THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2910 / 16

In the matter between:

MOLEMO KGODISANG LAWSON MOHLOMI **Applicant**

and

VENTERSDORP / TLOKWE MUNICIPALITY **First Respondent**

MEC FOR LOCAL GOVERNMENT AND HUMAN

SETTLEMENT: NORTH WEST PROVINCE **Second Respondent**

Heard: **4 May 2017**

Delivered: **14 November 2017**

Summary: Review application – review application based on principle of legality – considerations applicable to legality review – principles considered

Dismissal – Meaning of dismissal – Employer bringing employment contract to an end by way of resolution – Constitutes dismissal

Dismissal – Allegation of invalid appointment – Act of employer seeking to terminate employment contract as a result constituting dismissal

Nature of dispute – termination of employment contract of employee by way of resolution of municipal council – constitutes a dismissal as contemplated by the LRA – dispute should be dealt with by bargaining council under normal dispute resolution processes under Chapter VIII of the LRA – review not appropriate

Extraordinary circumstances – principles considered – no extraordinary circumstances shown to justify departure from normal dispute resolution processes – alternative remedy available

Review application – counter application by employer – material delay without explanation – employer non-suited as a result

Section 56 of the Municipal Systems Act – principles considered – employer has option to remedy non compliance by way of terminating employment contract or litigating – employer choosing termination route – bound by such choice

Section 56 of the Municipal Systems Act – does not entitle employer to simply terminate contract – must apply LRA and follow fair process in bringing about termination

Review application – no justification for consideration of review application – no case made out in counter application – both applications dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The matter started out life as an urgent application brought by the applicant on 15 December 2016. The application came about as a result of the termination of the applicant's employment contract by the first respondent, by way of a resolution adopted by the first respondent's council. The application was brought in two parts. In the first part of the application ('Part A'), the applicant

sought interim relief, pending the final determination of the second part of the application (Part B). In Part B of the application, the applicant applied to review and set aside the termination of his employment contract by way of the resolution referred to above. This review part of the applicant's application was brought in terms of Section 158(1)(h) of the Labour Relations Act[1] ('the LRA').

[2] The urgent application came before Lallie J on 20 December 2016, where the parties agreed to a consent order. The very purpose of this consent order was to afford the applicant interim relief pending the final determination of the review application. In terms of this consent order, the decision to terminate the applicant's services was suspended, with his salary and benefits to be paid in the interim, until the review application was decided. The interim order also made provision for the discovery of the record to be used in the review application, the filing of further affidavits by the parties, and the filing of heads of argument. The review application was set down for hearing on 2 March 2017.

[3] On 2 March 2017, the application came before Van Niekerk J. By agreement between the parties, the application was not decided, but postponed to 4 May 2017. Van Niekerk J granted a consent order, in which provision was made for the filing of supplementary affidavits and heads of argument. In terms of this order by Van Niekerk J, the applicant's review application then came before me for determination on 4 May 2017.

[4] However, and on 14 March 2017, the first respondent then filed a counter application. In terms of this counter application, the first respondent sought an order that the resolution of the Tlokwe City Council (the predecessor in title to the current first respondent) of 13 December 2013 to appoint the applicant into the position of manager: housing and planning, be reviewed and set aside on the basis that this was unlawful. Needless to say, this application was opposed by the applicant. This counter application also came before me on 4 May 2017.

[5] I will decide this matter by first summarizing the relevant background facts which gave rise to both these resolutions, being the one to appoint the

[1] Act 66 of 1995.

applicant, and then the one to terminate the applicant's services. As these are motion proceedings, and insofar as there exists a factual dispute between the parties, I shall resolve such dispute based on the principle as enunciated in *Plascon Evans Paints v Van Riebeeck Paints*[2].

The relevant facts

[6] The applicant was appointed by the Tlokwe City Council in November 2007 as its manager: housing and planning. The appointment was on a five year fixed term contract, terminating end of October 2012.

[7] In 2012, the Tlokwe City Council then advertised the position of manager: housing and planning ('the position') which needed to be filled upon the expiry of the applicant's fixed term contract. In terms of the advertisement, one of the qualifying criteria to be considered for the position was an appropriate bachelors' degree or equivalent qualification, and other equivalent tertiary qualification coupled with relevant skills.

[8] The applicant again applied for this position on 30 August 2012, along with a number of other incumbents. The applicant was amongst those incumbents that were shortlisted, and interviewed for the position.

[9] Following the interviews, the interview panel submitted its recommendations for appointment in a report dated 19 November 2012. The first preferred candidate for appointment in terms of these recommendations was Mr M Ralukake, and second preferred candidate was Mr M Musetha. The applicant was not recommended for appointment.

[2] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38. These principles were summarized in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19 aptly as follows: '…where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[10] On 29 January 2013, the Tlokwe City Council then resolved that Mr Ralukake be appointed in the position, and should he decline to be so appointed, Mr Musetha be appointed. Subsequently, both these candidates declined the position, and on 13 April 2013, the Tlokwe City Council resolved that all the other candidates not recommended for appointment be re-interviewed again. This would include the applicant.

[11] The Tlokwe City Council then did an about turn on the resolution of 13 April 2013 with regard to the re-interviewing of all candidates. Instead, it was resolved on 2 July 2013 that the scoring sheets from the original interviews will be used to make a recommendation for appointment in the position. The applicant was then recommended for appointment on this basis. It may be mentioned that the applicant had the second highest score in the interviews, even more than Mr Musetha.

[12] On 13 December 2013, the Tlokwe City Council then resolved that the applicant be appointed in the position, with effect from 13 December 2013, and on a fixed term contract of five years. On 20 December 2013, the applicant was then issued with an appointment letter. The applicant accepted the appointment, and commenced service in the position.

[13] The position of manager: housing and planning is a position as contemplated by Section 56 of the Municipal Systems Act ('the Systems Act')[3]. As such, the appointment of the applicant required the conclusion of a written contract of employment in line with the provisions of such Act, which contract was then concluded between the applicant and the Tlokwe City Council on 16 January 2014. In terms of this employment contract, it was also stipulated that the applicant's appointment to the position was for a period of five years, commencing 13 December 2013. The employment contract also provides, in clause 10 thereof, for the termination of the agreement. This includes, in clause 10.3.1, termination at the instance of the Tlokwe City Council with immediate effect, for any reason recognized by law as sufficient. Clause 10.2 provides that:[4]

[3] Act 32 of 2000 (as amended).
[4] The applicant has also referred to Regulation 17 of the Local Government: Municipal Performance Regulation for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006, which similarly provide.

> 'The Employer will be entitled to summarily terminate the Employee employment contract after substantiation and on any sufficient reason recognised by law … ' (sic)

[14] In the course of 2014, a former councillor of the Tlokwe City Council, one Mr J Johnson, lodged a complaint with the Municipal Manager of the Tlokwe City Council about the appointment of the applicant to the position. It was contended that the applicant did not possess the requisite prescribed qualifications for the position. Mr Johnson elevated these complaints to the second respondent (hereinafter referred to as 'the MEC''), and to the national Minister of Corporate Governance and Traditional Affairs. On 10 December 2014, the Tlokwe City Council then provided the MEC and the Minister with all the information relating to the applicant's appointment.

[15] Having considered all the information, and on 29 June 2015, the MEC sent a letter to the Executive Mayor of the Tlokwe City Council. In this letter, the MEC recorded that the appointment of the applicant appeared to be irregular, because he was not on the recommended list of appointees emanating from the original interview panel, and there was non-compliance with circular 19. The MEC stated that the appointment was thus not endorsed in terms of the Systems Act, and requested that the Executive Mayor to immediately take necessary remedial action, so as to ensure compliance with the Systems Act. But on the evidence, it seems nothing further was done until much later.

[16] The Tlokwe City Council was then disestablished by virtue of a notice published in terms of Section 12 of the Local Government: Municipal Structures Act[5], dated 22 June 2016. This was part and parcel of a restructuring that saw the amalgamation of the Tlokwe and the Ventersdorp Municipalities, into one Municipality called NW405 (Ventersdorp / Tlokwe Local Municipality), the current first respondent. In terms of clause 7(1)(b) of this notice, all the employees of the former two municipalities were transferred to the newly established first respondent, on their same terms and conditions of employment.

[5] Act 117 of 1998.

[17] The MEC issued a notice on 1 August 2016, pursuant to the Section 12 notice referred to above, recording that the amalgamation would take effect on 3 August 2016, and that with effect from that date, the Tlokwe and the Ventersdorp Municipal Councils would cease to exist. The MEC, in terms of this notice of 1 August 2016, then appointed a number of individuals into management positions in the newly established first respondent, in acting capacities, until such time as the new Municipal Council was constituted. In terms of this notice, the applicant would assume the position of acting director: housing and planning. This appointment was confirmed by the first respondent's executive mayor on 4 August 2016.

[18] Only after the establishment of the Council of the first respondent, and thus more than a year later, the issue as raised by the letter of the MEC of 29 June 2015 then served before the Council. In a meeting of the Council on 25 August 2016, it was resolved that legal opinion would be sought with regard to the validity of the applicant's appointment, and if the appointment was considered to be illegal, what could competently be done about it.

[19] Following the obtaining of legal opinion, the matter served before the first respondent's council again. On 6 December 2016, a resolution was adopted that the applicant's contract of employment be terminated with immediate effect, which was according to it in line with the directive of the MEC of 29 June 2015. On 7 December 2016, the first respondent was then issued with a notice of termination of his contract with immediate effect, and with it the termination of his services with the first respondent as from 6 December 2016.

[20] It is this termination of the contract between the applicant and the first respondent, and the consequent termination of the applicant's employment with the first respondent that has given rise to the matter now before me. Crystalized down to its pure form, the simple reason for the termination of the applicant's contract by and employment with the first respondent, was because the first respondent considered the applicant's appointment into the position on 13 December 2013 to be in contravention of the Systems Act, as a result of the applicant not having the requisite qualifications for the position when so appointed.

[21] As stated above, there are now two review applications before me, both premised on the same factual matrix, but each applying to a different resolution of the first respondent (and its predecessor the Tlokwe City Council). On the one hand, the applicant attacks the resolution of 6 December 2016. And on the other hand, the first respondent attacks the resolution of 13 December 2013. I will refer in this judgment, for the sake of convenience, to these two resolutions as the '2013 resolution' and the '2016 resolution'.

[22] In will now turn to deciding these review applications before me, by first setting out the legal principles applicable to deciding review applications such as these.

Review principles

[23] Section 158(1)(h) provides as follows:

> 'The Labour Court may- … review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

[24] The applicant has specifically relied on Section 158(1)(h) in his founding affidavit. Although it is not pertinently so stated in the first respondent's counter application, it is clear in my mind that the first respondent relies on this provision as well. Section 158(1)(h) indeed contemplates a review application. The applicable basis of a review application in terms of Section 158(1)(h) has been described in *Hendricks v Overstrand Municipality and Another*[6], as follows:

> 'In sum therefore, the Labour Court has the power under s 158(1)*(h)* to review the decision … on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'.

[6] (2015) 36 ILJ 163 (LAC) at para 20.

[25] Following on, the Court in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[7] said:

> 'The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds 'permissible in law'. Permissible grounds in law would include the constitutional grounds of legality and rationality and, if they constitute 'administrative action', on the grounds that are stipulated in PAJA …'

[26] Neither the applicant nor the first respondent have relied on PAJA[8] to establish any of their grounds of review in this case, and accordingly, I shall have no further regard to the provisions of that statute. Both the applicant and the first respondent have squarely founded their respective review applications on the principle of legality, which, as set out above, is indeed contemplated as a proper basis for a review application under Section 158(1)(h) of the LRA. Dealing specifically with the concept of 'legality', the Court in *Hendricks*[9] said:

> '…. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.'

[27] The Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[10] also specifically dealt with the meaning of 'legality', in the context of a review application under Section 158(1)(h) of the LRA, and held:

> '… The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. …'

[7] (2016) 37 ILJ 1857 (LAC) at para 38.
[8] Promotion of Administrative Justice Act 3 of 2000.
[9] (*supra*) at para 28.
[10] (2014) 35 ILJ 613 (CC) at para 28.

[28] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*[11] the Court held that the principle of legality had developed over the past decade, to the extent that a parallel system of review for actions which falls outside of the strict definition of administrative action, had developed. Having so held, the Court then proceeded to set out this development as follows:[12]

> '… Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:
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> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

The Court in *Weder*[13] then proceeded to consider this component of rationality as part of the legality enquiry, and held:

> 'In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:
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> 'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact

[11] (2014) 35 ILJ 2131 (LAC) at para 33.
[12] Id at para 34.
[13] Id at para 35.

on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.''

[29] In summary therefore, where a litigating party seeks to challenge a decision in the context of the public service employment environment, on the basis of a review application under Section 158(1)(h) of the LRA, founded on the constitutional principle of legality, the party seeking to review such a decision must show that the decision failed to meet the following essential requirements:

29.1 The decision was rationally connected to the purpose for which the power was given to it, thus meaning that the decision would not be considered to be arbitrary;

29.2 The decision accounted for all the relevant facts informing the decision, to the extent that the decision made can be said to be rational;

29.3 The process giving rise to the decision was lawful and fair; and

29.4 The decision itself was lawful, meaning that it is not a decision that falls outside the scope of the power afforded to the functionary.

Thus, should any applicant for review succeed in showing that any one of these requirements have not been satisfied, then the decision taken would be reviewable in terms of Section 158(1)(h) of the LRA, based on the principle of legality.

[30] Next, it is appropriate to set out the grounds of review as articulated by the parties, as this Court is only required to decide such a review application on the basis of the grounds as made out in the founding affidavit, and supplementary affidavits.[14] Turning first to the review grounds made out by the applicant, these all relate to the 2016 resolution, and are:

[14] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27; *Northam Platinum Ltd v Fganyago NO and Others* (2010) 31 ILJ 713 (LC) at para 27.

30.1 The decision was invalid because the first respondent erroneously regarded the applicant's appointment as null and void in terms of Section 56 of the Systems Act;

30.2 The decision was unlawful because the first respondent did not follow any disciplinary procedure before taking the decision;

30.3 The first respondent relied on an investigation by the second respondent, but the applicant was never consulted in the course of this investigation nor afforded an opportunity to make representations in this regard;

30.4 The first respondent misconstrued the second respondent's recommendation where it came to what was meant by taking remedial action;

30.5 The failure to re-advertise the position did not render the applicant's appointment invalid, and there was no obligation on the first respondent to re-advertise the post.

[31] The first respondent's review grounds all relate to the 2013 resolution, and are:

31.1 The decision to appoint the applicant was unlawful and irregular because the applicant did not possess the required minimum qualifications to be appointed in the position.

31.2 The applicant misrepresented, at the time, that he had the necessary qualifications for the position.

[32] However, and before deciding whether any of these grounds of review have substance, I must first decide whether it is indeed appropriate to entertain these review applications, on these grounds, which I will now turn to.

Is a Section 158(1)(h) review appropriate in all circumstances?

[33] There is no doubt that as a general proposition, the Labour Court has the jurisdiction, in terms of Section 158(1)(h) of the LRA, to consider both the applicant's application to review and set aside the 2016 resolution, and the first respondent's application to review and set aside the 2013 resolution. The Court in *Gcaba v Minister for Safety and Security and Others*[15] said that jurisdiction means:

> '… the power or competence of a court to hear and determine an issue between parties …'

And in *Merafong City Local Municipality*[16] the Court held:

> **'**Section 158(1)(h) of the LRA refers to a jurisdictional power of the Labour Court. It specifically provides that the Labour Court 'may review any decision taken or any act performed by the State'. The only way the Labour Court is able to review is by hearing and determining an application for review of the acts and/or decisions contemplated in s 158(1)(h). That section should be read as not only conferring a power, but also jurisdiction upon the Labour Court.'

[34] The enquiry whether or not to entertain such a review application however does not stop just because it may be accepted that the Labour Court in general terms has jurisdiction to do so. Simply put, the fact that the Labour Court has jurisdiction / power does not mean that the Court should exercise this power. In other words, and even though the Court may have jurisdiction to consider such a review under Section 158(1)(h), it does not mean that it is appropriate for it to exercise such power, especially where there are other specifically prescribed alternative means by way of which the issue can be resolved.

[35] Skweyiya J in *Chirwa v Transnet Ltd and Others*[17] dealt with what was in essence an unfair dismissal dispute based on poor work performance, but

[15] (2010) 31 ILJ 296 (CC) at para 74.
[16] (supra) at para 36.

which dismissal was challenged by the employee party on the basis of a case of the breach of her right to administrative justice, which is in essence a challenge based on legality. After accepting that Chapter VIII of the LRA specifically deals with dismissals, Skweyiya J then said:[18]

> '… The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers.
>
> Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty to relegate the finely tuned dispute-resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.'

[36] The Constitutional Court in *Gcaba*[19] followed suit, with Van Der Westhuizen J applying the *dicta* in *Chirwa* as follows:

> 'Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.'

[37] The Labour Appeal Court in *Hendricks*[20] then specifically applied the aforesaid *dicta* in both *Chirwa* and *Gcaba*, and concluded:

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[17] (2008) 29 ILJ 73 (CC).
[18] Id at paras 64 – 65.
[19] Id at para 56.
[20] (supra) at paras 10 – 12.

> 'These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices … should ordinarily pursue the remedies available in ss 191 and 193 of the LRA, as mandated and circumscribed by s 23 of the Constitution. …'

[38] Myburgh AJ in *Magoda v Director-General of Rural Development and Land Reform and Another*[21] recently applied all these principles as follows:

> '… insofar as the LRA provides a remedy to address the applicant's complaints … I do not consider a review in terms of section 158(1)(h) to be permissible – otherwise a separate legal framework would apply to public and private sector employees. As held by the LAC in De Bruyn, the LRA may oust the section 158(1)(h) review jurisdiction of this court, where, for example, the dispute involves the interpretation or application of a collective agreement, which stands to be arbitrated by the CCMA. The LAC went on to find that a section 158(1)(h) review was not permissible on what appears to be a wider basis: "[i]t follows that the appellant is confined to its remedy in terms of section 24 of the LRA and it may not, instead, seek to review the respondent's decision in the Labour Court in terms of section 158(1)(h)." Along similar lines, the LAC indicated in Hendricks that section 158(1)(h) reviews should be confined to legitimate challenges where there is no other remedy available under the LRA. As Murphy AJA went on to put it, "[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for [its] resolution". This court has also held, on more than one occasion, that where another remedy exists under the LRA, a section 158(1)(h) review is not permissible. …'

[39] What all the above means is that the LRA has a very unique scheme where it comes to resolving disputes that arise in the scope of the employment relationship. This includes such disputes involving the state as employer.[22] The LRA creates a right to a fair dismissal and the right to a fair labour practice, and then provides for a prescribed dispute resolution process to give effect to such rights.[23] At the heart of this dispute resolution process lies the

[21] [2017] JOL 38772 (LC) at para 10.
[22] See *Chirwa* (*supra*) at paras 64 and 66; *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another* (2012) 33 ILJ 1822 (LAC) at para 26.
[23] This is found in Chapter VIII of the LRA, and in particular Section 191.

notion of fairness as between both employer and employee. This notion of fairness is not compatible with concepts such as unlawfulness or illegality or invalidity. At a level of policy, this Court should always strive to give primacy to this prescribed dispute resolution processes of the LRA and the notions underlying it. These kind of policy considerations were evidenced in the judgment of the Constitutional Court in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[24] where the Court dealt with the notion of challenging dismissals under the LRA on the basis of the dismissal being unlawful or invalid. Zondo J (as he then was), writing for the majority, held:[25]

> 'I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a 'winner takes all' approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee.'

Having so held, the learned Judge then reflected on the dispute resolution process envisaged by the LRA, and said:[26]

> 'The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute-resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right.'

[40] Therefore, and when this Court is confronted with an application seeking to challenge decisions in the context of the employment relationship in the public service, this Court is duty bound to ascertain whether the decision taken is one that would normally be susceptible to challenge under the auspices of what is defined as a dismissal or unfair labour practice in Chapter VIII of the LRA,

[24] (2016) 37 ILJ 564 (CC)
[25] Id at para 116.
[26] Id at para 130.

irrespective of the fact that the review applicant may label it as a legality challenge.[27] Thus, the classification of the dispute as one of an infringement of a Constitutional principle of legality and a challenge being launched on that basis, must be carefully scrutinized, so as to ascertain if it is a dispute capable of resolution under the proper prescribed processes under Chapter VIII of the LRA in the forum properly and specifically designated to deal with such a dispute. As said by Ngcobo J in *Chirwa*:[28]

> '… It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.'

[41] Of proper practical illustration of this point is the following *dictum* from the judgment in *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another*[29]:

> 'Therefore, the court a quo (although of the opinion that the application before it was in terms of s 158(1)*(g)* of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave … is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution …'

[27] Compare *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para.52; *Chirwa* (*supra*) at para 63; *Gcaba* (*supra*) at para 66; *Farre v Minister of Defence and Others* (2017) 38 ILJ 174 (LC) at para 17.
[28] (*supra*) at para 124.
[29] (2012) 33 ILJ 1822 (LAC) at para 32. See also the conclusion reached by the Court at para 34 of the judgment.

[42] It is of course undoubtedly correct that jurisdiction of the Court is determined by the case as pleaded an applicant.[30] Accordingly, a pleaded case of infringement of the right to legality will clothe the Court with jurisdiction to consider the case. This is indeed what both the applicant and the first respondent did. But opening the door to considering the case does not mean that the case should actually be decided on the merits. That is a different, and further determination. The Court can still decline to decide the matter on the basis that the dispute should rather be dealt with in terms of the dispute resolution processes under Chapter VIII of the LRA, and this entails deciding what the true character of the dispute is, no matter what it may be labelled as by a party. In *Zungu v Premier, Province of Kwazulu-Natal and Another*[31] the Court said:

> 'Accordingly, the first exercise in any proceedings is to read, as in this case, the allegations in the affidavits, and make the determination. It is not, primarily, the form of relief sought, but rather the necessary averments to demonstrate the 'cause of action' that determines the 'character' of the dispute, although the form of the relief, if it is consonant with the cause of action, will point in the same direction.'

And in *Aucamp v SA Revenue Service*[32] it was held:

> '… it is the duty of the Labour Court to determine the true nature of the issue in dispute between the parties before court, no matter how an applicant may choose to label or describe the dispute. The court is not bound by the description of the dispute as may be articulated by an applicant. …'

The Court in *Aucamp* also applied the following *dictum* from the judgment in *CUSA v Tao Ying Metal Industries and Others*[33] where the Court held:

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[30] See *Gcaba* (*supra*) at para 75; *Mbatha v University of Zululand* (2014) 35 ILJ 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 ILJ 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 ILJ 1098 (LAC) at para 37; *Besani v Maquassi Hills Local Municipality* (2016) 37 ILJ 1386 (LC) at para 34.
[31] (2017) 38 ILJ 1644 (LAC) at para 18.
[32] (2014) 35 ILJ 1217 (LC) at para 18.
[33] (2008) 29 *ILJ* 2461 (CC) at para 66.

> '…The labels that the parties attach to a dispute cannot change its underlying nature …'

[43] To describe it as simply as possible, the fact that the Labour Court has the power or competence to do something, does not mean that it should, especially where that something is in reality an issue that should be dealt with under the proper prescribed dispute resolution processes under the LRA, once the real and underlying nature of the dispute has been determined. This was appreciated by the Court in *de Bruyn*[34] where it was held as follows:

> 'But it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course. Recourse to review proceedings, in terms of s 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place …'

[44] One final consideration remains in this respect. This is answering the question when should the Labour Court nonetheless exercise its powers under Section 158(1)(h) of the LRA, in place of the prescribed dispute resolution processes under the LRA? The answer is simple – under exceptional circumstances only. In dealing with an application to interdict disciplinary proceedings against an employee in the public service, the Court in *Booysen v Minister of Safety and Security and Others*[35] held that:

> '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.' (emphasis added)

[34] (*supra*) at para 28.
[35] (2011) 32 ILJ 112 (LAC) at para 54.

[45] In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[36] the Court equally confirmed the jurisdiction of the Labour Court to entertain an application to uplift a suspension of an employee in the public service, but then added:[37]

> 'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)*(a)*(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances …' (emphasis added)

Applying the aforesaid dictum in *Gradwell*, the Court in *Madzonga v Mobile Telephone Networks (Pty) Ltd*[38] held:

> '… In my view the issue is actually more than just the existence of an alternative remedy. The simple reason for this is that the alternative remedy is not just an available alternative remedy but a statutory prescribed alternative remedy. This is where the issue of competence comes in. The primary consideration must always be that proper effect be given to the clear terms of the statute, and for the Labour Court to entertain this issue would be contrary to the dispute resolution process clearly prescribed by such statute which should only be done with great circumspection and reluctance. In my view, and as a matter of principle, the Labour Court should only entertain urgent applications to declare suspensions unfair or unlawful or invalid on the basis of interim relief pending the final determination of the issue in the proper prescribed forum, and even then compelling considerations of urgency and exceptional circumstances have to be shown by an applicant for such relief.

[36] (2012) 33 ILJ 2033 (LAC).
[37] Id at para 46.
[38] [2013] ZALCJHB 232 (30 August 2013) at para 63. See also *Ida v Department of Co-Operative Governance Human Settlements and Traditional Affairs Limpopo Province and Another* [2016] JOL 37301 (LC) at para 53; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17.

> Whether or not compelling considerations of urgency and exceptional circumstances exist is a call the Court has to make on a case by case basis on the facts of the matter.'

[46] What thus clearly appears to be the central theme guiding the Labour Court in deciding whether or not to exercise the power afforded to the Court in terms of Section 158(1)(h) of the LRA, is the availability of a prescribed alternative process and accompanying remedies, and in particular the unfair dismissal and unfair labour practice dispute resolution process and remedies under Chapter VIII of the LRA. Apposite, in my view, is the following *dictum* of Skweyiya J in *Chirwa*:[39]

> 'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.'

[47] The existence of exceptional circumstances justifying immediate intervention must be set out in the applicant's founding affidavit, with proper motivation for the contention and sufficient particularity, and a proper case in this regard must be made out in line with legal principle. In this regard the Court in *Minister of Labour and Another v Public Servants Association of SA and Another*[40] held:

> 'Features that serve to distinguish the exception from the general are, inter alia, the source and nature of the action, whether the action involves, or is closely related to the formulation of policy, or to the initiation of legislation and/or whether it has to do with the implementation of legislation. In *De Villiers*

[39] (*supra*) at para 41. See also *Hendricks* (*supra*) at para 27; *MEC, Department of Education, KwaZulu-Natal v Khumalo and Another* (2010) 31 ILJ 2657 (LC) at para 26.
[40] (2017) 38 ILJ 1075 (LAC) at para 52.

> the Labour Court added the existence of alternative remedies as another factor to be considered, due to the importance attached to that aspect in both the *Chirwa* and the *Gcaba* decisions. …'

[48] It is useful to refer to some examples where such exceptional circumstances were found to exist. One of these is in fact the judgment in *Minister of Labour*[41] itself which dealt with the revocation of an employee's designation of Registrar of Labour Relations in terms of the LRA,[42] and his resultant removal from that position, for reasons that were entirely irrational and invalid and where there in reality was no alternative remedy. Another example is the well-known matter of *Solidarity and Others v SA Broadcasting Corporation*[43] which concerned the dismissal and victimization of reporters for being critical of policy decisions by the SABC as a public broadcaster, which conduct violated the Constitutional duties of the employees, and even infringed on the right of the public to be properly informed.

[49] Turning then to the instances where no alternative remedies exist, thus justifying an applicant party to resort to Section 158(1)(h), there is no better example than the issue of deemed terminations of employment under Section 17 of the PSA.[44] In these cases, and because of a statutory automatic termination of employment in instances of absence of employees from the workplace in the public service, there is no opportunity for such an employee to resort to the dispute resolution processes under the LRA, as there exists no dismissal. It has thus been consistently recognized that in these cases, this termination of employment can be challenged on review to the Labour Court under Section 158(1)(h) of the LRA, where it infringes on the principle of legality.[45]

[50] From the perspective of the employer in the public service, Section 158(1)(h) can be used for the purposes of reviewing decisions taken by functionaries which can be said to infringe on the principle of legality, and which can be

[41] (*supra*) at paras 53 and 92,
[42] See Section 108 of the LRA.
[43] (2016) 37 ILJ 2888 (LC) at paras 65 – 66.
[44] Public Service Act 103 of 1994. Prior to the Public Service Amendment Act 30 of 2007 this was dealt with in Section 17(5), and after these amendments in Section 17(3).
[45] See *Public Servants Association on behalf of Smit v Mphaphuli NO and Others* (2014) 35 ILJ 2260 (LC) at paras 26 and 32; *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC) at paras 12 and 45; *Weder* (*supra*) at paras 33 and 36 – 37.

seen to be unreasonable, irrational or procedurally unfair. This is most often found in cases where the state as employer seeks to review and set aside the decisions by its own appointed disciplinary hearing chairpersons when acquitting or deciding not to dismiss employees. It is in fact such an instance that came before the Court in *Hendricks*, and the Court held:[46]

> 'The underlying guiding rationale of the ratio decidendi in *Gcaba* and *Chirwa* is that once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The ratio cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. … The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and s 158(1)*(h)* of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer. …'

And further in *Ntshangase v MEC for Finance: KwaZulu-Natal and Another*[47], it was said:

> '… All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with ss 195 and 197 of the Constitution. …'

[46] (*supra*) at para 27.
[47] (2009) 30 ILJ 2653 (SCA) at para 18.

[51] To sum up *in casu*: This Court has jurisdiction to entertain the applicant's and the first respondent's review applications. But whether it is appropriate to exercise this jurisdiction and consider these applications is dependent upon deciding, firstly, whether the issue in dispute is in reality one relating to employment that could and should be resolved in terms of the dispute resolution processes under Chapter VIII of the LRA. If the issue in dispute is such a kind of dispute, then as a matter of general principle this Court should decline to entertain the applications. Secondly, and despite the fact that the issue in dispute is in reality one that should be resolved under Chapter VIII of the LRA, it must be decided whether this Court, as a matter of exception, should still entertain the application on the merits because of the existence of extraordinary circumstances justifying this. I will now proceed to decide the application of the applicant and the counter application of the first respondent, applying these two considerations.

Evaluation: The applicant's application

[52] There can be no doubt that what the applicant is challenging *in casu* is the termination of his employment with the first respondent. He says that this termination is unlawful and infringes on the principle of legality. There can be no doubt that on 6 December 2016, the first respondent decided to terminate the applicant's employment, and then implemented that decision on 7 December 2016.

[53] The applicant was clearly an employee as contemplated by the LRA. He had concluded an employment contract with the first respondent, and was rendering services under that contract. He was appointed and the contract was concluded pursuant to the 2013 resolution. The first respondent has made it clear in its answering affidavit that when it brought about the termination of employment of the applicant, this was never done on the basis that it considered the appointment of the applicant pursuant to the 2013 resolution and the employment contract concluded as a result thereof, to be null and void. The first respondent on its own version decided to bring the applicant's employment contract to an end for two reasons, being that the applicant did not possess the required qualifications for the position and that he misrepresented that he had these qualifications.

[54] As a matter of common sense and logic, such a decision by an employer for such a reason would be seen to be a dismissal. Surely it cannot be different for an employee in the public sector? After all, the same law applies to everyone. As said in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[48]:

> 'In *Chirwa*, this court held:
> 'The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion.''

[55] Section 186(1)(a) of the LRA *inter alia* defines dismissal as: 'Dismissal means that …. an employer has terminated employment with or without notice'. In *National Union of Leather Workers v Barnard NO and Another*[49] the Court dealt with Section 186(1)(a) prior to the 2015 amendments of the LRA,[50] and held as follows:

> 'The key issue in the interpretation of the phrase 'an employer has terminated the contract of employment with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognized as valid by the law.'

[56] The meaning of dismissal in terms of Section 186(1)(a) was also considered in *Ouwehand v Hout Bay Fishing Industries*[51] where the Court said:

> '... This formulation would appear to contemplate that the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiative undertaken by the employer must be established, which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.
>
> It is accordingly incumbent upon an employee to establish on a balance of

[48] (2014) 35 ILJ 613 (CC) at para 31. The Court was referring to *Chirwa* (*supra*) at para 66.
[49] (2001) 22 ILJ 2290 (LAC) at para 23.
[50] The provision was not materially amended in 2015. It used to read: ''Dismissal' means that- (a) an employer has terminated a contract of employment with or without notice…'. All that thus changed is that 'contract of employment' was replaced with 'employment', making the definition even wider.
[51] (2004) 25 *ILJ* 731 (LC) at para 14 – 15. See also *National Union of Metalworkers of SA and Others v SA Five Engineering (Pty) Ltd and Others* (2007) 28 *ILJ* 1290 (LC) at para 41; *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 *ILJ* 696 (LC) at para 27.

> probabilities,…some overt act by the employer that is the proximate cause of the termination of employment. …'

And in *Chemical Energy Paper Printing Wood and Allied Workers Union v Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics*[52] the Court held:

> '… the applicant must prove that the respondent has taken some initiative to terminate the contract, and that the respondent's action has caused the termination.'

[57] It does not matter what kind of label was attached to the act of termination, considering the following *dictum* in *Marneweck v SEESA Ltd*[53] where the Court said the following:

> '… the enquiry into whether or not there is a dismissal goes beyond investigating whether the employer used the word 'dismissal' in terminating the employment relationship with the employee. In other words it is not the label placed on the termination that determined whether or not there was a dismissal.'

[58] In *Uthukela District Municipality v Khoza and Others*[54] the Court dealt with a situation where a manager in the municipality (incidentally also a Section 56 manager such as the applicant) had simply been given written notice by the mayor that his employment contract had been 'abolished' following a council resolution. The Court held:[55]

> 'There can be no doubt that it was the applicant that brought the employment contract of the first respondent to an end. If it was not for the council meeting, the resolution adopted and the written notice to the first respondent, all on 6 June 2012, the employment contract would have endured. It simply does not matter whether the council viewed the termination as properly motivated by invalidity or voidness in terms of the Systems Act, as it still remained a dismissal. … In short, where the conduct of an employer brings about the termination of the contract of employment, whatever the motivation for this

[52] (2012) 33 *ILJ* 2386 (LC) at para 13. See also *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC) at paras 31 and 33.
[53] (2009) 30 *ILJ* 2745 (LC) at para 31.
[54] [2015] ZALCD 19 (20 March 2015) at para 18.
[55] Id at para 65.

conduct may be, it has to be considered to be a dismissal of the employee as contemplated by the LRA. The simple question that must be asked is whether, was it not for the conduct of the employer, the employment contract would have endured. If the answer is yes, then there has to be a dismissal. It is important to cast the dismissal net as wide as possible, because it is an imperative in terms of the LRA and Constitution that terminations of employment, as far as possible, be tested against the fundamental principle of fairness.'

[59] Based on the above, there can be no doubt that the applicant was dismissed, as contemplated by Section 186(1)(a) of the LRA. The first respondent decided to bring the employment of the applicant to an end, and then unilaterally acted in bringing about such termination. Was it not for this initiative, decision and conduct of the first respondent, the employment of the applicant with the first respondent would not have terminated.

[60] As the applicant was dismissed, it was then required of the applicant to have pursued this dismissal as an unfair dismissal dispute to the relevant bargaining council, if he sought to challenge it. That is exactly what the employee did in *Uthukela District Municipality*.[56] In the course of arbitration in the bargaining council, and once the applicant had proven he was dismissed (which in my view would have been an easy task), the *onus* would shift to the first respondent to prove that such dismissal was substantively and procedurally fair.[57] If the applicant is successful, he could get relief in the form of fully retrospective reinstatement and the restoration of his employment contract, with back pay.[58]

[61] There was no need for the applicant to approach this Court directly, and on an urgent basis, relying on concepts such as illegality and unlawfulness of the termination of his contract of employment. This bypasses the carefully crafted scheme of dispute resolution prescribed by the LRA where it comes the

[56] See para 2 of the judgment.
[57] Section 192(2) of the LRA.
[58] Section 193(1) of the LRA. See also *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) at para 38; *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) at para 44; *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* 2012) 33 ILJ 1081 (LAC) at para 30; *Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) at para 53; *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at paras 6 and 8.

dismissal of employees. It is an untenable prospect that just because an employee is employed in the public sector, such an employee should be given a choice to either challenge a dismissal based on legality directly to this Court, or pursue an unfair dismissal dispute in the bargaining council in terms of Chapter VIII of the LRA. As said above, this would allow the undesirable situation of a dual dispute resolution system to fester. It is now time to make it clear, once again, that where an employee is dismissed, whether in the private or public sector, that employee must follow the prescribed dispute resolution process under Chapter VIII of the LRA. This is not only an available alternative remedy, but a prescribed alternative remedy.

[62] It was never the intention with the introduction of Section 158(1)(h) of the LRA that this Court should be tasked, by virtue of this provision, with deciding what is in essence dismissal disputes of public sector employees as a Court of first instance, especially considering that these are motion proceedings. These kind of disputes are in my view always best decided and resolved in arbitration proceedings. The function of this Court should be to supervise the outcome arrived at in such arbitration proceedings,[59] and not deciding disputes as a first instance institution instead. Van Niekerk J in *Lesiba v Regional Head: Department of Justice and Constitutional Development (Mpumalanga Province) and Another*[60] in my view aptly articulated the position as thus:

> 'There is simply no basis on which the application ought to be entertained. To do so would undermine the statutory purpose underlying dispute resolution under the LRA. Workplace discipline remains regulated by the code of practice and preliminary points or to be dealt with in the ordinary course of the exercise of workplace discipline, as they were in the present instance. If these rulings become the subject of dispute, these are matters that ought to be dealt with if necessary during the course of an arbitration under the auspices of the CCMA were bargaining council having jurisdiction. This court exercises a supervisory jurisdiction by way of its power to review rulings and awards made by arbitrators. That system is entirely undermined when parties seek this court's intervention, as a forum of first instance …'

[59] See *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 21; *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 *ILJ* 1534 (LC) at para 23; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* (2013) 34 *ILJ* 2347 (LC) at para 37.
[60] [2017] ZALCJHB 365 (4 October 2017) at para 7.

The abuse of the Section 158(1)(h) by well paid public service employees to bypass a dispute resolution process that must be (and is) followed by everyone else, must stop.

[63] When this Court is faced with these kind of applications where the challenge of the dismissal of a public service employee is at stake, there should in my view be only one consideration, being whether exceptional and compellingly urgent considerations exist justifying immediate intervention. Entertaining the matter should be the absolute exception. This Court should jealously guard the key to the direct access door in this regard. I am confident in saying that intervention should be declined unless it can be shown that a grave and irremediable injustice would take place should the normal dispute resolution process be followed. I appreciate this is a hefty hurdle. But if that is what is needed to stop the abuse, then so be it.[61]

[64] One cannot overemphasize the fact that the review jurisdiction of this Court under Section 158(1)(h) flows from the LRA itself. As such, this jurisdiction must always be applied within the scheme of the LRA as a whole.[62] I mention this again because the Court in *Steenkamp*[63] when dealing with dismissals held that LRA did not envisage unlawful or illegal dismissals, and it was all about whether it was fair or unfair. The point I make is that as soon as a dispute concerns an unfair dismissal claim, it must be pursued, and then considered, on the basis of what is fair. And when doing so, arbitration is clearly the most appropriate route to take. Legality is a winner take all approach. Fairness is more than that, as it envisages flexibility, and ultimately protects the interests of both parties. In the whole scheme of the LRA, fairness must have preference over legality as a basis to resolve dismissal disputes. This approach should only be departed from the case of extraordinary circumstances as discussed above.

[65] What makes the matter *in casu* even worse is that several of the applicant's legality challenges are founded on nothing else but the fairness provisions in

[61] See the sentiments expressed in *SA Municipal Workers Union on behalf of Members v Kopanong Local Municipality* (2014) 35 *ILJ* 1378 (LC) at para 33; *South African Municipal Workers' Union obo Dlamini and others v Mogale City Local Municipality and another* [2014] 12 BLLR 1236 (LC) at para 45; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 *ILJ* 502 (LC) at para 45.
[62] See the *dictum* from the judgment of the Labour Appeal Court in *de Bruyn* quoted earlier in this judgment at para 38.
[63] See para 36 of this judgment, (*supra*).

the LRA. The applicant complains that the reasons given for his termination of his employment do not 'hold water', he was not given an opportunity to be heard, the 2016 resolution 'does not comply with fair labour practice', and the MEC conducted an investigation without given the applicant an opportunity to be heard. There kind of issues can be fully dealt with and competently raised in any arbitration proceedings in the course of deciding whether the applicant's dismissal was substantively and procedurally fair.[64]

[66] It cannot assist the applicant to try and label the dispute as something else. By calling the dispute an unlawful or irregular or illegal termination of employment, does not change what is in reality, a dismissal dispute. In *Zungu*[65] the Court dealt with what it had identified on the facts to be a dismissal dispute under Section 186(1)(b) of the LRA, despite it being labelled as something else, and said:

> 'It is sophistry to try to conceptualise the dispute as something else. Even if it is possible to characterise the dispute as having other characteristics too, such additional attributes do not dispel the validity of the finding that it fell within the purview of s 186(1)*(b).* In a judicial system where jurisdiction over causes of action is divided among several fora, it is no surprise that the imposition of what is, for policy reasons, an artificial ring-fencing of types of disputes, will from time to time result in a rubbing-up against the edges. However, where a clear characterisation is possible, it is not sensible to force a different characterisation to facilitate forum shopping. There can be no serious doubt that the legislation contemplates and requires a claim that a fixed-term contract be renewed on the grounds of a legitimate expectation is a species of 'dismissal', as defined in s 186 and is further regulated by s 191 of the LRA to be within the exclusive jurisdiction of the CCMA.'

[67] I thus conclude that the real and true issue in dispute is that of a dismissal as defined in Section 158(1)(a) of the LRA. This dispute must be dealt with in terms of the normal dispute resolution process under Chapter VIII of the LRA. This means that only one consideration remains. Did the applicant make out a case of exceptional circumstances justifying intervention nonetheless? In my view, not at all. The applicant, in the founding affidavit, has made much of the

[64] See Section 188(1) of the LRA.
[65] (*supra*) at para 20. See also *Aucamp* (*supra*) at paras 21 and 24.

financial prejudice that he would suffer. But surely this is the case with any dismissed employee. He says his reputation has been tarnished because of a story that aired on Carte Blanche on 27 November 2016 about this. But this event clearly preceded his termination of employment and cannot serve to justify why he could not have followed the normal dispute resolution process available to him. The applicant bandies about phrases such as 'grave injustice' in a general and unsubstantiated manner, but this does not assist him in the absence of proper particularity. There is simply nothing compelling on the facts that indicate why the applicant's dispute could not be treated the same way as any other employee that has been dismissed. Also, and as stated above, the applicant can obtain full and complete redress if he is successful in an unfair dismissal claim in the normal course. There accordingly exist no compelling considerations of injustice or the kind of trampling of fundamental rights that will motivate this matter being immediately dealt, such as for example was the case in *S A Broadcasting Corporation*.[66]

[68] As a result, I conclude that the applicant was required to have pursued his termination of employment on 7 December 2016 as an unfair dismissal dispute to the relevant bargaining council in the public service. It was not appropriate for him to have approached this Court on the basis of urgency to challenge such dismissal and labelling it as a legality review. There exists no exceptional circumstances justifying the bypassing of the normal dispute resolution processes as prescribed by Chapter VIII of the LRA. The applicant's application is thus doomed to fail, and cannot be sustained.

Evaluation: the first respondent's counter application

[69] Turning to the first respondent's counter application, it is of course true that the first respondent does not have the option available to it to resort to the dispute resolution processes under the LRA, as the applicant does. Applying the *ratio* in *Hendriks*,[67] it would thus be competent for an employer in the public service, such as the first respondent, to approach this Court in terms of Section 158(1)(h) to review and set aside decisions by functionaries that do not conform with the principle of legality. This would include seeking to review and

[66] (*supra*) footnote 43.
[67] (*supra*) para 50.

set aside the 2013 resolution, *in casu*. There are in fact several examples of this Court reviewing and setting aside resolutions adopted by functionaries in the public service, on the basis of it being invalid, or null and void.[68]

[70] Even though it may be competent to consider the first respondent's review application on the merits, there are in my view several insurmountable obstacles to this application succeeding, which I will now elaborate on.

[71] Firstly, and considering the counter application is brought to review and set aside the 2013 resolution, it has been brought way out of time. Whilst it is true that there exists no prescribed time limit for a review application in terms of Section 158(1)(h) of the LRA, it is trite that such an application must still be brought without undue delay. In *Khumalo*[69] the Court held:

> '… it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings …'

[72] The second respondent, on its own version, became aware of the 2013 resolution in October 2014, and then sought to investigate after having been sent all the information. On 29 June 2015, the MEC then instructed the first respondent to take appropriate action to remedy the situation. Legal opinion was only taken in August 2016 about what to do next, and it was then decided not seek to challenge the 2013 resolution in Court. The actual counter application the only followed on 14 March 2017. All of this means that there is a delay, on the most favourable consideration of the facts for the first respondent, namely as from when it was first instructed by the MEC to take action, of some 20 (twenty) months in bringing the application. By the time the application was brought, the applicant had been in the position for some three

[68] For examples of such challenges see *Motitswe v City of Tshwane* (2014) 35 *ILJ* 3458 (LC); *Sondlo v Chris Hani District Municipality* (2008) 29 *ILJ* 2010 (LC); *SA Municipal Workers Union on behalf of Monyama and Others v Greater Tzaneen Municipality and Others* (2013) 34 *ILJ* 1781 (LC); *Retlaobaka v Lekwa Local Municipality and Another* (2013) 34 ILJ 2320 (LC).
[69] (supra) at 44

years. This kind of delay is a material and excessive delay, and could serve to non-suit the first respondent.[70]

[73] In *Gqwetha v Transkei Development Corporation Ltd and Others*[71] the Court said the following:

> 'It is important for the efficient functioning of public bodies … that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule … is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. …'

[74] In *Khumalo*[72] the Court held:

> 'Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.' Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.'

The Court in *Khumalo* then considered the above *ratio* in *Gqwetha* and said:[73]

> 'In *Gqwetha* the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of 'all the relevant circumstances'); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.
>
> In terms of the first leg of the enquiry, any explanation offered for the delay is considered. ….'

[70] In *Khumalo (supra)* at para 39, the Court also dealt with a virtually identical situation where a MEC sought to challenge an appointment 20(twenty) months after becoming aware of complaints and four years after the employee had actually been appointed in the post.
[71] 2006 (2) SA 603 (SCA) at para 22.
[72] (2014) 35 ILJ 613 (CC) at para 46.
[73] Id at paras 49 – 50.

And finally as to the exercise of the discretion whether or not to overlook the delay, the Court held:[74]

> '… On this leg of the test, the majority in *Gqwetha* held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. In the context of public sector employment, the value of security for employees and in mitigating the arguably inherent inequality of the workplace must be kept in mind.'

[75] The first respondent did not seek to offer any explanation for the delay. The first respondent similarly did not even ask this Court to overlook the delay, in line with the principles as set out in *Khumalo*. The same criticism can be applied to the MEC, who also filed an answering affidavit, but similarly chose not to address the material delay in any way at all. These failures are serious. In *Khumalo* it was held:[75]

> 'The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious …'

[76] The judgment in *Khumalo* has many similarities on the facts, to the first respondent's counter application now before me. The challenges raised *in casu* are virtually identical to those in *Khumalo*. In fact, in *Khumalo*, the Court accepted that the employee concerned did not meet the requirements for the post into which he was appointed, and that the MEC concerned was justified

[74] Id at para 52.
[75] Id at para 51.

to seek to set it aside on review.[76] But despite this, the Court in *Khumalo* concluded:[77]

> 'The nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained, and although we might ameliorate the consequences of a possible finding of unlawfulness in remedy, the nature of the claim does not warrant condoning the delay.'

The same consequences must follow *in casu*. The delay is indeed unreasonable and entirely unexplained. Even if the first respondent is correct in saying that the applicant was appointed in his position without the requisite qualifications, this is still insufficient to warrant condoning the delay occasioned in this case, in bringing the application. For these reasons alone, the first respondent's counter application must fail.

[77] Secondly, in the answering affidavit filed on 16 February 2017, as discussed above, the first respondent on its own version made it clear that it did not consider the applicant's appointment to be null and void. Specifically, the first respondent says:

> 'Mr Mohlomi's appointment was not treated as null and void, it was treated as being in contravention of the Act and his contract was cancelled'

It must follow that this means that the first respondent decided not to take issue with the 2013 resolution, and the appointment of the applicant in terms thereof. What the first respondent specifically said is that because it discovered the applicant did not have the requisite qualifications for the position and misrepresented this in his application for the position, his appointment did not comply with the Systems Act, and thus it was entitled to bring about the termination of the employment of the applicant, which it did by way of the 2016 resolution.

[78] By seeking to now challenge the very same appointment made in terms of the 2013 resolution by way of the counter application, the first respondent is

[76] See paras 38 and 67 of the judgment.
[77] Id at para 68. The Court concluded at para 69 that this non-suited the MEC.

blowing hot and cold. It is taking up two different positions that are mutually contradictory. On the one hand, it takes no issue with the appointment of the applicant but contends it is entitled to bring it to an end. On the other hand, it seeks to set aside the appointment of the applicant as being invalid and irregular. The first respondent cannot have it both ways. Only one of these causes of action can apply. As was also said in *Pretorius v Rustenburg Local Municipality and Others:*[78]

> '… The law of contract recognizes that in certain circumstances a contracting party may be put to an election either to approbate (ie to affirm the continued existence of the contract) or to reprobate (ie to cancel or terminate the contract). A contracting party is bound by such an election, whether evinced expressly or by conduct, and cannot go back on it once made. He cannot, it has been put, act inconsistently or blow hot and cold. …'

[79] On the merits, the clear focus of the first respondent's case is founded on a contention of non-compliance with Section 56 of the Systems Act, and a lawful termination of the applicant's employment as a result. The Systems Act was amended with effect from 5 July 2011.[79] This amendment included amendments to Sections 56 and 57. The applicant has taken issue with the validity of these amendments, based on a judgment of Jansen J in *South African Municipal Workers Union v The Minister of Co-Operative Governance and Traditional Affairs*,[80] where the learned Judge declared this amendment to be unconstitutional. The learned Judge however referred this declaration to the Constitutional Court for confirmation, which I was informed is still pending. The affidavits contain substantial debate as to the effect of this judgment on the respective cases of the parties. There is however in my view no need to indulge this debate in this judgment, because I am of the view that the first respondent has failed to make out a case on the merits on the amended Section 56 as it stands, for the reasons to follow. I will thus decide this matter on the basis of applying Section 56 of the Systems Act, as amended.

[78] (2008) 29 ILJ 1113 (LAC) at para 41. See also *Hlatshwayo v Mare & Deas* 1912 AD 242; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 46.
[79] This was done by way of the Municipal Systems Amendment Act 7 of 2011.
[80] (2016) JOL 3555238 (GP).

[80] Section 56(1) provides:

> '(1)(a) A municipal council, after consultation with the municipal manager, must appoint – (i) a manager directly accountable to the municipal manager ….
> (b) A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competence and qualifications as prescribed. ….'

In Section 56(2), it is provided:

> 'A decision to appoint a person referred to in subsection 1(a)(ii), and any contract concluded between the municipality and that person in consequence of the decision, is null and void if –
> (a) The person appointed does not have the prescribed skills, expertise, competencies or qualifications …'

Finally and of relevance, Section 56(5) then provides as to what can be done where the appointment of such a manager does not comply with Section 56(1)(b), reading as follows:

> 'If a person is appointed to a post referred to in subsection 1(a) in contravention of this Act, the MEC for local government must … take appropriate steps to enforce compliance by the municipality with this Act, which steps may include an application to court for a declaratory order on the validity of the appointment or any other legal action against the municipality. …'

[81] In *Merafong City Local Municipality*[81] the Court dealt with the appointment of a municipal manager in terms of Section 54A of the Systems Act. For all intents and purposes, the wording thereof is virtually identical when compared to the relevant subsections of Section 56.[82] The Court specifically considered the stipulation where the appointed person did not possess the relevant skills and qualifications, the fact that such an appointment would be in contravention of the Systems Act, and then the application of the provision that any decision appointing the person and any contract concluded as a consequence of that

[81] (*supra*) footnote 7.
[82] Compare Sections 54A(2), (3) and (8).

decision, would be null and void. The Court accepted that despite such a 'null and void' provision, the MEC concerned still has a duty to satisfy himself / herself that the appointment and the process followed in making the appointment was in compliance with the Systems Act, taking all available information into account.[83] The Court next considered the instance where the MEC concerned was dissatisfied that there had been compliance with the Systems Act, had particular regard to Section 54A(8)[84], and said:[85]

> 'The provisions of s 54A(8) and (9) are measures that also have as their purpose the prevention, or limitation, of a proliferation of litigation, or multiple litigation, or unnecessary litigation, with its attendant consequences, least of which, is the delay that ensues with all of its ramifications. The provisions also seem to maintain and retain the hierarchical responsibility for appointments to be made in compliance with the Systems Act. …'

[82] It is significant that despite the Systems Act providing for an appointment of a manger being null and void if it is not in compliance with the Systems Act, it does not follow that the municipality (such as the first respondent) can simply revoke, ignore or cancel the appointment. If the municipality wants to treat the appointment as null and void, then it must approach the Court for an order to that effect.[86] In *Mbashe Municipality v Dumezweni and Others*[87] the Court dealt with Section 54A(3)[88] and said:

> 'I do not understand subsection (3) to mean that the appointment of a municipal manager may be treated conclusively by a Municipality, or anybody else, as null and void without the intervention of a court. The principle of legality does not permit this. Contracts are binding but may be void or voidable.'

This ratio clearly applies to Section 56(2) as well.

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[83] Id at paras 61 – 62.
[84] Basically the twin of Section 56(5), applying to the municipal manager, where Section 56(5) applies to managers reporting to the municipal manager.
[85] Id at para 66.
[86] This is in fact the view of the MEC in his answering affidavit filed on 30 January 2017.
[87] [2015] JOL 33241 (LAC) at para 23.
[88] The twin of Section 56(2).

[83] Therefore, and before any action is taken to enforce compliance with the Systems Act, there is first a duty on the MEC to investigate, gather all information, and if a contravention is found to exist, to then only take steps to enforce compliance with same. It is also clear that 'enforcing compliance' is not only limited to challenging the appointment in a Court, as this avenue is only one of the steps that may be taken. In my view, it is clear from the *ratio* in *Merafong City Local Municipality* that the phrase 'take appropriate steps' includes steps to bring about the termination of employment of the manager concerned without having to resort to legal action. Ordinarily, legal action would only be the appropriate course of action if the MEC or Municipality seeks invoke Section 56(2) to declare the appointment null and void. So, and in short, where an appointment does not comply with Section 56(1)(b) of the Systems Act, the MEC is obliged to remedy the situation by either instituting process to bring about the termination of employment of the manager, or litigating to challenge the validity of the appointment.

[84] On the facts as set out above, the MEC ('second respondent') became aware of the issue about the difficulties with the applicant's qualifications at least in October 2014. In line with the obligations imposed on the MEC, an investigation followed, and all the available information was provided to the MEC. Clearly having stratified himself as to the issue of non compliance with the Systems Act, the MEC instructed the first respondent on 29 June 2015 to take the 'appropriate steps' to remedy the situation. The first respondent then took legal advice, and decided that the appropriate steps to be taken in this particular instance would be to bring about the termination of employment of the applicant, which it then resolved to do. The first respondent could have chosen to instead approach a Court to decide on the validity of the appointment, but decided not to. Having chosen its course of action, the first respondent must be held bound to it. It simply cannot later, in litigation proceedings seeking to challenge the validity of its decision to follow the route of termination of employment, change stance and then decide to challenge the validity of the appointment.

[85] The above being said, it must be stated that there can be nothing wrong with the first respondent deciding to bring about the termination of the employment of the applicant so as to remedy the non-compliance with Section 56 of the

Systems Act. But what must be emphasized is that this termination of employment, as discussed above, would be a dismissal, and as such, it needed to be fair in line with what is required in LRA. Section 57 of the Systems Act, which is the provision in the Systems Act requiring that all Section 56 managers must have a written contract of employment and then provides for the essential terms and conditions to be dealt with in such contract, provides as follows in Section 57(3):

> 'The employment contract referred to in subsection 1(a) must – …
>
> (a) include the details of duties, remuneration, benefits and other terms and conditions as agreed to by the parties, subject to consistency with–
>
> (i) this Act;
>
> (ii) any regulations as may be prescribed that are applicable to municipal managers or managers directly accountable to municipal managers; and
>
> (iii) any applicable labour legislation ….'

[86] What is clear is that the applicant's contract of employment must be applied in a manner that is consistent with the LRA, and the applicable regulations. As I have summarized under the factual background above, the employment contract of the applicant provides for termination on any ground recognized by law, if substantiated. The regulations similarly contemplate the application of the LRA in bringing about termination of the contract of employment.[89] Thus, and where the first respondent wants to remedy non-compliance with Section 56(1)(b) by way of termination of the contract of employment, it must comply with the LRA. Insofar as it may be said the Systems Act may provide otherwise, the LRA has preference.[90]

[87] In the end, the first respondent, if it believed that the applicant did not meet the minimum qualifications to be appointed in the position and misrepresented the true state of affairs, would be entitled to terminate the employment of the applicant on this basis, provided it was fair to do so. Fairness entails that the

[89] See Regulation 17(2) of the Local Government: Municipal Performance Regulation for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006.
[90] See Section 210 of the L:RA which reads: 'If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail'.

first respondent substantiate the reason for termination in proper proceedings convened for that purpose. In this regard, the contention that the applicant misrepresented his qualifications would be a matter of misconduct, for which proper disciplinary proceedings could be instituted and for which dismissal may well be competent.[91] If the applicant did not meet the necessary qualification requirements for the position, this could serve as a basis for possible termination of employment on the grounds of incapacity and equally an incapacity process as contemplated by the LRA had to be applied.[92] But it was simply not on for the first respondent to bypass all of this by way of simply adopting the 2016 resolution and unilaterally bringing about the termination of employment of the applicant on that basis, under the guise of simply calling it a 'lawful' termination. The counter application to try and legitimize this position by attacking the original appointment by way of the 2013 resolution cannot assist the first respondent to change this. As said in *SA Post Office Ltd v Mampeule*[93]:

> '…. it is accepted in labour law jurisprudence that lawfulness cannot be equated with fairness. Accordingly it is not a defence to an unfair dismissal claim that the employee's dismissal was lawful …. .Thus Mampeule, like any other employee, enjoyed the right not to be unfairly dismissed or more appropriately unfairly removed. This is more so since the Act was enacted to give effect to the right to fair labour practices guaranteed in s 23(1) of the Constitution of the Republic of SA (Act 108 of 1996). The right not to be unfairly dismissed is not only essential to the enjoyment of this constitutional imperative but is one of the most important manifestations thereof and further forms the foundation upon which the relevant sections of the Act are erected and is consonant with the spirit and the letter of the Act ….'

[88] What I have said above can by no means be considered to be a pronouncement of the fairness of the termination of employment of the applicant. It is simply not my place to do so. It is still up to the applicant to

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[91] See *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 ILJ 881 (LAC) at para 26; *Department of Home Affairs and Another v Ndlovu and Others* (2014) 35 ILJ 3340 (LAC) at para 17; *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC) at para 47.

[92] Compare *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council and Others* (2010) 31 ILJ 1838 (LAC) at paras 10 – 11. On appeal, the SCA in *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* (2011) 32 ILJ 1618 (SCA).did not overturn the *ratio* in the judgment of the LAC referred to in these paragraphs.

[93] (2010) 31 ILJ 2051 (LAC) at para 21(b).

pursue an unfair dismissal dispute to the relevant bargaining council, and in those proceedings, it would be open to the first respondent to prove that it had a fair reason for the termination of employment based on the applicant's alleged lack of qualifications and misrepresentation.

[89] It is thus not necessary for me to decide whether the applicant did meet the requirements for appointment into the position, where it came to the qualifications prescribed. This is an issue that must be fully ventilated in any dismissal dispute the applicant may wish to pursue to the bargaining council, as I have stated previously, he should have done so in the first place. It is an issue that cries out for determination after hearing proper evidence and discussion in arbitration as to whether the applicant met the qualification requirements or not. As said in *Merafong City Local Municipality*:[94]

> 'Whether a particular person fulfils the requirements for appointment as municipal manager appears to be a matter of objective fact'

This would equally be applicable to a Section 56 manager, such as the applicant. It is certainly not appropriate to deal with the same in urgent motion proceedings.

[90] For all the reasons set out above, it is my view that the first respondent's counter application must fail.

Conclusion

[91] Based on all that has been discussed above, I conclude that the applicant has failed to make out a case to review and set aside the 2016 resolution, on the basis that it was not appropriate for the applicant to approach this Court directly seeking such relief, instead of pursuing an unfair dismissal dispute to the requisite bargaining council in terms of Chapter VIII of the LRA. The applicant's application is thus dismissed.

[92] As to the first respondent counter application to review and set aside the 2013 resolution, this application must similarly fail, as it was made excessively out of time and no proper cause to overlook this delay was made out. Also, the first

[94] (supra) at para 59

respondent must be held bound to its decision to pursue a termination of employment of the applicant in order to remedy what it considered to be a violation of Section 56(1)(b) of the Systems Act, instead of seeking to challenge the original appointment of the applicant. The counter application of the first respondent must therefore also be dismissed.

[93] With the applicant's application being dismissed, the basis for the interim relief afforded to the applicant in terms of Part A of his application thus falls away. For the sake of clarity, I shall thus also make an order to the effect that the interim relief granted in terms of the order of Lallie J on 20 December 2016 is discharged.

[94] This is however not the end of the road for the parties, and their respective cases. The applicant would of course still be free to pursue his termination of employment as an unfair dismissal dispute to the relevant bargaining council. The first respondent would still be able to prove in any bargaining council proceedings that it had proper substantive reason to terminate the employment of the applicant. In short, whether what happened to the applicant is fair or unfair is an issue that must still be decided, in the proper forum tasked to do so by the LRA.

[95] This then only leaves the issue of costs. In terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I consider that both parties failed in the relief that they sought. I also consider that both parties applied the same kind of ill advised approach of coming to this Court to deal with issues that should have been dealt with in another forum in the course of the normal prescribed dispute resolution processes under the LRA. I am also mindful of the fact that considering what happened until now, it is likely that the engagement between the parties in litigation will continue in another forum. In light of all of these circumstances, I do not believe it would be appropriate to mulch either of the parties with a costs order against him, or it. It is thus my view that the appropriate order where it comes to costs, is to make no order as to costs.

Order

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

1. The applicant's application is dismissed.

2. The first respondent's counter application is dismissed.

3. The interim relief granted to the applicant in terms of paragraphs 1, 2, 3 and 4 of the order of Lallie J dated 20 December 2016 is hereby discharged.

4. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Mr C Scholtz of Francois Uys Inc Attorneys
For the First Respondent:	Adv L Morrison SC with Adv M Seti-Baza
Instructed by:	Maimane Inc Attorneys