REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: 193/2017

VUYO MLOKOTHI **Applicant**

And

ATHOL TROLLIP **First Respondent**

NELSON MANDELA BAY METROPOLITAN

MUNICIPALITY **Second Respondent**

JOHANN METTLER **Third Respondent**

Coram: **Chetty J**

Heard: **24 August 2017**

Delivered: **5 September 2017**

JUDGMENT

Chetty J:

[1] The ***Constitution of the Republic of South Africa***, 1996, vests the executive and legislative authority of a municipality in its Municipal Council which is enjoined by s 54A (1) of the ***Local Government Municipal Systems Act***[1] (the Act), to appoint a municipal manager as head of its administration. During 2016, the second respondent advertised the post, inadvertently classified as City Manager, in a local tabloid. It is common cause that the applicant duly completed and signed the official application form thereby affirming the correctness of his responses to the questionnaire. Pursuant to a comprehensive interview process of the six short listed candidates, the applicant emerged as the preferred contender. It is furthermore common cause that on 27 October 2016, the municipal council (the council) resolved (i) to appoint the applicant to the post with effect from 1 December 2016, and (ii) that the then acting municipal manager, Mr *Johann Mettler* (*Mettler*) continue in his acting capacity until 31 December 2016.

[2] In its aftermath, a raft of missives were exchanged between the first respondent, the executive mayor, and the applicant. I shall in due course elaborate on its content, but am constrained to first continue with the *sequelae* of the appointment. On 25 November 2016, the first respondent notified the applicant that the council had resolved to rescind the decision to appoint him as its municipal manager and had, in his stead, appointed *Mettler* to the position. The aforementioned resolution galvanised the applicant into action and in due course ushered him through the portals of this court.

[1] Act No, 32 of 2000

[3] In his notice of motion filed during January 2017, the applicant challenged the rescission of his appointment, and sought relief formulated as: -

> "1. That the decision of the Nelson Mandela Bay Metropolitan Municipality of 27 November 2016, rescinding the appointment of the applicant as City Manager, be declared invalid.
>
> 2. That the decision of the Nelson Mandela Bay Metropolitan Municipality of 27 November 2016 rescinding, the appointment of the applicant as City Manager be retrospectively set aside.
>
> 3. That the applicant's appointment by the Nelson Mandela Bay Metropolitan Municipality on 27 October 2016 be confirmed as of 1 December 2016.
>
> 4. That the respondents be held jointly and severally liable for the cost of this application, such costs to be paid on attorney and own client scale."

[4] The application is opposed. Prior to the hearing, the applicant gave notice of his intention to apply for condonation for the late filing of his replying affidavit and for joinder of *Mettler* as the third respondent. The respondents properly assented hereto and the interlocutory applications were accordingly granted. As per the citation, *Mettler* is the third respondent.

Jurisdiction

[5] The application is resisted, firstly, on the ground that the rescission resolution does not constitute administrative action reviewable under ***Promotion of Administrative Justice Act***[2] (***PAJA***) and, being a ***"quintessential labour-related matter"***, a dispute to be processed through the appropriate mechanisms as prescribed in the ***Labour Relations Act***[3] ***(LRA)***. In advancing his argument that the applicant was obliged to initiate these proceedings in the Labour Court, Mr *Kennedy*, who appeared together with Ms *Ngwenya* for the respondents, submitted that given the applicant's admission that an employment relationship was concluded between himself and the second respondent, the only appropriate forum to ventilate his dispute was the CCMA, a Bargaining Council or the Labour Court.

[6] As authority for his submissions, I was referred to extracts from two judgments emanating from the Constitutional Court, the first, from ***Chirwa v Transnet Limited and Others***[4], where Ngcobo J, said the following:-

> "[143] Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under section 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and labour relations and administrative action are two different areas of laws.

[2] Act No, 3 of 2000
[3] Act No, 66 of 1995
[4] 2008 (3) BCLR 251 (CC)

It is true they may share some characteristics. Administrative law falls exclusively in the category of public law while labour law has elements of administrative law, procedural law, private law and commercial law.103

[144] The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement. It deals with labour and employment relations separately. This is dealt with in section 23 under the heading "Labour Relations". In particular, section 23(1) guarantees to "[e]veryone . . . the right to fair labour practices". The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices. To this extent, section 23 of the Constitution guarantees the right of every employee and every employer to form and join a trade union or an employers' organisation, as the case may be."

And the second from ***Gcaba v Minister of Safety and Security and Others***[5] where van der Westhuizen J, reasoned as follows: -

"[64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action.99Section 33 does not

[5] 2010 (1) BCLR 35 (CC)

> regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action."

[7] Finding succour in the aforementioned dicta, Mr *Kennedy* thus submitted that the applicant, having elected not to pursue the remedies available to him under ss 191 and 193 of the ***LRA***, is precluded from approaching this court in an employment dispute based on a review of administrative action under ***PAJA***. The argument, whilst persuasive, ignores the legal basis pleaded for invoking this court's jurisdiction. In his founding affidavit the applicant averred that: -

> "23. I am reliably informed that the Resolution of the second respondent, which set aside my appointment as City Manager of the second Respondent, was unlawful, invalid and stands to be set aside for the reasons more fully set out below.
>
> 24. In order to satisfy on lawful grounds, the decision to rescind the Council Resolution appointing me as City Manager, the second respondent is enjoined to ensure that such grounds are fair and justifiable. In the absence of a fair and/or reasonable and/or justifiable ground for rescinding the Council Resolution, it follows that the rescission of the Council Resolution was for arbitrary reasons and therefore unfair, lacking legal validity."

[8] Whilst it is correct that the applicant acknowledged that an employment relationship eventuated, the claim, as pleaded, clearly did not purport to be one which falls within the exclusive jurisdiction of the Labour Court. Properly interpreted, it is, notwithstanding its inelegant formulation, rooted in administrative action, which the applicant avers was unreasonable, unlawful and procedurally unfair. The objection raised to this court's competence to adjudicate the matter cannot thus be sustained. I turn thus to the substantive issues raised.

The Legality Principle

[9] The applicant's contention that the rescission resolution is *ultra vires* and unlawful, however, proceeds from a misinterpretation of s 54A (3) of the Act, and necessitates an examination of the text. It provides as follows: -

> "(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council 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; or
>
> *(b)* the appointment was otherwise made in contravention of this Act."

[10] It will be gleaned from the aforegoing that the section merely explains that the person designated to fill the position of a municipal manager must have the prescribed skills, expertise, competencies and qualifications and it then deals with how and when a person may be appointed as a municipal manager. It stipulates that if any of the prohibited grounds are breached the appointment is rendered null and void, *ipso iure*. To submit, as Mr *Moorhouse* did, that the section means that a council is precluded from rescinding an earlier resolution in circumstances other than those listed in the subsections is simply untenable. As Mr *Kennedy* correctly pointed out, the specified instances do not purport to be exhaustive, are not stated to be nor necessarily implied. In my view, the interpretation contended for is strained and fails to appreciate the full extent of the executive authority which the Constitution vests in a Council.

The Review

[11] There are however, as I shall adumbrate upon, more than sufficient grounds for the Council rescinding its earlier resolution. As a precursor to determining the question whether the rescission resolution was, as contended for, arbitrary, unfair and lacking in legal validity, it is apposite to posit the fundamental role a municipal manager exercises in the administration and functioning of a municipality. He is, as the Constitutional Court reiterated, ***"a key structure of a municipality and not merely a personnel appointment as contemplated in s 160 (1) (d) of the Constitution."***[6] His core functions were explained by van der Merwe AJA in ***City of***

[6] Executive Council of the Western Cape v Minister of Provincial Affairs RSA 1999 *(12) BCLR 1360 (CC) at [109]*

Johannesburg Metropolitan Municipality and Others v Hlope and Others[7] as follows: -

> "[19] Section 55 of the Local Government: Municipal Systems Act 32 of 2000 (the "Systems Act") provides that the municipal manager is the head of administration and the accounting officer of a municipality. Subject to the policy directions of the municipal council, the municipal manager is responsible and accountable for the management of the municipality's administration in accordance with the Systems Act and other legislation applicable to the municipality. The municipal manager is also responsible and accountable for the management of the provision of services to the local community in a sustainable and equitable manner. Moreover, as accounting officer he or she is responsible and accountable for all income, expenditure and assets of the municipality and for the discharge of all its liabilities. The municipal manager, therefore, heads the administration of a municipality and holds its purse. This necessarily means that the city manager has the power and the duty to ensure that the City complies with its obligations in terms of a court order."

[12] It is evident from the aforegoing that a prospective municipal manager's integrity and, above all, trustworthiness, are traits of cardinal importance and, against that character recognition, I turn to consider the competing versions of the circumstances which preceded the rescission resolution. In his founding affidavit the applicant adverted to correspondence which he received from the first respondent

[7] [2015] 2 ALL SA 251 (SCA) at para 19.

concerning his previous employment at the State Information and Technology Agency (SITA). The first email sought information from him about his employment at SITA and posed the question ***"is there anything there that I need to know about or be concerned about?"*** He responded as follows: -

> "Dear Executive Mayor. I joined Sita on the first of July 2014 on a three year contract which was to end in June 2017. Early this year (around March) the New CEO informed me and another deputy CEO in confidence of his desire to move certain functions across various divisions (basically to restructure some divisions to optimise organizational performance) I supported the initiative but simultaneously suggested to him that we agree on a transition to allow me to persue my other work interests beyond SITA. By the middle of July this year I then suggested to him that I was ready to resign to which we agreed with the proviso that I be available to assist with anything that he may ask me to. Effectively therefore I resigned in July from the Company. With regard to my possible starting date at NMBM, I did indicate that a two weeks notice period would be sufficient to assume the new duties." (Emphasis added)

[13] A further querying email from the first respondent ***". . . so there was no matter of suspension? I know how the rumour mill works . . ."*** elicited the following response: -

"Thanks Executive Mayor for this. As you say the rumour mill can do tainting of one's image. Just to put you at ease about this, let me clarify what happened. At SITA I was the Executive in Charge of Corporate services which included five departments, one of which was Human Capital Management (HCM). The HOD of HCM was then suspended by the CEO around May (on one friday) when I was away on a family funeral. This followed some audits that we had launched in HCM. On my return I was puzzled that one of my immediate subordinates was suspended without my knowledge. Around the same time the CEO suspended the Company Secretary. I raised this matter with the CEO and three weeks later I then proposed to him that given that the HOD concerned reported to me, how about I step aside (more of a special leave) and allow the investigation not to be seen to have my hand or potentially be seen to be blocked by me. We both agreed on this approach. By the time I resigned there was nothing against me and thus am not worried about my record in the company." (Emphasis added)

[14] On 14 November 2016, the applicant addressed the following email to the first respondent: -

"This serves to acknowledge the receipt of your emailed letter dated 11th of November 2016 received at 4:56 pm on the same day.

At the outset, I must state that I welcome the Executive Mayor's efforts to ensure that the new municipal manager which the council resolved to appoint on the 27th of October 2016 brings with him credentials and a record that may not tarnish the image of the office of the Executive Mayor in particular and that of the council in general.

As stated before, I did voluntarily resign from SITA on the 15th of July 2016 freely and without coercion of any kind and so far as I know there are no "material facts" which council needed to know surrounding my departure from SITA and which could "materially affect" the council decision to employ me as the municipal manager of the NMBM. I have, for ease of reference, **attached my certificate of service from SITA dated 31st July 2016** which explicitly states the reason for me to leave SITA.

Given the classification of SITA as a National Key Point and the confidentially clauses of the agreement, there would not have been a need for me to disclose this matter to you or to council. As part of the mutual separation agreement, the parties had agreed on record not to disclose the terms of the agreement to any third party.

The parties further agreed that should the employee commit any breach of obligations in terms of the agreement then the company shall be entitled, in its absolute discretion, to elect to claim damages from the employee arising out of the employee's breach and or pursue any other remedies available in law. Based on this agreement, it would also be legally incorrect for me to sign the consent form that you have sent me.

Lastly, I wish to place it on record that there is no outstanding or pending disciplinary cases or criminal charges against me arising from my employment with SITA." (Emphasis added)

[15] The aforementioned email is a model of self-aggrandizement, lacking in candour and moreover, a complete distortion of the truth. The applicant could not, on receipt of the first respondent's email have laboured under any misapprehension. He

had, prior to being informed of the appointment resolution, been made aware of ***"rumours"*** then circulating and his responses were designed to allay the first respondent's fears thereanent. Reliance upon SITA's classification as a National Key Point and calling into aid the confidential character of the mutual separation agreement concluded between himself and SITA as lawful impediments to him disclosing the information sought was disingenuous.

[16] The fact that the applicant subsequently disclosed the separation agreement does not inure to his benefit. It is quite clear that he deigned to comply with the request upon SITA's stance that his election to disclose the content of the agreement was determinative of the matter. As it turned out, the information sought to be suppressed lacked the requisite characteristics of confidentiality necessitating its non-disclosure. It's incorporation into the separation agreement was for his benefit, and his alone.

[17] Clause 4 thereof, under the rubric, ***"Separation and Payment"*** recorded the following: -

> **"The Parties have agreed that the Employee resigns on a voluntary basis with immediate effect. The Company undertakes to terminate all and any pending disciplinary processes against the Employee at the Termination Date. The Company undertakes to pay the Employee's final proportionate salary, being that for July 2016."**

[18] The aforementioned revelation that the applicant's voluntary resignation actuated SITA's decision to terminate disciplinary proceedings against him is irreconcilable with the information furnished in the employment application form submitted to the second respondent. Therein, in response to a question whether he had resigned pending the finalisation of disciplinary proceedings, he replied in the negative. That answer was patently false. As adumbrated hereinbefore, an incumbent to the position of a municipal manager is required, given the ambit of the functions delineated in s 55 of the Act to be a person of unquestionable honesty and integrity. The question posed in the application form was pertinent thereto and created an obligation to speak the truth. Notwithstanding the glaring inconsistency, the applicant has the temerity to state ***". . . at no point during that whole process of my appointment did I not disclose material facts within the confines of the non-disclosure agreement and the law."***

[19] The gravamen of the complaint, viz, that the rescission resolution was thus arbitrary, unlawful and legally invalid is, upon a conspectus of the evidence adduced, without any substance. The first respondent's apprehension, albeit informed by rumour, was validated by the content of the separation agreement which ineluctably established the applicant's *mala fides*. The council's decision was therefore fully justified and not arbitrary.

[20] The further contention, that the rescission resolution, which the applicant avers terminated his employment with the second respondent, contravened the Local Government Regulations on Appointment and Conditions of Employment for

senior managers is likewise misconceived. This bald statement, at variance with the averments made in his replying affidavit, is clearly a last gasp attempt to inveigle this court into affording him relief. It is singularly lacking in substance.

[21] In the result the following order will issue:

The application is dismissed with costs, including that of two (2) counsel.

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D. CHETTY

JUDGE OF THE HIGH COURT

Obo the Applicant:	*Adv A.C. Moorhouse*
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