA to set aside the conduct of Koma in concluding the agreement and consequently also setting aside the agreement itself. I intend to afford the first respondent a period of six weeks to bring such application. And pending the determination of this application under PAJA, the applicants' enforcement application filed on 3 October 2013 must be stayed. Should the first respondent fail to institute the application as directed in judgment, the applicants shall then be entitled to re-enroll their enforcement application for hearing forthwith. I shall make an order to give effect to this.

Costs

[86] This then only leaves the issue of costs. It is true that the applicants' contempt application was unsuccessful and the first respondent's rescission application was successful. But then the first respondent in the first place did seek an indulgence. Also as I have said, the first respondent actually laboured under a misapprehension in thinking it could just refuse to comply with the agreement. Furthermore, there is still much litigation to come in this case and certainly, the parties have an ongoing relationship with one another. I simply do not intend to cause further difficulties by mulching either party with a costs order in this case. I have a wide discretion when it comes to the issue of costs and I consider that overall, fairness dictates that no order as to costs be made.

Order

[87] In the premises, I make the following order:

1. The applicants' contempt of Court application is dismissed.

2. The first respondent's condonation application for the late filing of its rescission application is granted and the late filing of its rescission application is hereby condoned.

3. The first respondent's rescission application is granted and the order granted by Van Niekerk J on 8 October 2013 is hereby rescinded and set aside.

4. The first respondent is directed, should it intend to rely on any invalidity or unlawfulness of the agreement concluded on 5 December 2012 as a basis not to comply with such agreement, to file an application as contemplated by PAJA to set aside the agreement, which application must be brought within six weeks' of the date of the handing down of this order.

5. Provided the first respondent files an application as directed in this order, the applicants' enforcement application is stayed pending the final determination of this application.

6. Should the first respondent fail to file an application within the time

period as directed in this order, the applicants shall be entitled to immediately upon expiry to the time period in terms of this order apply to the registrar to set their enforcement application down for hearing.

7. There is no order as to costs.

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Snyman, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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For the Respondents: Advocate H W Sibuyi

Instructed by: Phungo Inc Attorneys