REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 735 / 2013

In the matter between:

UTHUKELA DISTRICT MUNICIPALITY **Applicant**

and

BHEKI HAMILTON KHOZA **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

ARBITRATOR MLUNGISI SABELA **Third Respondent**

Heard: **21 October 2014**

Delivered: **20 March 2015**

Summary: **Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Review concerning issue of jurisdiction – Test of rationally and reasonableness does not apply – Issue considered *de novo* as to whether arbitrator right or wrong**

Practice and procedure – Review grounds based on case never before arbitrator – Impermissible to raise such review grounds – Review grounds rejected

Practice and procedure – Pre-arbitration agreement as to how case is to be conducted – Parties bound by such agreement – Review grounds contrary to such agreement rejected

Municipal Systems Act – Sections 56 and 57 – Consideration and interpretation of such sections – Application to employment contract of senior manager considered

Dismissal – Meaning of dismissal – Employer prematurely bringing employment contract to an end – Constitutes dismissal

Dismissal – Allegation of invalid contract – Act of employer seeking to abolish contract constituting dismissal

Employment contract – Unilateral termination by employer prior to expiry of contract term – Such constituting unfair dismissal – Arbitration award upheld

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the third respondent in his capacity as an arbitrator of the SALGBC ("the second respondent"). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The very issue before the third respondent as arbitrator was whether the first

[1] No 66 of 1995.

respondent had been dismissed by the applicant, or whether the first respondent's employment had been terminated by operation of law. The first respondent however, contended that he had been dismissed on 6 June 2012, and he pursued his contended dismissal an unfair dismissal dispute to the second respondent, being the applicable bargaining council. The matter came before the third respondent for arbitration on 13 April 2013. The third respondent, in an award dated 13 July 2013, determined that the first respondent had indeed been dismissed by the applicant, and that such dismissal was unfair. The applicant was directed to reinstate the first respondent with effect from 11 June 2012, and pay the first respondent back pay from 1 January 2013 in an amount of R481051.26. It is this determination by the third respondent that forms the subject matter of the review application brought by the applicant, which application was timeously filed on 23 July 2013.

Background facts

[3] Fortunately in this matter, the case was presented by way of what was in effect tantamount to an agreed statement of facts. No *viva voce* evidence was led as to the merits of the matter. There was also a bundle of documents presented as agreed and accepted evidence. The parties also made written submissions in support of their respective cases. The background facts set out hereunder are extracted from all this agreed evidence.

[4] The first respondent was employed by the applicant as the Executive Director: Health and Environmental Services. The first respondent was in fact appointed to head up that department in the applicant. The first respondent occupied this position as from 1 July 2005.

[5] On 15 July 2006, the applicant and the first respondent concluded a written contract of employment, for a fixed period of five years, commencing on 1 July 2006. As stated, and in terms of this contract, the first respondent was appointed

as the Executive Director: Health and Environmental Services, and reported to the Municipal Manager. Provision was made for the renewal of the contract upon expiry upon mutually agreed terms and conditions.

[6] Despite the commencement of the five year period in terms of the aforesaid contract being defined as 1 July 2006, and the contract thus expiring on 30 June 2011, it appears that the parties commenced a process of concluding another contract with the first respondent in 2010. There was never any evidence as to why this was the case. In this regard, however, a meeting of the Council was held on 31 May 2010 to discuss the renewal of the contract of the first respondent. The Council then adopted a resolution on 31 May 2010 (resolution 7.3). The resolution records that the issue of the contract period of the first respondent, going forward, was debated. The resolution further reflects a consideration of the issue of an appropriate fixed term contract period, in the form of a statement that the Municipal Manager's contract cannot exceed five years, but the other heads of department could have longer contract based on the prerogative of the Council. Pursuant to this discussion, it was resolved as follows:

> 'Mr B H Khoza's contract be renewed for seven (7) years as the Executive Director Health and Environmental Services with effect from 1 July 2010.
>
> The Municipal Manager as the administrative head of the municipality enter into a seven (7) years contract with the Executive Director Health and Environmental Services in accordance with Section 57 of the Municipal Systems Act'

[7] A further fixed term contract was then indeed concluded between the Municipal Manager and the first respondent, on 1 July 2010, pursuant to the above resolution. The first respondent was again appointed as Executive Director: Health and Environmental Services, reporting directly to the Municipal Manager. The contract commenced on 1 July 2010 and would endure for a period of

7(seven) years, ending 30 June 2017. The applicant, however, had the right to terminate the contract before the expiry of the fixed term, on three months' notice, but subject to applicable labour laws.

[8] It was common cause that the first respondent's appointment was made in terms of the Municipal Systems Act ('the Systems Act')[2]. There was however, an issue between the parties as under which section of the Systems Act the appointment of the first respondent was made, being in terms of section 56 or 57. I will address this later in this judgment. However, and having been so appointed and having concluded the contract referred to above, the first respondent, at all relevant times, properly discharged his duties in terms of this appointment.

[9] The Systems Act was amended with effect from 5 July 2011.[3] This amendment included amendments to sections 56 and 57. Considering the case advanced by the applicant (as will be dealt with hereunder), it is necessary to refer to the relevant parts of these two sections, as they existed prior to and after the amendment.

[10] I will first refer to section 56, which is the section in the Systems Act that provides for the appointment of managers that are directly accountable to the Municipal Manager. Prior to 5 July 2011, section 56 provided that a manager directly accountable to the Municipal Manager is appointed by the Council, and the person so appointed must have the requisite qualifications and skills for the position, but also taking into account affirmative action objectives. Then, and after 5 July 2011, section 56 read thus:

> '(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

[2] Act 32 of 2000.
[3] This was done by way of the Municipal Systems Amendment Act 7 of 2011.

the skills, expertise, competence and qualifications as prescribed. ….

(5) 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, within 14 days of becoming aware of such appointment, 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 of any other legal action against the municipality. ….

(7) 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 appointed in accordance with this section.'

[11] Turning then to section 57, this is the section that regulates the issue of employment contracts, both for the Municipal Manager, and the managers directly accountable to the Municipal Manager. Section 57(1)(a) required that all such managers must have a written contract of employment signed by both parties. Prior to 5 July 2011, the relevant further parts of the section 57 read:

'(3) The employment contract referred to in subsection 1(a) must include, subject to applicable labour legislation, details of duties, remuneration, benefits and other terms and conditions of employment ….

(6) The employment contract for a municipal manager must – (a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality ….

(7) A municipality may extend the application of subsection (6) to any manager accountable to the municipal manager.'

Then, and after 5 July 2011, the relevant part of section 57 read:

'(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 ….'

(6) The employment contract for a municipal manager must – (a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality ….'

In addition, subsection (7) allowing for the application of subsection (6) to managers directly accountable to the Municipal Manager was deleted by way of the amendment.

[12] Following the 2011 amendment of the Systems Act, the Department of Co-operative Governance and Traditional Affairs for Kwa-Zulu Natal ('Cogta') issued circular 37 of 2011, on 3 October 2011. It was recorded in such circular that its purpose was to emphasize the provisions of the Systems Act (especially the amendments) and the legal responsibility on Municipal Councils as a result. It was recorded that the MEC was obliged to take appropriate steps to ensure compliance with, *inter alia*, section 56 of the Systems Act. Because of the responsibilities that rested on the MEC in terms of the amended Systems Act, the circular was intended to impress on the Municipalities why it was important that all information that had to be provided to the MEC in terms of the Systems Act by the Municipalities, had to be timeously and properly provided. However, and of importance to the proceedings *in casu*, the circular recorded that the

recommended procedure when appointing a municipal manager or a manager directly accountable to the municipal manager was that the post had to advertised in a national newspaper as sanctioned by council resolution, the decision for the constituting of the short list panel and details of its members had to be sanctioned by council resolution, and the decision for the constituting of the interview panel and details of its members also had to be sanctioned by council resolution.

[13] What followed circular 37 of 2011 was then circular 5 of 2012, issued by Cogta on 3 May 2012. The purpose of circular 5 of 2012 was to enlighten the functionaries in the municipalities of the requirements and the provisions of the Systems Act where it came to the recruitment, appointment and employment of municipal managers and managers directly accountable to municipal managers. The circular was critical about the manner in which such managers had been appointed in the past. It was explained in detail how such managers had to be recruited, selected and appointed going forward, and what information about such appointments then having to be supplied to the MEC. It was recommended that the MEC should first endorse the appointments to prevent possible disputes and legal problems. Circular 5 of 2012 also dealt with existing employment contracts of municipal managers and managers directly accountable to municipal managers, and recorded that the following principles must be considered: (1) the Systems Act provided that an employment contract must be for a fixed term of employment up to a maximum of five years, not exceeding a period of one year after election of the next council; (2) Mayors are required to scrutinize the employment contracts of municipal managers and managers directly accountable to municipal managers to determine compliance with these fixed term provisions; (3) Council should immediately commence with recruitment processes to expedite the filling of posts.

[14] Circular 13 of 2012 from Cogta promptly followed on 15 May 2012, and was

intended to provide a 'further guide' with regard to the principles as set out in circular 5 of 2012 in respect of the appointment of municipal managers and managers directly accountable to municipal managers. In circular 13 of 2012, 'practical measures' were proposed with regard to instances where there was a termination of the employment contracts of municipal managers and managers directly accountable to municipal managers, which measures were: (1) municipalities may retain these senior managers on a month to month basis, in an acting capacity, up to a maximum of six months; (2) the municipality, if it does not retain such managers, may appointed internal employees in an acting capacity for not more than six months, provided such employees are suitably qualified; (3) secondment of employees from district municipalities could be considered; and (4) the MEC could be requested to second other suitably qualified individuals at the municipality's cost. Properly considered, this circular informed municipalities what could be done in the interim, where the employment contracts of municipal managers and managers directly accountable to municipal managers ended, but the post still needed to be filled.

[15] All of these circulars, and the amendments that were effected to the Systems Act, prompted the applicant to seek its own legal opinion from attorneys in Ladysmith, being Ramkhelawan Inc. In a written opinion dated 23 May 2012, Ramkhelawan stated that the amendment to section 57 of the Systems Act does not take away the discretion of the council to determine the terms of employment of managers directly accountable to the municipal manager. Ramkhelawan further said that the duration of the contract of a manager directly accountable to the municipal manager is determined by the actual terms of the contract itself that was entered into. Ramkhelawan concluded that the assertion that the employment contracts of managers directly accountable to the municipal manager would terminate on 18 May 2012 was incorrect, and that the employment contract of managers directly accountable to the municipal manager may only be terminated of the expiry of the actual stipulated term in that contract.

Ramkhelawan specifically said that any attempted reliance on circulars 5 and 13 of 2012 as substantiation for earlier termination of such employment contracts would be incorrect.

[16] Another document in evidence was circular 14 of 2012 issued by the South African Local Government Association ('SALGA'), dated 28 May 2012, of which the applicant is a member. The circular records that SALGA had been 'inundated' by requests from municipalities to provide guidance where it came to the issue of the termination of the employment contracts of municipal managers and managers directly accountable to municipal managers, following the amendments to the Systems Act. SALGA stated that circulars issued by provincial departments in this regard were contradictory, inconsistent with the law, and caused 'general confusion in the sector'. After discussing the relevant Constitutional framework governing municipalities and referring to the Systems Act (as amended), SALGA expressed the view that where it came to a manager directly accountable to a municipal manager, the municipality had the discretion as to the terms of appointment of such managers. According to SALGA, unless the employment contract of such managers contained an express provision as contemplated by the now repealed Section 57(7), the agreements of such managers must be allowed to run its course.

[17] Then, and faced with all of the above, the applicant convened a special council meeting on 6 June 2012 to *inter alia* discuss the employment contract of the first respondent. The minutes of such meeting form part of the documentary evidence. From these minutes, it appears that there was some concerns about terminating the employment contract of the first respondent. A reading of the minute in my view reflects all the circulars referred to above, as well as the legal opinion by Ramkhelawan Inc, was available for consideration. Finally, and in this meeting, it was resolved that the employment contract of the first respondent be 'abolished', the first respondent be appointed on a month to month basis not

exceeding six months, and the process of advertising for the position commence immediately.

[18] On the same day, being 6 June 2012, the first respondent was then given written notice by the mayor that his employment contract had been 'abolished' with effect from 6 June 2012 following a council resolution. The first respondent then approached his attorneys, who wrote to the applicant on 11 June 2012, recording that the 'abolishment' of the first respondent's contract was not accepted, and was unfounded and arbitrary. The first respondent's attorneys attempted to resolve the issue by suggesting that the first respondent would accept that the approach adopted by the applicant could be considered to be issues of misunderstanding and misinterpretation, and that the first respondent was willing to overlook this if the applicant simply restored the *status quo ante*. The applicant failed to heed this invitation.

[19] On 20 June 2012, the first respondent then referred an unfair dismissal dispute to the second respondent, being the bargaining council with jurisdiction, contending in the referral that the applicant had terminated his employment before the expiry of its term without fair reason on 6 June 2012. The first respondent sought reinstatement. The dispute was unsuccessfully conciliated on 18 July 2012, and referred to arbitration on the same date. The first respondent, at all relevant times, was pursing an unfair dismissal dispute and seeking reinstatement.

[20] In the arbitration before the third respondent on 13 April 2013, the arbitration was in essence conducted as a stated case, as I have referred to above. The only *viva voce* evidence given was by the first respondent only as to his current employment status.

[21] By agreement between the parties, the issue the third respondent had to determine was whether the first respondent had been dismissed by the applicant as contemplated by Section 186(1) of the LRA. The crisp issue relevant to this

determination was whether the applicant was legally obliged to terminate the employment contract of the first respondent as a result of the provisions of sections 56 and 57 of the Systems Act (as amended), as read with Cogta circulars 5 and 13 of 2012. In short, the case of the applicant was that the employment contract of the first respondent expired in terms of the Systems Act, and even if it had not expired, it was unlawful and void because it was at odds with the Systems Act and thus its termination could not be a dismissal.

[22] Both parties then indeed submitted written submissions to the third respondent, as agreed. The third respondent ultimately made an award that the first respondent had indeed been dismissed, that such dismissal was unfair, and the first respondent be afforded the relief as set out above. It is this award that then gave rise to this review application.

The relevant test for review

[23] The issue as to whether the first respondent was dismissed by the applicant is a jurisdictional fact. If there is no dismissal, then the bargaining council (second respondent) would have no jurisdiction to determine the matter in terms of the LRA. This being the situation, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] does not apply. In specifically considering the judgment in *Sidumo*, the Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[5] said:

> 'Nothing said in *Sidumo*, *supra*, means that the grounds of review in section 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section

[4] (2007) 28 *ILJ* 2405 (CC).
[5] (2008) 29 *ILJ* 964 (LAC) at para 101.

> 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.' (emphasis added)

The same reasoning would clearly also apply to the review of bargaining council arbitration awards.

[24] When deciding a review on the basis of jurisdiction, the proper review test where the existence of the requisite jurisdictional fact is objectively justiciable in court, would be whether the determination of the arbitrator was right or wrong. This was so held in *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd*[6] where the court said:

> '… Where the precondition is an objective fact or a question of law, its existence is objectively justiciable in a court of law and if the public authority made a wrong decision in this regard the decision may be set aside on review…'

And in *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* it was held[7]:

> '…The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds...'

[25] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[8] the Labour Appeal Court specifically articulated the enquiry as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine

[6] (1998) 19 *ILJ* 557 (LAC) at para 24.
[7] (1999) 20 *ILJ* 108 (LAC) at para 6:
[8] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.

whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[26] There are several recent applications of this 'jurisdiction' review test by the Labour Court, starting with *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[9] where Steenkamp J reasoned:

'The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the commissioner correctly found that Van Rooyen had been dismissed.'

The same approach was followed in *Hickman v Tsatsimpe NO and Others,*[10] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[11] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[12] *Workforce Group (Pty) Ltd v CCMA and Others*[13] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[14] I conclude with the following reference to what I said in *Trio Glass t/a The Glass Group v Molapo NO and Others*[15]:

'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted

[9] (2012) 33 *ILJ* 363 (LC) at para 23.
[10] (2012) 33 *ILJ* 1179 (LC) at para 10.
[11] (2013) 34 *ILJ* 392 (LC) at paras 5–6.
[12] (2012) 33 *ILJ* 1171 (LC) at para 14.
[13] (2012) 33 *ILJ* 738 (LC) at para 2.
[14] (2013) 34 *ILJ* 1272 (LC) at para 21.
[15] (2013) 34 *ILJ* 2662 (LC) at para 22.

test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[27] What all of the above means is that, in determining the question whether the first respondent was dismissed by the applicant, I will decide whether the award of the third respondent was right or wrong, by way of a *de novo* consideration of the justiciable facts on record.

The applicant's review case

[28] Before I even start deciding the merits of this review application, I will first address exactly what the applicant's review case is, and then whether such review case is properly before me for determination. Starting with the founding affidavit, it is of no assistance when seeking to determine what exactly the applicant's grounds of review are. The founding affidavit is permeated with what can simply be described as general and unmotivated statements of alleged irregularities without any particularity as to how it is arrived at. For example, it is said that the second respondent failed to consider and to properly evaluate relevant and admissible evidence, without any indication of why this is so. There is a bald statement that the arbitration award is not reasonable in relation to the reasons given, but nothing is said as to why. There is no summary of the background facts. The founding affidavit is hopelessly inadequate, and bordering on being a material defect susceptible to being struck out. It is of no assistance to the Court where review applicants simply make generic and unmotivated statements raising review grounds in the widest possible terms. If this review application was founded only on what is contained in the founding affidavit, I may have been inclined to dismiss the review application for this reason alone.

[29] Fortunately for the applicant, the supplementary affidavit does fare better. But there are still problems. Firstly, I am somewhat puzzled by the fact that the applicant's supplementary affidavit contains a number of references to events

and issues that are simply not relevant to the case at hand, and was never in evidence before the third respondent. There were statements to the effect that the first respondent issued false certificates for a number of vehicles and that the first respondent was one of the miscreants in the municipality responsible for wholesale looting in the municipality. There was also reference to a disciplinary process being instituted against the first respondent. As stated above, the evidence in this matter was in essence in the form of a stated case and written submission by the parties. There is nothing in these documents making reference to these facts now raised for the first time in the supplementary affidavit. It is entirely inappropriate and unacceptable to raise new material in a review application that was not before the arbitrator. In *Rambar Construction (Pty) Ltd t/a Rixi Taxi v Commission for Conciliation, Mediation and Arbitration and Others*[16] the Court held:

> '… Parties cannot come before court with fresh evidence no matter how good it is and hope that the court will find in their favour when that evidence ought to have been brought and tested at the arbitration level by the commissioner…'.

I shall therefore have no regard to any of these contentions, as the same simply did not form part of the agreed evidence before the arbitrator.

[30] In the supplementary affidavit, it is stated that the applicant's case before the third respondent had been that there was no dismissal and that the bargaining council did not have jurisdiction to hear the case. Elaborating on this, the applicant says, as a first ground of review, that there was no dismissal of the first respondent in this instance because the first respondent's employment contract terminated by way of operation of law in terms of section 57 of the Systems Act.A second ground of review raised is to the effect that the first respondent's

[16] (2012) 33 *ILJ* 1911 (LC) at para 42. See also *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* (2013) 34 *ILJ* 2347 (LC) at para 32; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 24.

employment contract was 'illegal' and thus its termination cannot be a dismissal. If I consider the agreed statement of facts and the parties' closing arguments, I am satisfied that the issues relating to these two grounds of review were indeed placed before the third respondent and were part of the applicant's case at the arbitration. I will thus consider and determine these grounds of review, hereunder.

[31] But then, in the supplementary affidavit, the applicant raises a number of other review grounds. The first of these further grounds of review are that the issue in dispute before the third respondent was the termination of a fixed term contract based on a misinterpretation of the law, and that such cases should not come before the bargaining council, but should be referred directly to the Labour Court. Then the applicant also refers to the arbitration clause contained in clause 10.1 of the first respondent's employment contract, and stated that in terms of this clause, the matter should have been referred to private arbitration. The next of these further review grounds is a contention that the first respondent's erstwhile employment contract signed on 15 July 2006 would only expire on 31 July 2011, and there was thus a 'scheme' between the first respondent and one Mr Nkehli to 'mislead' the council and trick it into an undue renewal of the employment contract already in 2010. Added to this, the applicant complains that one cannot renew a fixed term contract one year before it expires. If I then consider to the agreed statement of facts, the documents, and the written submissions by both parties, none of these issues now raised as grounds of review were ever raised or placed before the third respondent in evidence, or as part of the applicant's case the third respondent was called on to determine. This is not permissible. The Court in *Albany Bakeries Ltd v Van Wyk and Others*[17] made it clear that it was prohibited for a review applicant to raise on review a case never placed before the arbitrator.

[17] (2005) 26 *ILJ* 2142 (LAC) at paras 39 and 40.

[32] Even considering that this is a jurisdictional review, determined on the basis of the arbitrator being right or wrong, the applicant is still not entitled to raise a case on review that was never before the arbitrator in the first place. The applicant, even in this regard, must remain bound by the case placed before the arbitrator. The approach adopted by the applicant is similar to where an appellant seeks to raise a new case on appeal, never before the Court *a quo*, and it has been made clear that this is not permissible.[18] As was said in *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)*[19]*:*

> '…. An issue cannot be properly the subject of an appeal against a dismissal of the review if the issue had not been put to that review court as a ground of review. Thus, even if a contention that, on a balance, the sanction was too harsh, had enjoyed merit, which, in our view, it cannot, it is not open to the court of appeal to entertain it.'

I conclude in this respect by referring to the following *dictum* from the judgment in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[20]:

> '…. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

[33] Therefore, I shall not consider the ground of review of the applicant relating to the arbitration clause in the contract. I may mention in this regard that this ground in any event has no merit of any kind in any event, considering the wording of clause 10.1 which specifically excludes disputes in terms of the LRA (which is what this matter actually relates to) from this prescribed private arbitration. I shall

[18] See *SA Police Service v Solidarity on behalf of Barnard (Police and Prisons Civil Rights Union as Amicus Curiae)* (2014) 35 ILJ 2981 (CC) at para 59; *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others* (2013) 34 *ILJ* 1440 (LAC) at para 41.
[19] (2014) 35 *ILJ* 2406 (LAC) at para 46.
[20] (2008) 29 *ILJ* 2461 (CC) at para 67.

equally not consider the grounds of review relating to some or other 'scheme' to mislead the council into concludingthe contract, nor the issue as to whether it is possible to renew a fixed term contract one year before it expires. The simple point is that none of these issues were before the third respondent as arbitrator and it was never part of the applicant's case. It is simply not permissible to raise it now, and thus I will not entertain it.

[34] Finally, the applicant raised several review grounds as to the manner in which the third respondent conducted the arbitration, with reference to the review record. The applicant complains there was disproportionate representation in the arbitration, as the applicant's representative was facing an experienced labour law advocate on behalf of the first respondent. The applicant says further that the curtailment of cross examination by the third respondent was prejudicial to the applicant A further issue raised is that the third respondent allowed the first respondent's representative to ask leading questions. As these are the kind of review grounds that can be competently raised following the discovery of the record of proceedings in the arbitration, I will equally consider these review grounds.

The issue of the conduct of the arbitration

[35] In a nutshell, the applicant's case with regard to the issue of representation, the curtailment of cross examination and the allowing of leading questions is a case that the third respondent committed misconduct in the conducting of the arbitration as contemplated by section 145(2)*(a)*(i) of the LRA.[21]

[36] In my view, any case by the applicant of misconduct committed by the third respondent in the course of the arbitration faces an insurmountable obstacle, being the agreed basis on which the arbitration was in the end conducted. At the

[21] Section 145(2)(a)(i) reads: 'a defect referred to in subsection (1), means — *(a)* that the commissioner — (i) committed misconduct in relation to the duties of the commissioner as an arbitrator'. See *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 *ILJ* 1546 (LC) at para 13.

outset of the arbitration, the applicant's representative, Mr L Yingwana ('Yingwana') is asked to make an opening statement, and he says '…. In fact we don't think that there is any oral evidence that we are going to be leading. On our part, safe to say that the argument, we've got documents, it's all a matter of principle. Otherwise I won't have any opening address' (sic). Ms Allen, who also represented the first respondent in the arbitration, said that she and Yingwana spent some time that very morning finalizing pre-arbitration minutes. These minutes were, as stated above, handed to the third respondent together with an agreed bundle of documents. Ms Allen said that the only real issue is the applicability of section 57 of the Systems Act. Ms Allen further records that it had been agreed that the matter be dealt with by way of written submissions by both parties. Ms Allen finally stated that the crux of what the third respondent had to determine was whether or not there was a dismissal. Yingwana never contradicted anything Ms Allen said, and in fact confirmed that the documentary evidence handed in has been accepted by both parties. Considering all of this, as to the substance of the matter, it was clearly conducted by way of an agreed process. There is no dispute that this agreed process was then applied.

[37] The applicant is bound by this agreed process. The applicant simply cannot now, whether directly or indirectly, seek to in any way contradict or disavow that process by way raising grounds of review as it did in the founding affidavit, especially those complaints relating to the presentation of evidence. The Court in *Filta-Matix (Pty) Ltd v Freudenberg and Others*[22] dealt with the issue of a party seeking to resile from that which was recorded in a pre-trial minute and said:

> '…To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pretrial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation.'

The exact same sentiment was echoed in *National Union of Metalworkers of SA*

[22] 1998 (1) SA 606 (SCA) at 614B-C.

and Others v Driveline Technologies (Pty) Ltd and Another[23] where Zondo AJP (as he then was) held:[24]

> 'I think it is necessary immediately to accept as a point of departure that, where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues. …'

[38] Furthermore, and once again by agreement, the only *viva voce* evidence led was by the first respondent, and this only related to his present employment status. From the record, it is clear that Ms Allen only asked him such related questions. Yingwana was given an opportunity to cross examine the first respondent and stated off by saying: 'Ordinarily, you know, the questions that were asked were kind of leading with the common causes.' (sic). Ms Allen answers: 'Leading on common cause issues I didn't think it would be a problem'. Yingwana replies: 'Ja, it won't be a problem.' But now, and on review, the applicant complains about leading questions being asked and allowed by the third respondent. I consider this to be entirely disingenuous and in fact opportunistic and nothing more than an attempt to try and bolster the review.

[39] When Yingwana then starts his cross examination, he proceeds to ask the first respondent who drafted the contracts that the first respondent entered into. As stated above, and by agreement, the only *viva voce* evidence by the first respondent would be as to his current employment status and nothing else, and Ms Allen did not lead him on anything else. The question by Yingwana had nothing to do with employment status and was actually irrelevant, and needless to say, Ms Allen properly objected. Ms Allen in fact said that if Yingwana wanted to delve into the merits in his cross examination of the first respondent, then the parties may as well 'scrap' the pre-trial minute, and she would then lead the first respondent on all of the merits of the case. After some debate on the issue,

[23] (2000) 21 *ILJ* 142 (LAC). See also *GE Security (Africa) v Airey and Others* (2011) 32 ILJ 2078 (LAC) at paras 20 – 21
[24] Id at para 83.

Yingwana concedes, and says 'I will be able to address it in my submissions. Okay fine I will live with that.' But now, and on review, the applicant complains about undue curtailment of cross examination. I am again compelled to regard the review ground of undue curtailment of cross examination raised by the applicant as entirely disingenuous and in fact opportunistic, and again nothing more than an attempt to try and bolster the review.

[40] This then only leaves the representation point. It has, fortunately, a simple answer. There was in effect no arbitration conducted before the third respondent. There was agreed documentary evidence and an agreed statement of facts. Both parties could, and did, go away from the arbitration and use the ample time afforded to draft proper and complete written submissions based on what had been agreed to be the evidence. In this respect, Yingwana could seek whatever assistance he wanted. In my view, he prepared proper and detailed submissions and I am satisfied that he understood and properly came to grips with what was the real issue. There was never any issue of disproportionality in the conduct of the arbitration.

[41] In the end, there is simply no substance in any review ground to the effect that the third respondent misconducted himself. Any review ground in this respect falls to be rejected.

<u>The existence of a dismissal</u>

[42] As stated above, the existence of a dismissal was the real issue before the arbitrator. In addition, this was not an issue of fact, but principally an issue of law. In his closing submissions, Yingwana in fact says the following:'The introduction portrayed in the Applicants founding documents depict a fair summation of events and the contents of the documents as they are. What needs to be answered is whether the contract entered into was a legal document or and to answer if indeed the Respondent erred in interpreting circulars from COGTA'

(sic). Yingwana concludes: 'It is the Respondent's case that in any event the contract of employment would have terminated on 18 May 2012 as per prescripts of legislation and cannot in any circumstance terminate at any other time if the prescripts of legislation were applied.' This certainly encompasses the two review grounds I have referred to above, and I will now proceed to determine these issues.

[43] It is undisputed that the first respondent was appointed as a manager directly accountable to the municipal manager. For ease of reference, I will refer to the concept of the manager that is directly accountable to the municipal manager as 'the section 56 manager'. It is also undisputed that the first respondent was indeed appointed by the council, by way of resolution, on a fixed term contract of seven years, and that a written employment contract to this effect was signed between the first respondent and the Municipal Manager on 1 July 2010. Finally, it was also undisputed that the signature of the first respondent's employment contract by the Municipal Manager was also approved by the same council resolution. Therefore, and in the normal course, the first respondent's employment contract appeared to have been validly and properly concluded, and would come to an end on 30 June 2017.

[44] It was common cause that the first respondent's employment contract was terminated by the applicant on 6 June 2012, more than five years prior to the expiry of the agreed fixed term. The applicant called it an abolishment of the employment contract. It was however, clear that this termination came about by way of a resolution of the council and thus it is clearly this conduct of the applicant that caused the employment contract to terminate.

[45] As stated above, what now must be determined is whether this termination of the first respondent's employment contract on 6 June 2012 was a dismissal as contemplated by Section 186(1)(a) of the LRA.

[46] At the core of the applicant's first point raised in argument by Mr Jafta, on behalf of the applicant, was that section 57(6) in fact applies to the employment contract of the first respondent, as section 57 as a whole was extended to such contract by way of the council's appointment resolution. According to Mr Jafta, all section 56 managers' posts are permanent posts, and thus any appointment made by the council into such posts must be a permanent and not fixed term appointment. He submitted further that only if the now repealed section 57(7) is actually applied by the council, can a section 56 manager be appointed on a fixed term, and then only for the period as permitted in section 57(6). So therefore, according Mr Jafta, the Council really only has two choices where it comes to a section 56 manager, being either permanent appointment, or a fixed term appointment only for the five year period (or one year following a council election) in terms of section 57(6). Therefore, and as far as the applicant was concerned, the fixed term appointment of a section 56 manager could only be effected by using section 57(7) to incorporate section 57(6) into the employment contract, and because the time period in terms of section 57(6) was limited to five years or one year after council election, any fixed term employment contract concluded for a longer period was invalid, and thus would terminate by operation of law when the actual period in section 57(6) expires. This all meant, according to the applicant, that the first respondent's employment contract terminated on 18 May 2012, which is one year after the new Council was elected.

[47] Unfortunately for the applicant, there are several fundamental flaws in this argument all based on an incorrect interpretation of sections 56 and 57, which I will now discuss hereunder.

[48] A section 56 manager is not appointed in terms of section 57, but in terms of section 56. Section 56 allows for the appointment of a Municipal Manager and a section 56 manager by the council, and in this respect, all that section 56 requires for a valid appointment is a properly skilled and qualified person as

approved by council resolution. Section 57 in turn then requires the section 56 manager (and a municipal manager for that matter) to conclude a written employment contract with the municipality, once appointed, and provides that this employment contract has to specify all the relevant terms and conditions of employment relating to the appointment. However, and where it comes to a municipal manager specifically, section 57(6) prescribes only fixed term employment as an essential term of the employment contract, and this section also determines this fixed term. But where it comes to the section 56 manager, it is the employment contract itself that regulates and determines employment terms. The council can, however, resolve to also apply section 57(6) to a section 56 manager, and if the council does this, it has to be unambiguously recorded in the employment contract itself. Following the 2011 amendment of section 57, this option is in any event no longer available.

[49] In effect, the point of departure of interpreting sections 56 and 57, by the applicant, is wrong. Section 56 does not prescribe terms of employment. It prescribes what is needed for a valid appointment. Section 57 then determines terms of employment, and in essence prescribes a written contract of employment that specifies the employment terms. Section 57 does not dictate what these employment terms must be, save for the case of the municipal manager, where it is actually dictated that only fixed term employment for the legally prescribed term is permitted. Thus, in short, neither section 56 nor 57 prescribes only permanent employment of section 56 managers, as suggested by the applicant. It prescribes employment in terms of a written contract of employment on terms agreed to between the parties. In fact, and contrary to what the applicant submits, section 57 does not seek to prescribe permanent employment per se, but actually seeks to prescribe only fixed term employment per se for municipal managers. For all else, any term of employment is determined by agreement. Following the 2011 amendments, these terms of employment must just be consistent also with the Systems Act, relevant

regulations and labour laws.

[50] The above being the case, what was then the mutually agreed terms of employment between the first respondent and the applicant? It starts with the resolution of 31 May 2010, which was adopted following discussion whether the five year fixed term contract period applicable to municipal managers was equally applicable to the appointment of the first respondent. It was resolved, pursuant to this deliberation, that the first respondent be appointed for seven years from 1 July 2010, as this five year limitation did not apply, and the municipal manager was authorized to conclude a contract with the first respondent in terms of section 57. Again, and contrary to what the applicant suggests, this is simply not a resolution by the council to apply or adopt section 57(6). Far from it, it is clear from the resolution that the council in fact considered section 57(6) and concluded that it did not apply, and the council then resolved to conclude a specific agreement for seven years with the first respondent. The reference to section 57 in the resolution clearly contemplates the employment contract in terms of section 57(1)(a) as read with section 57(3). I agree with the submission of Ms Allen that if the council intended section 57(6) to apply, it would have specifically said so in the resolution, and this would have found room in the contract itself.

[51] I thus conclude sections 56 and 57 do not require, in the case of a section 56 manager, that section 57(6) must be applied by a municipality in order to validly effect a fixed term appointment of such a manager. Provided the council authorizes the appointment, the manager appointed is suitably skilled and qualified, and a written contract is concluded in the terms of what is required in section 57(3) for such a manager, there can be nothing unlawful or invalid in concluding such contract, and in particular, any agreed fixed term stipulated therein. In *Dihlabeng Local Municipality v Nthute and Others*[25], Musi JP, writing

[25] [2009] JOL 23108 (O).

for the full Court on appeal, said the following:[26]

> 'The court *a quo* erred when it said that section 57 appointees needed to have fixed-term contracts and concluded that because the second to the fifth respondents did not have such fixed-term contracts, they could therefore not be managers directly accountable to the municipal manager. The requirement of a fixed-term contract is contained in section 57(6) and applies only to the appointment of a municipal manager. Of course a municipal council can act in terms of subsection (7) of section 57 and extend the requirement to managers directly accountable to the municipal manager. There has been no suggestion *in casu* that the appellant council had so extended the requirement.
>
> Section 57 stipulates only two basic requirements for the appointment of a manager directly accountable to the municipal manager. They are a written contract of employment and a separate performance contract. …. In this regard it is noteworthy that whereas in terms of section 56(a), the municipal council must make the appointments, the fulfilment of the provisions of section 57 is left to the municipal manager. ….'

[52] *In casu*, there is, as said, a written contract and an appointment by the council. There was no issue in the arbitration about the conclusion or not of a performance contract by the first respondent and no evidence was presented in this regard. As this was never placed in issue *in casu*, and was not a basis upon which the applicant challenged the employment contract of the first respondent, the existence of a performance contract is an irrelevant consideration in this particular matter. Thus, all the requirements for a valid employment contract of the first respondent as section 56 manager exists.

[53] I may point out that in his heads of argument, Mr Jafta raised the point of the absence of a performance contract, as a basis for contending that the first respondent's employment contract was invalid. In the absence of this issue being

[26] Id at paras 21 – 22.

raised before the third respondent, and even more importantly, not even being raised as a ground of review in the supplementary affidavit, it simply cannot be competently raised in heads of argument. In *Brodie v Commission for Conciliation, Mediation and Arbitration and Others*[27] it was held:

> 'The final issues raised by Ms *Liebenberg* were that proper performance standards were not set, and if there were standards set, they were not reasonable, because the third respondent did not adhere to the rules of SOMAR. The problem with these issues raised is that no such case has been made out in the founding affidavit or in the rule 7A(8) notice of the applicant. There also does not appear to be any issue raised in the record that no standards were set and/or that standards were unreasonable …. The applicant sought to raise these additional issues for the first time in her heads of argument on review, and that is not permissible….'

Similarly and in *Northam Platinum Ltd v Fganyago NO and Others*[28] it was held that:

> '… In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.'

I shall thus have no regard to the issue as to whether a performance contract was concluded, in deciding this matter.

[54] Therefore, considering the above, and applying the *ratio* in *Dihlabeng Local Municipality*, I accept that the employment contract concluded between the applicant and the first respondent on 1 July 2010 is valid and lawful. There is no indication *in casu* that section 57(6) was extended to the appointment of the first

[27] (2013) 34 *ILJ* 608 (LC) at para 33.
[28] (2010) 31 *ILJ* 713 (LC) at para 27.

respondent, and in fact, as I have said, the contrary is true. The employment contract in all respects complies with what is stipulated in sections 57(1) and (3). This all being the case, it is an imperative that effect must be given to the employment contract. Although dealing with a case of legitimate expectation in the instance of a senior manager contracted under section 57 of the Systems Act, the Court in *Tshongweni v Ekurhuleni Metropolitan Municipality*[29] said:

> '…. By the same token, the employment of senior managers in local government, governed by s 57, must be done in terms of a written contract, and renewal for a fixed period depends on the prior satisfactory attainment of identified performance objectives and targets. The reluctance of the court a quo to create a new contract for a municipal manager on the basis of legitimate expectation accordingly reflects prudent and appropriate deference to the contractual requirements applicable to senior managers in the local government sector.' (emphasis added)

I find this same reasoning apposite *in casu*. With a proper written contract in place in this instance, following a valid appointment approved by the council, effect must be given the employment contract as it stands.

[55] I therefore conclude that the seven year term as contained in the employment contract concluded between the applicant and the first respondent on 1 July 2010 is binding on both parties. This means that the employment contract expires on 30 June 2017, and I thus reject the applicant's contention that the employment contract in fact expired on 18 May 2012 by virtue of the application of the section 57(6) time period.

[56] The next question is whether the 5 July 2011 amendments of the Systems Act change anything, considering the employment contract was concluded on 1 July 2010, prior to such amendments. This seems to have been the view of the applicant's council, based primarily on its interpretation of the contents of

[29] (2012) 33 *ILJ* 2847 (LAC) at para 33.

circulars 5 and 13 of 2012, by Cogta. In my view however, and based on the reasons I will now go into, I do not believe the 5 July 2011 amendments of the Systems Act changed anything.

[57] Firstly considering section 56 of the Systems Act, it is in my view clear that none of the amendments effected, in any way impact on the validity of the appointment of the first respondent and the resolution adopted by the council on 30 May 2010. The substance of the section remained the same following the amendment, insofar as it concerns the basis of appointment of a section 56 manager. What was added was a provision which allows for the appointment of an acting section 56 manager and a determination that if the provisions of the Systems Act with regard to appointment of such an acting manager was not complied with, the contract concluded with the acting manager is null and void. What was further introduced was a process in terms of which a new section 56 manager, where such a post had become vacant, must be recruited, and a duty is imposed on the municipality to report to the MEC as to such recruitment process.[30] Further, and in the case of an irregular or invalid appointment, the MEC is given the power to intervene to enforce compliance with the Systems Act.[31] None of these amendments detract from the validity of the appointment of the first respondent effected in terms of section 56, prior to amendment. The first respondent was still firmly in the position when the amendments came into effect and thus there simply was no vacancy to be filled on the basis as contemplated by the new section 56(3). Equally, there was no intervention by the MEC with regard to the first respondent's appointment at any time, nor was this sought by the applicant.

[58] Where it came to the amendment of section 57, what took place was a tightening up of the provisions relating to the conclusion of the performance agreement[32], which, as I have said, is not relevant *in casu*. Further, there were additions to

[30] Section 56(3), (4) and (4A).
[31] Section 56(5).
[32] Section 57(2).

provisions of section 57(3) relating to the content of the employment contract to be concluded with the manager concerned, including that terms and conditions of employment must be consistent with the Systems Act, relevant regulations, and applicable labour laws.[33] It was added that bonuses may be awarded to such managers, subject to certain conditions. What is significant, however, is the fact that section 57(7) has been deleted, which further cements the distinction between the municipal manager and the section 56 manager, as well as the fact that any terms and conditions relating to the appointment of the section 56 manager would have to be determined by the council in its discretion, and this would include any fixed term of employment.

[59] I simply cannot see, based on a simple reading of the sections concerned, how any of the amendments to sections 56 and 57 can serve to undo the employment contract concluded on 1 July 2010. I will now turn to Cogta circulars 5 and 13 of 2012 to see whether this might bring me to other insights. Circular 5, considering the new provisions relating to the recruitment and appointment of section 56 managers in the case of filling a vacancy, sought to enlighten municipalities as to the process to follow in recruiting and then appointing such managers, and in particular impressed on municipalities the obligation to provide information in this regard to the MEC. Circular 5 then dealt with existing employment contracts of managers, and as set out above, simply stated that certain principles must be 'considered' by councils, which included the section 57(6) time limits, so as to determine whether there was compliance with legally prescribed termination dates. There is nothing in circular 5 prescribing or even suggesting the termination of the contracts of section 56 managers by using the section 56(7) time limits. How circular 5 can ever be interpreted to suggest such a course of action is in my view beyond belief. What is in effect really said is that Mayors should check contracts to see of the section 57(6) time limits actually apply, and if so, whether the contract terms then correspond with the legally prescribed

[33] See Sections 57(3)(a) and 57(3A).

termination dates. This can never be seen to be an instruction to terminate these contracts, even if it found that section 57(6) applies.

[60] Turning then to circular 13, all its seeks to do is to provide guidance to the municipalities on what to do where the contract of a municipal manager or section 56 manager then indeed terminated, and there is thus a vacancy in a position that certainly requires continuity. Municipalities are simply informed that there is the option to still keep these managers on, despite the termination of their contract, but then on a month to month basis up to a maximum of six months. And if this is not a viable option, municipalities are informed where they can obtain alternative resources on an interim basis until the vacancy is filled. This would all of course be an interim solution until the vacancy had then been properly filled using the process in the Systems Act referred to above. Again, I am completely bemused by the suggestion that circular 13, provides a basis for the termination of the first respondent's contract. In fact, any interpretation of circular 13 to that effect is simply nonsensical, as the circular is, in simple terms, a directive as to what to do only once the contract of the section 56 manager has ended and the position has become vacant. The circular cannot serve as a means or basis to actually end the contract.

[61] But, and worse still, before the applicant even went down the path of terminating the employment contract of the first respondent, it had available to it alternative, and in my view entirely authoritative, proper and correct, advice. SALGA made it clear in its circular 14 of 2012 that where it came to a section 56 manager, the municipality had the discretion to decide on the terms of appointment of such manager, and unless the contract contained an express provision as contemplated by the now repealed section 57(7), the agreement of such a manager must be allowed to run its course. The applicant also had the written opinion by Ramkhelawan Inc, which stipulated that the section 57 amendments did not take away the discretion of the council to determine the terms of

employment of the section 56 manager, and that the duration of the contract of a section 56 manager would be determined by the actual terms of the contract itself. But more importantly, Ramkhelawan Inc made it clear that any attempted reliance on circulars 5 and 13 of 2012 as substantiation for earlier termination of such contracts would be incorrect.

[62] I find it astonishing that the applicant would then convene a special council meeting, as it did on 6 June 2012, and resolve that the first respondent's employment contract be abolished. If one reads the extract from the minutes of this council meeting, it appears that the council was well aware of the difficulties surrounding this issue. As I said above, what the council then did, by way of its resolution on 6 June 2012, is to prematurely terminate the first respondent's valid and binding employment contract, which would only finally run its course on 30 June 2017. But the basis on which the applicant sought to 'abolish' the first respondent's contract has no foundation in law, and was not provided for or sanctioned by the Systems Act, whether before or after the 2011 amendment.

[63] It does not matter that the council sought to label the premature termination as 'abolishing' the contract. The Oxford Dictionary[34] defines abolish as 'formally put to an end', and 'to do away with'. This clearly constitutes a termination of the contract by ending it. The resolution of the council abolishing the contract was perfected by written notice to the first respondent on the same day, informing him that his contract was abolished, and this clearly constitutes written notice that the contract had been terminated by the council. No matter how one looks at it, it was the conduct of the council that brought the employment contract of the first respondent to an end.

[64] 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

[34] Oxford 2014 Edition.

National Union of Leather Workers v Barnard NO and Another[35] the Court held as follows as to this definition:

> '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.'

Further, and hot off the press, so to speak, the Labour Appeal Court in *Edcon v Karin Steenkamp and Others*[36] said:

> 'The definition of dismissal is thus wide enough to include a wrongful or "invalid" termination in violation of contractual of statutory notice periods within its ambit. The word "terminated" in section 186(1)(a) of the LRA should be given its ordinary meaning of "bringing to an end". The ordinary meaning is coloured by the lawfulness, fairness or otherwise of the action ….'

The Court in *Edcon* concluded:[37]

> '…. A termination by an employer without giving proper or valid notice is still a dismissal. It may prove to be a wrongful or unfair dismissal, but it is a dismissal nonetheless. As explained earlier, wrongful or unfair dismissal will have the consequences of bringing a contract of employment to an end unless and until a court orders specific performance or retrospective reinstatement. The LRA thus clearly recognises what has been termed a "premature termination" to constitute a dismissal. The ideas of nullity, voidness and invalidity are inconsistent with that scheme.'

[65] 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

[35] (2001) 22 *ILJ* 2290 (LAC) at para 23.
[36] Unreported case numbers JS 648 / 13, JS 51/14 and JS350/14 dated 3 March 2015 per Tlaletsi DJP, Murphy AJA and Musi JA, at para 41.
[37] Id at para 49.

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 any event, the unilateral conduct of the applicant in bringing about the end of the first respondent's contract of employment must be considered in the proper legal context, as enunciated in *SA Post Office Ltd v Mampeule*[38], where the Court said:

> '… 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 …'

In short, where the conduct of an employer brings about the termination of the contract of employment, whatever the motivation for this conduct may be, it has to be considered to be a dismissal of the employee as contemplated by the LRA.[39] 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

[38] (2010) 31 *ILJ* 2051 (LAC) at para 21(b).
[39] See also *Trio Glass* (*supra*) at paras 35 – 36.

against the fundamental principle of fairness.

[66] I thus have no doubt that the conduct of the applicant, by way of the resolution of the council on 6 June 2012 and the notice issued to the first respondent on the same day, constitutes a dismissal of the first respondent. It is clearly the conduct of the applicant that brought about the end of the employment contract, and was it not for this conduct, it would have endured (in the normal course) until the end of its term on 30 June 2017. In the end, the third respondent, as arbitrator, was thus correct in concluding that there was a dismissal in this instance.

[67] For the sake of completeness, and even if it was true that the fixed term in the employment contract concluded between the applicant and the first respondent was in contravention of the Systems Act, it was simply not up to the applicant to by way of what is nothing more than self-help, seek to 'abolish' it. The fact is that the applicant should have sought to challenge the agreement by way of available legal avenues, such as, for example, applying to court to declare it invalid[40]. With the agreement having been concluded, and then applied for almost two years, it simply not up to the applicant to adopt another resolution to abolish it. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[41] the Court said:

> '…. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set

[40] *Khumalo and Another v MEC for Education, KwaZulu-Natal* (2013) 34 *ILJ* 296 (LAC) at para 43. For examples of such very 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).

[41] 2004 (6) SA 222 (SCA) at para 26.

> aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

This *ratio* in *Oudekraal Estates* has been consistently applied over the last decade,[42] and was equally applied by Molahlehi J in the Labour Court in *Taung Local Municipality v Mofokeng.*[43] Most recently, however, the Constitutional Court was specifically asked to reconsider the *Oudekraal Estates* principle in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute.*[44] The majority of the Court, by way of Cameron J, held as follows:[45]

> 'The argument mistakes the nature of the mandate the Constitution entrusts to public officials. This does not require them to act without erring. On the contrary, the Constitution anticipates imperfection, but makes it subject to the corrections and constraints of the law. The task of public officials is thus to act in accordance with the law and the Constitution, which includes being subject to correction when they err.
>
> By corollary, the department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-

42 See *Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA) at para 17; *Kouga Municipality v Bellingan and Others* 2012 (2) SA 95 (SCA)*; Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para *62; Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at para 14.
43 (2011) 32 *ILJ* 2259 (LC) at paras 27 – 30.
44 2014 (3) SA 481 (CC).
45 Id at paras 88 – 89.

> help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration.'

The Court in *Kirland Investments* concluded as follows:[46]

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

[68] The conduct of the applicant, *in casu*, propagates the very approach the Court in *Kirland Investments* is critical of. The applicant simply cannot, just because the applicant's council considers the first respondent's contract of employment to be invalid, resolve to undo it. The facts of the current matter actually serve as an excellent illustration why this kind of conduct should be discouraged in the strongest possible terms. What has happened *in casu* is that a long serving and senior employee in the applicant occupying a senior and responsible position, in a department supplying an important public service, is simply bounced out of his position, leaving it *de facto* vacant, just because councilors, in the face of clear opinion to the contrary, consider the employment contract to be invalid. It is for this kind of reason why these kind of decisions relating to legality of contracts, especially contracts of employment, must be left up to the Courts to decide. As a result, whether or not the first respondent's contract of employment was invalid, simply matters not. It was just not up the council to in effect declare it invalid and

[46] Id at para 103.

abolish it by way of resolution. In doing this, the applicant thus still effected a dismissal of the first respondent.

[69] The applicant was always entitled to terminate the employment contract of the first respondent before the expiry of the fixed term, as this was provided for in the employment contract itself. But it was specifically agreed in the contract that in order to do this, the municipality had to give three months' written notice subject to applicable labour laws.[47] This clearly means that such notice of termination of employment had to be fair as contemplated by Section 188 of the LRA, and thus must be effected for a fair reason and pursuant to a fair procedure. It is undisputed evidence that there was never a fair procedure followed, and certainly the first respondent was never heard when the decision to abolish his contract was made. Further, and considering what I have said above, there equally existed no substantive fair reason for the termination of the contract. It follows that the first respondent was unfairly dismissed on 6 June 2012. Again, the conclusion of the third respondent as arbitrator in this regard is correct.

[70] I thus conclude that the award of the third respondent to the effect that the first respondent was indeed dismissed by the applicant, and that such dismissal was unfair, is correct, and must thus be upheld. This means that the applicant's review application must fail.

Concluding remarks

[71] I also have before me the first respondent's application in terms of section 158(1)(c) to make the arbitration award of the third respondent an order of court., brought under case number D 1011 / 13. This application was opposed only on the basis of the pending review. As the applicant's review is unsuccessful, it follows that there is no basis not to grant the first respondent's application to make the arbitration award an order of court.

[47] See clause 4.1 of the contract.

[72] In closing, I must say that I share the third respondent's sentiments expressed in his award that the conduct of the applicant *in casu* is difficult to comprehend. How it could have interpreted the Cogta circulars as a license to abolish the contract of employment of the first respondent is beyond belief, especially considering the clear and unambiguous opinions, to the contrary, available to it. At the very least, the applicant should have referred the matter to the MEC. I am actually comfortable in saying that what the applicant did in this instance smacks of *mala fides*.

[73] I also have a difficulty with the regard to the manner in which the applicant sought to bolster its review case by raising issues that were never in dispute between the parties or before the third respondent to decide. This kind of litigation practice should be discouraged, and compels a judge to deal with issues that are just not necessary to be dealt with.

[74] I make all these comments in the context of the issue of costs. Both the applicant and the first respondent asked for costs in the event of either one of them being successful, in other words that costs should follow the result. Ms Allen has actually asked for a punitive costs order against the applicant. 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 believe the applicant should have known better than to still pursue this matter, which always had little merit. This was the kind of case that should not have proceeded beyond arbitration. I was momentarily tempted by Ms Allen's invitation to award punitive costs, but I do not think the conduct of the applicant in this instance goes far enough to justify such kind of punishment. But there is no reason why a costs award should not be made against the applicant, both in respect of the review and the section 158(1)(c) applications.

Order

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

75.1 The applicant's review application is dismissed.

75.2 The arbitration award under case number KPD061211 dated 13 July 2012 is made an order of court.

75.3 The applicant is ordered to pay the costs of the review application and the section 158(1)(c) application under case number D 1011 / 13.

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Snyman AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr P O Jafta of Jafta Inc Attorneys
For the First Respondent:	Advocate K Allen
Instructed by:	Vishnu Moodley & Company Attorneys