



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022 - 033927

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29/2/2024
DATE

J Moorcroft
SIGNATURE

In the application by

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Applicant

**DISMISSED EMPLOYEES LISTED IN ANNEXURE “ML75”
ANNEXED**

Second to Seventy-
Eighth Applicants

And

JOHANNESBURG METROPOLITAN MUNICIPALITY

First Respondent

**MUNICIPAL MANAGER: JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Second Respondent

**EXECUTIVE MAYOR: JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Municipality – powers of – unilateral rescission of contracts – not permissible without court order or agreement

Legality review of decision of municipality

Order

[1] In this matter I make the following order:

- 1. Declaring that the second to seventy-eighth applicants are permanent employees of the first respondent;*
- 2. Declaring that the first respondent is obliged to consult with the second to seventy-eighth respondents before amending their employment contracts;*
- 3. Ordering the first respondent to pay the costs of the application, such costs to include the costs of two counsel.*

[2] The reasons for the order follow below.

Introduction

[3] The application is brought by a trade union and seventy-eight of its members whose employment by the first respondent is the subject of a dispute. The first respondent is a municipality and the second and third respondents are the municipal manager¹ and

¹ Referred to in the papers also as the city manager.

executive mayor of the municipality cited *nomine officio*.

The second and third respondents are officials of the first respondent and need not be cited separately. I refer in this judgment to the first respondent as “*the respondent*” and to the second and third respondent by their titles. The applicants are referred to as the “*union*” and the “*employees*” respectively.²

[4] The applicants seek a declaratory order that the employees are permanent employees of the respondent, and that the respondent was and is contractually bound to consult with the applicants before amending or rescinding their employment contracts. In doing so they seek a legality review of the decision of the respondent³ in terms of which the employment status of the employees as permanent employees was rescinded and they reverted to being fixed term employees. The fixed terms have lapsed.

[5] I deal with the aspects raised under different headings below.

Condonation

[6] The applicants’ attorneys addressed a letter to the second respondent on 13 March 2022 seeking the restoration of the employment contracts. The respondent’s attorneys advised on 15 March 2022 that the respondent rejected the demand and that it would oppose any court application.

[7] The applicants then instituted review proceedings in the Labour Court and judgment was handed down on 3 May 2022. The application was dismissed on the ground that the Labour Court did not have jurisdiction. An application for leave to appeal was dismissed on 28 July 2022.

The applicants then proceeded to consider their position and in consultation with counsel

² Where appropriate I refer to page references on the Caselines system to facilitate the reading of the judgment.

³ A number of other prayers were abandoned in the applicants’ heads of argument.

in August and September 2022 they elected to bring the present application as an alternative to petitioning the Labour Appeal Court for leave to appeal. The present application was then prepared and powers of attorney were obtained from the employees. The application was launched in October 2022.

[8] I am satisfied that the applicants were not dilatory in their prosecution of what is a matter of some complexity involving a large number of applicants, and that they approached this court within a reasonable time. They did so after the expiry of the 180 day period referred to in the Promotion of Administrative Justice Act, 3 of 2000 but insofar as the Act may be found to be applicable grounds exist for the extension of the 180 period. The 180 day period would have expired 180 days after 15 March 2022, in other words on about 15 September 2023.

Hearsay

[9] It was argued on behalf of the respondent that the applicants relied on hearsay evidence by the deponent to the founding affidavit and that the employees did not sign confirmatory affidavits. The evidence must therefore be approached with some circumspection but I am satisfied that the application can be decided on the common cause facts and by applying the *Plascon-Evans* rule.⁴

[10] The application turns on the documents emanating from the respondent that are common cause, though the parties differ on the interpretation of the documents. The probative value of the documents depends on the credibility of the respondent⁵ and there is no reason to believe that any of the documents are not what they purport to be. It is not disputed that the documents emanate from the respondent and were written or published under the hand of the officials whose names are reflected in the documents.

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634G.

⁵ Compare section 3(1)(b) of the Law of Evidence Amendment Act, 48 of 1988.

The power of the Court to grant declaratory relief

[11] The Court's power to grant declaratory relief is not contentious. The right to fair labour practices is enshrined in section 23 of the Constitution of 1996 and a declaratory order may be granted when a right in the Bill of Rights is infringed or threatened.⁶ The power to grant declaratory relief is also reflected in the Superior Courts Act.⁷ The Court is required to exercise a judicial discretion.⁸

[12] The respondent disputes the applicants' entitlement to relief but quite correctly do not dispute their standing to approach the Court or the power of the Court to grant declaratory relief.

A brief legislative overview

[13] Three Acts are important to this judgment and are referred to in abbreviated form. These are -

- 13.1 The Local Government: Municipal Systems Act, 32 of 2000 (the "Systems Act");
- 13.2 The Local Government: Municipal Structures Act, 117 of 1998 (the "Structures Act");
- 13.3 The Local Government: Municipal Finance Management Act, 56 of 2003 (the "Finance Act").

⁶ Section 23 and 38 of the Constitution.

⁷ Section 21(1)(c) of the Superior Courts Act, 10 of 2013.

⁸ See also *Adbro Investment Co Ltd v Minister of the Interior and Others* 1961 (3) SA 283 (T), *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A), *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).

[14] The respondent is an organ of state⁹ recognised in the Constitution.¹⁰ It has the “right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions,”¹¹ including the power to enter into employment contracts.

[15] The executive and legislative authority of the respondent is vested¹² in its municipal council.¹³ The municipal council takes all the decisions of the municipality subject to section 59. Section 59 deals extensively with the delegation of powers and provides *inter alia* that the municipal council may review decisions taken and may then confirm, vary or revoke a decision subject to rights that may have accrued.¹⁴

Delegation does not divest the council of responsibility concerning the exercise of the power or the performance of the duty that was delegated.¹⁵

[16] The executive mayor as the premier political office bearer of the municipality fulfils various functions¹⁶ including when appropriate the appointment of a mayoral committee.¹⁷ In terms of section 56(3)(f) of the Structures Act the executive mayor in performing the duties of his or her office, must *inter alia* perform such duties and exercise such powers as the council may delegate to him or her in terms of section 59 of the Systems Act. He or she reports to the municipal council on all decisions taken.¹⁸

[17] The municipal manager is the head of the administration¹⁹ of a municipality and is responsible and accountable for *inter alia* the appointment of staff,²⁰ subject to the policy directions of the municipal council. He or she provides guidance and advice to the

⁹ Section 2(1)(a) and (d) of the Systems Act.

¹⁰ Ch 7 of the Constitution.

¹¹ Section 156(5) of the Constitution. See also section 8(2) of the Systems Act.

¹² Section 151(2) of the Constitution, section 11(1) of the Systems Act.

¹³ Section 157(1) of the Constitution, referred to in section 1 of the Systems Act.

¹⁴ Section 59(3)(a) of the Systems Act.

¹⁵ Section 59(2)(e) of the Systems Act.

¹⁶ See for instance sections 30, 39, 57(2)(b), 59(3)(b), 60, 62(4)(b) of the Systems Act and sections 56 and 60 of the Structures Act.

¹⁷ Section 60 of the Structures Act.

¹⁸ Section 56(5) of the Structures Act.

¹⁹ Sections 54A(1)(a) and 55 of the Systems Act.

²⁰ Section 55(1)(e) of the Systems Act.

municipality and also acts as the accounting officer.²¹

The termination of employment

[18] The employees were formerly employed on fixed term contracts and their status was converted to that of permanent employment as from 1 March 2021. The conversion was effected in accordance with a decision of the mayoral committee. The respondent itself in a letter²² by the executive mayor dated 19 March 2021 adopted the attitude that the employment contracts have been lawfully converted.

[19] On 25 February 2022 the municipal council of the respondent rescinded²³ the decision of the mayoral committee on the ground that the mayoral committee did not have the power to sanction the conversion. The employees were informed²⁴ of the decision on 28 February 2022 and were informed that contraventions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Finance Act would be investigated. The municipal council invited the employees to make representations *“regarding how their unlawful employment should be regularised without offending the legal interests that are mentioned in section 6(2)(c) of the MSA²⁵ and section 78(1)(c) of the MFMA.”*²⁶ The union responded in writing²⁷ on 4 March 2022 to request an extension of the deadline for submissions and stating that in its opinion only a court may pronounce on the validity of the employment contracts.

[20] . The respondent issued a directive²⁸ on 9 March 2022 referring to the irregular conversion of the fixed term contracts, pointing out that the employees had failed to successfully challenge the rescission in the twelve days since the notice of rescission, and confirming that the conversion was irregular and improper. The rescission would

²¹ Section 60 of the Finance Act.

²² 03-178.

²³ The resolution appears in the papers at 03-91.

²⁴ “ML76” (03-84).

²⁵ The Systems Act.

²⁶ The Finance Act.

²⁷ “ML77 (03-86).

²⁸ “ML78” (03-88).

therefore be implemented.

[21] The decision to rescind the employment contracts was a unilateral decision of the respondent and there was no prior consultation.

The applicants' response to the rescission

[22] The applicants approached the Labour Court on an urgent basis and the application was dismissed on the ground that the Labour Court did not have jurisdiction.²⁹ An application for leave to appeal was dismissed.³⁰ Thereafter they approached this court.

[23] The applicants argue that –

- 23.1 The rights of the employees in terms of sections 22,³¹ 23³² and 33³³ of the Constitution have been infringed;
- 23.2 They have a clear right to the relief sought, they have no alternative remedy, and they stand to suffer irreparable harm;
- 23.3 They were not consulted before their permanent employment rights were unilaterally rescinded;
- 23.4 The respondent acted in bad faith, for an ulterior purpose or motive, or were influenced by an error of law.

[24] The applicants argue that the conversion of the fixed term contracts to permanent

²⁹ *SAMWU and others v Johannesburg Metropolitan Municipality and others*, 3 May 2022. The case number on the copy of the judgement that form part of the papers is not legible. The judgement appears in the papers at 03-93.

³⁰ The judgement dismissing the application for leave to appeal appears in the papers at 03-105.

³¹ Freedom of trade, occupation or profession.

³² Fair labour practices.

³³ Just administrative action.

status contracts was done lawfully and all policies and legislative requirements of the respondent were complied with. They refer to a letter of employment issued by the respondent to one employee. The employee who received the letter is not one of the employees listed as an applicant but the letter emanating from the desk of the Group Head: Group Human Capital Management of the respondent informs the employee concerned of the conversion of the employment status in terms of a resolution of the respondent. Group Human Capital Management is part of the administrative infrastructure of the respondent.

The respondents' argument

[25] The respondent argues that the executive mayor did not have the power to appoint staff; this was an administrative function that was delegated to the municipal manager. The municipal manager however did not have the power to convert employment contracts from fixed term to permanent as this would have a *“massive impact on the finances of”* the respondent – the decision would have to be taken with the approval of the council.

The authority to approve levels 3 and below of the staff establishment developed by the municipal manager was delegated to the executive mayor, but not the authority to appoint people to positions.

[26] The decision was in conflict with existing council policy and was therefore not exercised within the relevant policy framework. The power to do so was beyond the power delegated to the executive mayor and the mayoral committee, and to the extent that the contracts were amended, the decision was unlawful, irrational, and therefore null and void and of no force or effect.

The staff establishment framework

[27] The respondent adopted a staff establishment policy framework with effect from 1

May 2012.³⁴ On 24 April 2012 the municipal council delegated the authority in terms of section 59 to approve levels 3 and below of the staff establishment developed by the municipal manager to the executive mayor, subject to council approval of a policy framework within which the delegation is to be exercised.

[28] In February 2021 it was recommended *inter alia* that a conversion and placement arrangement framework³⁵ be approved and that the fixed term employment of employees in political office on the level of Assistant Director and lower be converted to permanent employment. The submission was signed by the Group Head: Group Human Capital Management, the Acting Group Executive Director: Group Corporate and Shared Services, Member of the mayoral committee: Corporate and Shared Services, and the municipal manager. The municipal manager appended the words “*for Mayco discussion*” to his signature. It is clear from the context that this is a reference to the mayoral committee.

[29] The employees argue that pursuant to these recommendations their fixed term employment was lawfully converted to permanent employment in compliance with section 66(3) of the Systems Act.

[30] Following enquiries from within the council by an opposition party the executive mayor issued a media statement³⁶ in March 2021, stating that the conversion had been done after a well thought out process taking into account relevant considerations. What followed was a letter on 17 March 2021 on behalf of the opposition threatening an approach to the High Court to seek interdictory relief.

[31] On 19 March 2021 the executive mayor responded in writing³⁷ to the political opposition. He stressed that the decision to convert employment status of the employees was a decision of the executive mayor taken in terms of powers delegated to him (*nomine officio*) by the municipal council on 24 April 2012 and 21 June 2012. Various administrations have acted in terms of these delegations since 2012. He confirmed that the conversion had been done after considering all relevant facts and legal principles including case law, policy, and remuneration revenue ratio. The applicants say that the

³⁴ “ML81” (03-107).

³⁵ CPA. A report is included in the papers (03-134).

³⁶ 03-151.

³⁷ 03-159.

letter by the executive mayor satisfactorily disproved any allegations of unlawfulness of the conversions.

The threatened court application never materialised.

[32] The documents emanating from the respondent indicate that the municipal manager recommended the conversion, that the conversion was approved, and that it was in the view of the executive mayor a decision properly taken after the respondent had applied its mind to the matter.

The distinction between *ultra vires* and irregular acts

[33] There is a distinction between an act beyond or in excess of the legal powers of a public authority, and an irregular or informal exercise of a power. In *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*³⁸ Ponnann JA said::

“[11] It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other....

[12] In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with (see for example National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A); Potchefstroom se Stadsraad v

³⁸ *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA).

Kotze 1960 (3) SA 616 (A)). Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.” [footnotes omitted]

[34] The union and the employees were entitled to assume that internal arrangements and formalities were complied with, and that the respondent is bound by the conversion.

[35] Entering into employment contracts is not *ultra vires* the powers of the respondent and the requirements imposed by section 33(1) of the Finance Act do not apply to employment contracts.³⁹ The inference is that the conversion was not *ultra vires*. The respondent also regarded the conversion as irregular rather than *ultra vires*.⁴⁰ To my mind it is neither desirable nor necessary⁴¹ to determine whether the conversion fell within the powers delegated to the executive mayor, whether the municipal manager approved the conversion (he certainly supported it), what powers were delegated to the municipal manager, and whether the respondent’s officers were clothed with actual or ostensible authority.⁴²

[36] Authority may be actual or ostensible. In *Makate v Vodacom Ltd*⁴³ The majority⁴⁴ of the Constitutional Court endorsed the explanation of the distinction as given by Lord Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another*.⁴⁵ In distinguishing between estoppel and ostensible authority, Jafta JA said:

“[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in

³⁹ Section 33(2)(b) of the Finance Act.

⁴⁰ See para 6 of the Directive of the Acting City Manager dated 9 March 2022 (03-88).

⁴¹ In view of the conclusion reached under the heading “The rule of law” below.

⁴² The respondent’s staff establishment framework form part of the papers. See “ML81” (03-107).

⁴³ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 48.

⁴⁴ Jafta J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J concurring).

⁴⁵ *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) 583A-G, also reported at [1967] 3 All ER 98.

replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent had authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.” [footnotes omitted]

The rule of law

[37] It is common cause that the decision to rescind the conversion was taken unilaterally and without any consultation.

[38] A decision erroneously taken may nevertheless have lawful consequences until set aside. Officials are not permitted to usurp the role of the courts by deciding that a decision was unlawful and rescinding it unilaterally when the rescission affects accrued rights, even when those rights are disputed – the imprimatur of the Court is a prerequisite. The need to approach the Court flows from the rule of law, a cornerstone of the Constitutional dispensation in South Africa. Until the court pronounces on an allegedly unlawful exercise of public power, the exercise of the power maintains legal authority solely due to its existence in fact. Administrative action retains legal validity, notwithstanding potential objective invalidity.

[39] In *Merafong City v AngloGold Ashanti Ltd*⁴⁶ Cameron J, speaking for the majority,

⁴⁶ *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) paras 42 to 43.

said:

"[41] The import of Oudekraal⁴⁷ and Kirland⁴⁸ was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to Kirland, in Economic Freedom Fighters.⁴⁹ He pointed out that our constitutional order hinges on the rule of law:

'No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'

[43] But it is important to note what Kirland did not do. It did not fossilise

⁴⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), [2004] 3 All SA 1 (SCA).

⁴⁸ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

⁴⁹ *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC).

possibly unlawful — and constitutionally invalid — administrative action as indefinitely effective. It expressly recognised that the Oudekraal principle puts a provisional brake on determining invalidity. The brake is imposed for rule-of-law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule-of-law reasons, the decision stands.”

[40] The words of Khampepe J speaking for the majority⁵⁰ in *Department of Transport and Others v Tasima (Pty) Ltd*⁵¹ are particularly apposite:

“No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'. However, for the reasons developed through a long string of this court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.”

[41] The conversion certainly had legal consequence and could not be set aside unilaterally. It follows that the respondent's decision to rescind the conversion can not stand. The applicants are entitled to the relief sought.

Conclusion

[42] For the reasons set out above I make the order in paragraph 1.

⁵⁰ Khampepe J (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring).

⁵¹ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.


J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **29 FEBRUARY 2024**

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DATE OF ARGUMENT: 19 FEBRUARY 2024

DATE OF JUDGMENT: 29 FEBRUARY 2024