**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 1479/14

In the matter between

**NELSON MANDELA BAY MUNICIPALITY** Applicant

and

**ISRAEL TSATSIRE** Respondent

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**JUDGMENT**

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**REVELAS J**

[1] At issue in this application is whether a fixed contract of employment was validly concluded between the respondent and the applicant's former acting municipal manager. The agreement, or the purported agreement as the applicant calls it, was concluded on 27 June 2012. The applicant seeks a declarator to the effect that the agreement be declared null and void *ab initio*, for want of statutory compliance.

[2] The respondent was appointed and employed as the applicant's Chief Operations Official (COO). As such he was a "*manager directly accountable to the municipal manager"*. He was appointed for a fixed term of 5 years, effective from 1 August 2007, after which would term the

agreement would terminate on 30 August 2012. This agreement was concluded on 3 October 2007.

[3] Upon the termination of the aforesaid agreement ('the first contract"), the respondent was appointed for a further term of three months from 1 September until the end of November 2012. Another contract of employment was concluded in terms of which he was employed in the same post until the end of February 2013. However, the post of Municipal Manager became vacant during December 2012, and the respondent was appointed to that post in an acting capacity until 28 February 2013, or until a permanent municipal manager was appointed, whichever occurred first.

[4] Dr Lindiwe Msengana-Ndlela was appointed as City Manager (the new City Manager) at the end of February 2013. The respondent returned to his post of COO and his contract was extended for a month to the end of March 2013. The new city manager advised the respondent in a letter dated 29 March 2013 that his last day in service would, "for compassionate reasons" be 30 April 2013, but that the last day he should report for service would be 30 March 2013. The respondent suffers from diabetes. The respondent consequently regarded the city manager's letter as a termination of his services.

[5] Prior to the expiry (in August 2012) of the fixed term contract concluded in 2007, the respondent had, however, concluded another agreement, also for a fixed term of five years, with the applicant's former acting municipal manager, Mr Themba Hani ("Hani") on 27 June 2012 ("the second contract"). It is this agreement that the applicant seeks to set aside on the grounds that it was not concluded in terms of the pre-emptory provisions of section 56 of the Local Government Systems Act, 32 of 2000 ("the Systems Act").

[6] The respondent, on the basis that the second contract was valid, invoked the dispute resolution mechanisms by the Labour Relations Act, 66 of 1995, and referred a dispute about an unfair dismissal to the Public Service Bargaining Council (the Bargaining Council). The outcome of the arbitration was that the fixed term contract under consideration was extant and until set aside by a court and must be given effect to. The commissioner did not pronounce on its validity and I believe the applicant is correct in proposing that this omission was due to a lack of jurisdiction to interpret a contract.

[7] The respondent opposes the present application on the grounds that the second contract was a result of a decision by the Executive Mayor ("the mayor") that the second contract be renewed and that decision and the consequential action of the municipal manager, Hani, in concluding

the second contract were both valid administrative acts within the meaning of section 33 of the Constitution and section 1 of The Promotion of Administrative Justice Act, 6 of 2000 (" PAJA"). Even if these two acts were invalid, the respondent argued, they continue to exist until set aside by a court, and accordingly established a continuous employment relationship.

[8] The applicant challenges the validity of the second contract on the ground that in concluding it, there was no consultation with the municipal council ("the council") as prescribed by section 56 of the Systems Act.
The applicant argued that the only question to be decided in this matter is whether this second agreement is valid, and in compliance with the constitutional principle of legality and the requirements of section 56.

[9] Section 56(1)(a) of the Municipal Systems Act provides as follows:

> "(a) A municipal council, after consultation with the municipal manager, must appoint-
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> (i) a manager directly accountable to the municipal manager; or
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> (ii) an acting manager directly accountable to the municipal manager under the circumstances and for a period as prescribed.

(b) A person appointed as a manager in terms of paragraph (a)(ii) must at least have the skills, expertise, competencies and qualifications as prescribed (Emphasis added)"

[10] The provisions of section 56(2) are very clear. It is the council, and no one else, who must appoint a manager directly accountable to the municipal manager. In terms of section 56(3) the **"council** must-

(a) advertise the post nationally . . . .

and

(b) select . . . . a suitable person . . . . for appointment to the post".

If there is no suitable candidate, section 56(4) requires that "the **council** must re-advertise the post.

This section disallows any other entity to perform the functions of the council in the appointment of managers.

[11] On the day prior to the expiry of the first contract, the matter of the respondent's continued employment was on the agenda of meeting of the municipal council held on 30 August 2012. An extract of the minutes of the meeting is attached to the founding papers.

[12] In item 20, under the heading **RENEWAL OF THE EMPLOYMENT CONTRACT FOR THE CHIEF OPERATING OFFICER (4/3/3/3)** the matter of the respondent's employment position is raised by Hani. He filed a report which is now dealt with. Under the heading **"Purpose**" the following is said:

> "The purpose hereof is to request the Council to note and to resolve on the renewal of the contract of employment for the Chief Operating Officer (COO) for a fixed term not exceeding 5 years on similar terms, conditions and remuneration as with the current contract."

[13] In the second paragraph, the second respondent's numerous qualifications and substantial work experience are set out. His services as acting municipal manager "from time to time" during the preceding five years, is also noted. Thereafter the duties of a COO are set out, followed by a reference to the applicable legislation (sections 56 and 56A of the Systems Act), under "**Motivation for renewal**", the respondent's numerous achievements while in office are listed by Hani as well as the fact that he scored 101% in the 2009/10 performance assessment conducted.

[14] The issue of the respondent's continued employment (renewal of contract) in item 20 is ended off by Hani as follows:

"**E. Conclusion**

From my observations, Dr. Tsatsire in his capacity as the COO is suitable, has the necessary competence, exposure, experience, qualifications and skills required of a senior manager in the local government sphere and in particular, the Nelson Mandela Bay Metropolitan Municipality. Further, Dr. Tsatsire's 17 years experience as an employee of the Municipality will assist in the preservation of the institutional memory element vested in the current Senior Management. In addition, noting that the majority of Senior Management positions are currently vacant, the COO position can be effectively used in creating stability of the Municipality.

In light of the above, it is my opinion that the COO's employment contract should be renewed.

**IT IS RECOMMENDED:**

(a) That the renewal of the Chief Operating Officer's employment contract under the current terms and conditions of employment with effect from 1 September 2012 be noted by the Council.

(b) That the Executive Mayor's decision in consulting with the Acting Municipal Manager to renew the Chief Operating Officer's employment contract be ratified."

[15] The Council's Chief Whip proposed the following amendment to Hani's recommendation:

> "That the Chief Operating Officer's Employment Contract under the current terms and conditions of employment for a period of 3 months with effect from 1 September 2012 be noted by council."

[16] The extract above gave rise to a factual dispute as to what exactly was resolved by the applicant's counsel. It is clear from the minute that the Chief Whip proposed (on motion) an amendment to Hani's recommendation (part (a) thereof, and it was seconded by councillor Bungane) and that the motion, in other words the amendment, was put to vote **"AND DECLARED CARRIED"**.

[17] The respondent stated that the three month extension was never discussed with him and he never agreed thereto. The respondent's case is therefore that his employment beyond the expiry date of the first contract was not in terms of short extensions, but in terms of the second contract which he contends is a valid contract.

[18] The respondent made several submissions, regarding the meeting of the council. He argued that whatever the Chief Whip believed he was achieving by moving the amendment which was adopted by the council, the subsequent amendment to of Hani's recommendation, did not result in the contents of the amended paragraph becoming a resolution by the council. Even if it had, he submitted the council could not unilaterally amend the contract already, validly concluded. The absence of a

suspensive condition in the second contract that was subject to the approval of the council was an indication, according to the respondent, that the council's approval was not necessary. Reference was also made to section 63 of the Systems Act in this regard. This section requires the mayor and the municipal manager to report on decisions taken by them in terms of delegated authority. The respondent argued that the agreement is valid because the council delegated to the office of the mayor all of its powers, save for those specifically reserved to the council.

[19] The respondent also criticized the applicant for not attaching an affidavit confirming the antecedents of the report attached to the founding affidavit, averred by the deponent thereto. It is difficult to apprehend for whatever other reason the respondents meritorious attributes as an employee are set out, other than to persuade the council to reappoint him. Hani also confirmed in his supporting affidavit that he knew that the council's approval was required to validate the second contract. There was however, only an approval of the further extension of the existing contract for a further three months. The renewal of a further fixed term contract for five years was expressly not accepted.

[20] The respondent's contention that ratification was not necessary and even if so, the council did in fact ratify the contract, does not assist his case. In terms of section 56 of the Systems Act, it is council that must

appoint a manager and not ratify an *ex post facto* appointment. At sub-paragraph 2 thereof, it provides that a decision to appoint a person referred to in sub-section (1)(a)(ii) (and of course any contract concluded as a consequence thereof between the council and that person), is null and void if-

> "(b) The appointment was made in contravention of this Act".

[21] By virtue of the aforesaid, it is clear that the Legislature expressly disallows anyone, besides the council to appoint, re-appoint or re-employ a manager directly accountable to the municipal manager.

[22] The present processes governing the appointment of managers to senior positions such as section 56 managers, as provided for by section 56(1) of the Systems Act, were introduced into law by the promulgation with effect from 5 July 2011, of the Local Government: Municipal Systems Amendment Act, 7 of 2011. Prior to the 2011 amendment, managers directly accountable to the municipal manager were appointed by mayoral committee, in terms of a delegated authority, as read with section 60(3) of the Local Government: Municipal Structures Act 117 of 1998. It is therefore clear that the Legislator intended the council to make such appointments and to revoke the power to delegate that function.

[23] The respondent also relied on the provisions of section 52(7), of the Systems Act which provides that: "a person appointed in a permanent capacity as

a manager directly accountable to the municipal manager when this section takes effect, must be regarded as having been appoint in accordance with the sections".

[24] Since the first contract was concluded in 2007, before and at the time section 52(7) took effect, he must be deemed to have been appointed in terms of the aforesaid section and therefore Hanie need not have obtained ratification of the second contract from the council. The applicant emphasised that the respondent was not employed in a permanent capacity, but only for a fixed five years term. Accordingly, when that term comes to an end, only the council re-appoints such a person. That is, with respect, the correct interpretation of section 52(7). If the respondent's construction of the of the section is to be followed, then any person who is appointed for a fixed period of five years, can have his contract renewed by the municipal manager alone, and circumvent any interference by the council. In fact no ratification by the council of such a renewal would be necessary. That can simply not be correct.

[25] The respondent also asserted that the municipal council delegated "all of its powers, save for those specifically reserved for council" to the mayor who acted as the "functionary" who made the decision "to re-extend" the respondent's employment or to enter into a second agreement with him.

[26] The applicant retorted that if this were to be believed, the entire legislation purpose behind the Municipal Systems Act would be defeated, as it would be a classic example of unlawful sub-delegation of powers, contrary to the principles of natural justice.

[27] In a supplementary affidavit, the respondent attached an extract from a report which served before the first meeting in 2000 of the council in which it was recommended that all powers and functions previously delegated to the Executive and Standing Committees of the erstwhile Port Elizabeth Transitional Local Council be delegated to the mayor. In my view, this was an unlawful delegation of powers and I agree with the deponent of the founding affidavit that this is an example of the tail wagging the dog. As a repository of power, the council may not sub-delegate to another functionary the power to employ such manager. That is a matter of law. In any event any such delegation can be revoked at any time. In the discussion above regarding the history of section 56 of the Systems Act, that point was dealt with.

[28] The respondent stressed that his position was not advertised and submitted that he, in essence, always held the same position which was subject to renewal every five years. Section 56(6)(a), substituted by section 12 of Act 19 of 2008, makes it clear that no manager directly accountable to the municipal manager, may be employed in terms of an

employment contract entered into, for a terms beyond five years. The second contract stands on its own. It is not a renewal of the previous agreement. He is therefore precluded from relying on the invalid extension of the first contract.

Administrative Action

[29] The respondent submitted that the present application was brought out of time and the relief sought is impermissible. The respondent contends that the applicant ought to have brought a review application because the actions of the mayor and Hani constituted administrative action as envisaged in section 33 of the Constitution and therefore the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) was applicable. It was not the mere exercising of executive powers or functions. They acted in terms of delegated authority and implemented policy. In addition, they acted in terms of an empowering provision and those actions which had a direct external legal effect.

[30] Accordingly, the applicant has launched this application in excess of a year and nine months (or at least for it, 8 months) after becoming aware of the administrative action without applying for an extension of the 180 day period within which it was obliged to do so.

[31] The Constitutional Court has held that legislative bodies exercising original, deliberative, lawmaking powers, are not engaged in administrative action[1]. The applicant referred to examples where courts have held that a municipal council's decision to rename streets and places[2] and remove street humps[3] is neither legislative or administrative action. The same can be said about the employment of a public official or the renewal of an employment agreement by the council.

[32] The renewal of a service contract, even if exercised in terms of delegated powers, by a public official or administrator does not amount to administrative action, even where there is a public law element thereto. The appointment of a state employee is, a 'quintessential labour-related issue'[4] that has few consequences for citizens and ratepayers. The decision to re-employ or re-appoint the respondent has no public impact.

[33] The respondent submitted that even if the second contract is invalid for want of statutory compliance, as it is administrative action and nonetheless has legal consequences until it is set aside. In this regard the respondent relied on the decision in *Oudekraal Estates (Pty) Ltd v City*

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[1] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1991 (1) SA 374 CC at paras [56] and [59].

[2] *Democratic Alliance v Ethekwini Municipality* [2010] ZASCA 221 (30/11/11) at paras [19] – [20]

[3] *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C) at para [19].

[4] As stated in *Gcaba v Minister for Safety and Security and Others* 2010(1) BCLR 35 (CC)

*of Cape Town and Others*[5]. The applicant pointed out that in *Oudekraal,* the decision to open a township register was invalid (but existed in fact) and the subsequent proclamation which was published, a precondition for the validity of the consequent acts. Accordingly, if the first contract was invalid, the respondent would have been able to argue that despite its invalidity it exists in fact, and that the extension of the first written agreement by the purported conclusion of the second contract (a subsequent administrative act) depends for its very validity on the substantive validity of the prior administrative Act. It was always the respondent's case that the first agreement was valid. Therefore *Oudekraal* does not find application in the present matter.

[34] There is a distinction in law between the improper exercise of power as in *Oudekraal* and the purported exercise of power where none exists. In the present matter Hani did not improperly exercise his power by signing the second contract. He simply possessed no conferral of power or jurisdiction to extend the first contract. This fact is conceded by Hani in his supporting affidavit. The applicant also stressed the distinction in law between an action by a public authority beyond its legal powers and the irregular exercise of its powers. The conclusion of the second contract fell within a former category. The employment or appointment of the respondent in a manner beyond the powers of the official purporting to

[5] 2004 (6) SA 222 (SCA)

appoint him has no legal consequences. In *Motola & Others v The Master of the High Court*[6] it was considered that even court orders granted without jurisdiction may be ignored by organs of State. The council took no decision to appoint the respondent. Accordingly, any other decision to appoint him can be disregarded.

[35] The respondent is also wrong in his assertion that this application is out of time (assuming that it ought to have been brought in terms of the PAJA) because the application was launched on 14 May 2014 and the arbitration award made in the respondent's favour was received by the applicant's attorneys on 2 April 2014, well beyond the hundred and eighty day limit. In my view, the PAJA does not apply to the present matter, in any event. The broad principle of legality, a component of the rule of law, applies.

[36] It must also significant that the respondent has elected to persue his dispute about , what he regards as a dismissal, by referring the matter to the Bargaining Council as a purely labour related dispute, which it is. He did not seek a declaration of rights in the High Court to advance his fundamental right to administrative action.

[37] For all the aforesaid reasons the application should succeed.

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[6] 2012 (3) SA 325 at 333 paragraphs [14] and [15]

**Order**

[38] It is ordered that –

(i) The agreement signed on 27 June 2012, is declared to be void *ab initio.*

(ii) The respondent is to pay the costs of the application consequent upon the employment of two counsel.

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**E REVELAS**
**JUDGE OF THE HIGH COURT**

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| Counsel for the applicant: | Adv Buchanan (SC) & Adv Smith<br>Port Elizabeth |
| Instructed by: | Kaplan Blumberg<br>Port Elizabeth |
| Counsel for the respondent: | Adv Richards<br>Port Elizabeth |
| Instructed by: | Gray Moodliar<br>Port Elizabeth |
| Dates Heard: | 23 October 2014 |
| Date Delivered: | 31 March 2015 |