REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1710/04

In the matter between:

MAFIHLA, T E Applicant

and

GOVAN MBEKI MUNICIPALITY Respondent

JUDGMENT

Introduction

1.This matter came before me on the return day of a rule nisi.

2.The Applicant was the Respondent's municipal manager. The proceedings concern a dispute arising from a memorandum dated 4 October 2004 in which the Respondent's Executive Mayor informed the Applicant that his employment with the Respondent was terminated with immediate effect.

3.The Applicant seeks an order declaring that he remains employed by the Respondent as its municipal manager on terms and conditions of employment contained in a written contract of employment provided to him in 2001, and directing the Respondent to permit him to perform his duties as municipal manager. In the alternative, the Applicant seeks an order reinstating him into the employment of the Respondent with effect from 4 October 2004.

4.An interim order was granted on 12 October 2004 the effect of which was to prohibit the

Respondent from employing any person other than the Applicant in the post of municipal manager pending the finalisation of this application.

The relevant facts

5.The Applicant commenced employment with a predecessor of the Respondent in February 1998. In January 2001 he was appointed as the Respondent's transformation manager. In June 2001 he was appointed as the Respondent's municipal manager pursuant to a resolution of the Respondent's council, which I will refer to as "the Resolution". The Resolution reads as follows:

> "1. That in terms of Section 82 of the Municipal Structures Act, Act 117 of 1998 Mr Thabo E Mafihla ***BE APPOINTED*** *as the Municipal Manager of the Highveld East Municipality with effect from 1 July 2001.*
>
> *2. That the employment contract,* ***BE APPROVED*** *and used as terms of terms of employment for the Municipal Manager.*
>
> *3. That the department Corporate Services* ***FINALIZES*** *the performance agreement and ensures that the said agreement is signed with Mr TE Mafihla before 1st July 2001.*
>
> *4. That a committee, comprising of the commissioners from Corporate Services and Finance, Acting Heads of Department of the relevant Departments,* ***WORK OUT*** *a remuneration package for the newly appointed Municipal Manager and the said committee should also seek advise from SALGA about the remuneration package for the Municipal Manager.*
>
> 5. *That the process of taking over from the Acting Municipal Manager, by the newly appointed Municipal Manager, should* ***BE COMMENCED*** *with immediately.*
>
> 6. *That the newly appointed Municipal Manager* ***OCCUPY*** *the office which is currently occupied by the Head of the Highveld Ridge Administrative Unit with effect from 1 July 2001.*
>
> 7. *That the Acting Municipal Manager* ***INFORMS*** *the personnel of the appointment of the new Municipal Manager."*

6.The Highveld East Municipality is the same entity as the Respondent, now known as the Goven

Mbeki Municipality.

7.Section 82 of the Local Government: Municipal Structures Act, by reference to which the Applicant was appointed in terms of Paragraph 1 of the Resolution, requires a municipal council to appoint a municipal manager who has the relevant skills and expertise to perform the duties associated with that post.

8.The appointment of a municipal manager is further regulated by the provisions of Section 57 of the Local Government: Municipal Systems Act 32 of 2000. The relevant provisions of Section 57 of that Act provide as follows:

> "(1) A person to be appointed as the municipal manager of a municipality … may be appointed to that position only –
>
> (a) in terms of a written employment contract with the Municipality complying with the provisions of this section; and
>
> (b) subject to a separate performance agreement concluded annually as provided for in sub-section (2).
>
> 2) …
>
> 3) The employment contract referred to in sub-section (1)(a) must include, subject to applicable labour legislation, details of duties, remuneration, benefits and other terms and conditions of employment.
>
> 4) …
>
> …
>
> (6) The employment contract for a municipal manager must –
>
> (a) be for a fixed term of employment not exceeding a period ending two years after the election of the next council of the municipality;

(b) include a provision for cancellation of the contract, in the case of non-compliance with the employment contract or, where applicable, the performance agreement;

(c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and

(d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.

…"

9.On 14 June 2001, the day following the Resolution, the Respondent's Executive Mayor addressed a letter to the Applicant concerning his appointment. It reads as follows:

"***APPOINTMENT AS MUNICIPAL MANAGER***

It is with pleasure that I hereby confirm that in terms of Chapter 4, Section 82 of the Local Government: Municipal Structures Act, 1998 you have been appointed as Municipal Manager of the Highveld East Municipality with effect 1 July 2001.

The written employment contract and performance agreement as stipulated in Section 57 of the Local Government: Municipal Systems Act, 2000 will be provided to you in due course. The same applies to applicable remuneration and benefits.

Until this is finalized the status quo will be maintained regarding your current remuneration and benefits.

I want to use this opportunity to congratulate you on your appointment and express the wish that you will serve this Municipality and its Community to the best of your ability."

10.As is apparent from paragraph 2 of the Resolution, the Respondent's council had approved the terms of an employment contract to be used to govern the employment of the Applicant in the position of Municipal Manager.

11.The employment contract that had served before the Respondent's council was a specimen contract establishing what was described as a fixed five year term of employment. The specimen contract approved by the council was incomplete in certain respects. The names of the parties to the contract were not reflected in it. Nor was the employee's job title, starting date and the termination date specified. The employee's remuneration was, similarly, not specified. The specimen contract was not signed by the parties when it served before and was approved by the council.

12.The identity of the parties to the contract, the job title, starting date and duration of the contract were, however, clearly established when the provisions of the specimen contract are read together with the Resolution. In relation to remuneration, paragraph 4 of the Resolution required that a committee should "work out" a remuneration package for the Applicant. Until that had happened, the Applicant would continue to receive his current remuneration and benefits (applicable to him in his capacity as the Respondent's transformation manager). This was what was communicated to him in the letter of appointment dated 14 June 2001.

13.The committee that was required to determine the Applicant's remuneration package did meet during the course of July 2001. According to the committee's chairperson, Mr Phungwayo, who deposed to an affidavit to that effect, the committee determined the remuneration package that was to apply to the Applicant. Thereafter, certain officials of the Respondent were tasked with compiling a completed contract of employment with the necessary details reflected in the contract, including the remuneration package determined by the committee. This they did.

14.It is apparent that, apart from the insertion of missing details, there are certain other differences between the provisions of the completed contract and the provisions of the specimen contract that was approved by the council in the Resolution. Mr Laka, who appeared on behalf of the Respondent, did not, however, specifically point me to any such differences and did not seek to rely on any such differences in support of the contentions that he advanced in these proceedings. I therefore do not, for the purposes of this judgment, consider any such differences to be material.

15.During July 2001 the contract in its amended form was submitted to the Applicant by the administrative officials responsible for compiling it. Shortly thereafter, however, the Applicant was informed that the Executive Mayor did not wish to sign the contract because he was not satisfied with the remuneration package that had been determined by the relevant committee.

16.Despite this, at the end of July 2001 the Applicant was paid in accordance with the remuneration package determined by the committee and reflected in the revised contract. He has been remunerated on that basis since then.

17.No performance agreement contemplated in Section 57(1)(b) of the Municipal Systems Act was in fact concluded between the parties. Neither party sought to attach any significance to this fact and this did not play a material role in the events that followed. For that reason I do not, for the purposes of this judgment, consider what the effect is of non-compliance with the statutory requirement that such an agreement be concluded on an annual basis.

18.On 22 June 2004, some three years after his appointment as Municipal Manager, the Applicant was provided with a memorandum dated the previous day and addressed to him by the Respondent's director for corporate services. The memorandum reads as follows:

> "***EMPLOYMENT CONTRACT OF THE MUNICIPAL MANAGER***
>
> *The Executive Mayor's meeting resolved … that the department Corporate Services, in consultation with the Executive Mayor's Office, ensure that the Municipal Manager signs the employment contract within seven days.*
>
> *Attached hereto, please find an Employment Contract. You are requested to sign the attached Contract of Employment and forward same to the Office of the undersigned for finalization."*

19.The employment contract that was presented to the Applicant with that memorandum was materially different in form to the contract that had been approved by the Respondent's council in 2001. Its content was also different in certain respects which the Applicant considered to be material. He did not accept the amended terms presented to him. This attitude was articulated in a letter addressed by his attorneys to the Respondent dated 24 June 2004, material portions of which provided as follows:

> "3. The new contract of employment purports to supersede our client's existing contract and to change his terms and conditions of employment. Our client does not accept these changes.

…

5. *Our client has no objection to entering into a performance agreement and invites the Municipality to table its proposal in this regard.*

6. *Should the Municipality wish to have a contract of employment that is signed by both parties, it may sign our client's existing contract."*

1.

20.The Respondent was not satisfied with this response. At an Executive Mayor's meeting during the first half of July 2004 a decision was taken to revoke paragraph 2 of the Resolution, which recorded the council's approval of the specimen contract that had served before it during June 2001. This was communicated to the Applicant in a memorandum dated 12 July 2004.

21.Certain further letters were exchanged between the Applicant's attorneys and the Respondent in which the parties' respective positions were re-iterated. In a letter dated 2 August 2004 the Respondent's director for corporate services, Mr van Niekerk, articulated the Respondent's position as follows:

> "It is confirmed that there is not yet a written employment contract, as the law requires, between your client and our Municipality. The Resolution which appointed you client … in the Municipal Manager position has been revoked … in so far as it relates to the kind/structure of the written contract to be concluded. This is because the written specimen contract attached to and which formed part of the appointing Resolution was deficient in extent when viewed against the provisions of the law, particularly the Municipal Systems Act."

22.Mr Laka, who appeared for the Respondent, did not persist with the contention that the specimen contract that served before the council in June 2001 failed to satisfy the requirements of the Municipal Systems Act. He did, however, persist with the Respondent's contention that the mere approval of that specimen contract did not satisfy the requirement that a written contract be concluded, and that as at August 2004 there was no written employment contract in existence between the Applicant and the Respondent.

23.Matters were brought to a head when the Respondent addressed a memorandum to the Applicant dated 1 October 2004 re-iterating the Respondent's view that the 2001 contract was not binding on the Respondent and that in consequence the Respondent did not have a written employment contract with the Applicant as required by the provisions of Section 57(1)(a) of the Municipal Systems Act. The Respondent stated that it was "*not willing to further remain in breach of the condition of employment of the Municipal Manager as provided for in the said legislation*", and demanded that the Applicant should sign the draft contract that had been provided to him in July 2004.

24.The Applicant, through his attorneys, persisted in refusing to sign the contract and re-iterated that the 2001 contract was a contract in writing that complied with the provisions of the Municipal Systems Act. The Applicant declined to sign the new contract and again invited the Respondent to sign the 2001 contract.

25.The Respondent then addressed a memorandum to the Applicant, dated 4 October 2004. The memorandum said this:

> "***SUBJECT: TERMINATION OF EMPLOYMENT RELATIONSHIP***
>
> *The Municipality regrets that notwithstanding repeated attempts to have the draft employment signed by you, you have in no uncertain terms refused to do so.*
>
> *In the light thereof the Municipality is left with no option but to accept your refusal to sign.*
>
> > *Since Section 57(1)(a) of the Municipal Systems Act 32 of 2000 provides that a person to be appointed as a Municipal Manager of a Municipality may be appointed to that position only in terms of a written employment contract, we regret it that the employment relationship between yourself and the Municipality cannot be allowed to continue.*
> >
> > *Therefore, based on operational grounds, your employment relationship with this Municipality is hereby terminated immediately.*
>
> *Kindly hand back all the property belonging to the Municipality that may be in your possession.*
>
> > *In the mean time our human resource department will be finalising what is due to you and you*

will be advised accordingly in due course.

We thank you very much for the good things you did this Municipality. We wish you a successful future."

26.The memorandum is signed by the Respondent's Executive Mayor.

27.The Applicant then initiated these proceedings. He approached this court directly, without first referring a dispute to conciliation in terms of section 191 of the Labour Relations Act.

Was there a written employment contract?

28.On the evidence before me I am satisfied that at the time he was appointed, the Applicant was appointed in terms of a written contract of employment that satisfied the provisions of Section 57(1)(a) of the Municipal Systems Act.

29.Those provisions do not require a written contract that has been signed by the parties. This is in contrast to the provisions of certain other statutes that prescribe formalities for the conclusion of enforceable agreements, where signature is an express requirement. One example is section 2(1) of the Alienation of Land Act (Act 68 of 1981). It is clear from this provision and from the provisions of many other similarly worded statutes that if the legislature requires that a written agreement must be signed by the parties it says so expressly: see *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd 1992 (3) SA 825(W)* 828B-G**,** the dicta in *Boland Bank Bpk v Steele 1994 (1) SA 259 (T)* 279D- 280B**.** what is required is an agreement in writing, it is sufficient that a written document has been adopted and acted upon by the parties: *Fassler, Kamstra & Holmes v Stallion* 828H.

30.In my view the written employment contract provided to the Applicant during July 2001 reflects the terms of a written employment contract between the parties that satisfies the requirement of section 57(1)(a) of the Municipal Systems Act. Although the Applicant was informed in 2001 that the Respondent's Executive Mayor was not willing to sign that document because he was not satisfied with the remuneration package reflected in it, this does not in my view indicate the absence of the consensus between the parties that is necessary to give rise to a binding agreement. The remuneration reflected in the written contract had been determined properly in the manner contemplated in the Resolution. Furthermore, the Applicant in fact took up and continued employment on the basis of the terms reflected in the contract, to the knowledge of the Executive

Mayor, and was remunerated in accordance with the remuneration provided for in that contract.

31.Even if I am wrong in this regard, I have no doubt that the specimen contract that was placed before the council and which was approved by the council in June 2001, as reflected in the Resolution, read with the Applicant's letter of appointment, satisfied the requirement (in section 57(1)(a) of the Municipal Systems Act) that a municipal manager may be appointed only in terms of a written employment contract.

2.

32.When the meeting of the Executive Mayor during July 2004 resolved to revoke clause 2 of the Resolution (assuming for present purposes that the mayoral committee, if that was what it was, had the power to revoke a resolution of the council itself) this could not by itself have had the effect of either varying the terms of or terminating the employment contract that had by then been in existence between the Applicant and the Respondent for some three years.

Was the termination contractually valid?

33.The primary submission of Mr van der Riet, who appeared for the Applicant, was that the memorandum of 4 October 2004 did not in fact bring about a termination of the Applicant's employment, as it purported to do. Mr van der Riet submitted that a contract of employment can be said to be terminated only if it has been brought to an end in a manner recognised in law. The purported termination on 4 October 2004 was, he submitted, contractually invalid and consequently of no force and effect. In support of this submission, Mr van der Riet referred me to *AZAWU v Gordon Verhoef & Krause [1996] 3 BLLR 279 (IC)*at 305H to 306B, and to Brassey *Employment and Labour Law vol 3: Commentary on the Labour Relations Act*at A8:8 to A8:9.

34.In the alternative, Mr van der Riet submitted that even if the Applicant's employment had been terminated, the circumstances in which this occurred constituted an unfair dismissal. Where a dismissal was so glaringly wrong that it could not be fair, Mr van der Riet submitted, it was not necessary for the Applicant to follow the ordinary procedures required in dismissal cases, that is a referral in terms of Section 191 of the LRA; there were no factual disputes that required a trial and the Labour Court was entitled to intervene and to grant what would in effect be a remedy of re-instatement of the kind contemplated in Section 193(1)(a) of the LRA.

35.In response to Mr van der Riet's primary submission Mr Laka submitted that this Court has no power to enquire into the contractual validity of the termination of an employee's employment. He

submitted that the Applicant had in fact been dismissed by the memorandum of 4 October 2004, and that he was bound, if he considered his dismissal to be unfair, to follow the procedures described in the LRA for dealing with such claims. Finally, Mr Laka submitted that even if the termination of the Applicant's employment was contractually invalid because no notice had been given in terms of the contract, the Applicant was limited to seeking, as a remedy, payment of the amount of remuneration he would have been entitled to receive for the period of notice that would have been required by the contract to terminate his employment.

36.The Applicant relied, in pursuing a contractual remedy, on the jurisdiction which this Court has in terms of section 77(3) of the Basic Conditions of Employment Act, 1997. It is clear that this Court has the necessary jurisdiction, by reason of that provision, to determine the question whether an employment contract has been validly terminated, to determine whether there has been a breach or repudiation of an employment contract, and in these circumstances to grant relief applying ordinary contractual principles.

37.Although the Applicant's employment contract is described as a contract with a fixed five year term, it is not in fact a true fixed term contract, because it contains a clause which entitles either party to terminate the contract at any time during the five year period on giving one month's notice in writing to the other party. A contract of this nature may, in my view, more properly be described as a maximum duration or maximum term contract.

38.The Respondent gave the Applicant notice on 4 October 2004 that his employment was terminated with immediate effect. It did not purport to invoke the notice provision in the contract. Instead, it contended that it was entitled to terminate the contract summarily on the grounds that a statutory requirement necessary for the continuation of that employment was not satisfied, and that the Applicant, by refusing to sign or accept the terms of the employment contract presented to him during 2004, was in material breach of his obligations to the Respondent.

39.The Respondent was mistaken. The statutory requirement had in fact been satisfied, and the Applicant was entitled (from a contractual perspective) to decline to sign or accede to amended terms. The Respondent's conduct in giving the Applicant notice of termination of his employment with immediate effect was, in those circumstances, itself a material breach of the contract of employment which may properly be characterised as a repudiation by the Respondent of its obligations under that contract.

40.The next question to decide is whether the Respondent's notice, although not given in terms of the contract, and although not serving to terminate the Applicant's employment with immediate effect, as it purported to do, nevertheless served as a valid notice which expired a month after it was given. This was the thrust of Mr Laka's submission, as I understood it, when he argued that the Applicant was limited to seeking remuneration for the period of notice required to be given in terms of the contract.

41.The proposition that short notice is nevertheless valid and must be taken to expire when it would properly do so was established in *Honono v Willowvale Bantu School Board & Another 1961 (4) SA 408 (A)*. The proposition is one described by *(Employment and Labour Law vol 3* A8:8) as "highly dubious". Nevertheless it received recent approval by the Labour Appeal Court, though in the context of the period of notice required to terminate a collective agreement, in *Edgars Consolidated Stores v Federal Council of Retail & Allied Workers Union (2004) 25 ILJ 1051 (LAC) a*[27].

42.In *Honono v Willowvale* employer was required in terms of the applicable regulations to give a teacher notice of termination of employment during the first week of the school quarter, if employment was to terminate at the end of that quarter. The employer could only establish that valid notice was given some time after the first week of the quarter. The Appellate Division, as it then was, agreed that the notice was insufficient to terminate teacher's appointment at the end of the first quarter. But it did not follow that it had no force and effect at all. The position of the teacher was, as far as notice of termination or dismissal was concerned, equated with the position of any other employee at common law. That being so, the Court considered, it followed (from the judgment of INNES CJ in *Pemberton N.O. v Kessell 1905 A.T.S. 174*) that the notice served on the teacher during the first school quarter was sufficient and valid to terminate his appointment at the end of the second quarter.

43.The principle that short notice may in certain circumstances nevertheless serve to terminate a contract of employment at the end of the expiry of the notice period necessary in the circumstances has no application, in my view, to a situation where an employer terminates an employment contract with immediate effect, with no notice, on the grounds of an alleged material breach on the part of the employee or, as in the case before me, on the grounds of a mistaken belief that continued employment violates the provisions of a statute regulating that employment.

The remedy of specific performance

44.I have found that the Respondent was not entitled to give notice of summary termination of employment. Its notice was itself a material breach of the contract of employment, and may properly be described as a repudiation of that contract.

45.The contractual position is that the repudiation did not itself serve to terminate the contract. Faced with a repudiation of the contract, the Applicant had an election. He could choose to "accept" the repudiation and cancel the contract. In that event, the exercise of that election would terminate the contract. Or he could refuse to accept the repudiation, and instead seek to enforce the terms of the contract: see generally Christie *The Law of Contract* 4th edition at 626 - 629.

46.The contractual remedies available, among those that may be characterised as methods of enforcement of a contract, include both specific performance and a declaration of rights. The relief sought by the Applicant in the present matter is, in effect, a combination of these remedies. Where the Applicant is entitled to consequential relief, a declaratory order will seldom be appropriate: *Shaban v Culemborg Banking Corpn Ltd 1962 2 SA 450 (W)* 451A. In the present circumstances, the Applicant seeks a declaratory order coupled with an order for consequential relief. It seems to me that the effect of the relief formulated by the Applicant is that he seeks specific performance of the employment contract, and is not seeking declaratory relief in the abstract.

47.As a general principle, a litigant in the position of the Applicant is entitled to specific performance, subject only to the court's discretion: *Farmer's Co-op Society (Reg) v Berry 1912 AD 343 at 350.* The discretion must be exercised judicially upon a consideration of all the relevant facts: *Haynes v Kingwilliamstown Municipality 1951 2 SA 371 (A) at 378G*.

48.The Respondent did not seek to place any evidence before the Court, and Mr Laka was unable to submit, that there were any specific facts or considerations that militated against an order for specific performance being made. The reluctance of civil courts to order specific performance of contracts for personal services has been extensively written about. It is now clearly established that there is no rule of law that specific performance of employment contracts will not be granted: *National Union of Textile Workers v Stag Packings (Pty) Ltd 1982 4 SA 151 (T).*

49.Christie (in *The Law of Contract, 4ed,*) considers that *"the reason why the courts have not granted such orders remain as valid as ever, provided it is remembered that in every case the*

court has a discretion". is not easy to reconcile this view with the clearly stated views of the full bench in *Stag Packings* (at 156H):

> "*As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. There is, in my view, no reason why this general rule should not also be applicable to contracts of employment.*"

50.The learned author may have had in mind the following passage of the judgment (at 158E):

> "*This does not mean that the considerations mentioned in Schierhout's case why in such a case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty indeed and in the normal case they might well be conclusive. But that is a far cry from saying that the Court should therefore close its eyes to other material factors and refuse to evaluate them.*"

After considering the objects of the Labour Relations Act of 1956, on the basis of which the claim in that case was brought, the Court continued (at 158G-H):

> "It may well be that these objects are frustrated if a remedy of reinstatement is not granted. … That public policy may in some cases proscribe reinstatement is in my view obvious. In my view a Court should give due weight to this consideration as well as to those set out in Schierhout's case and to other possible relevant facts when deciding whether to refuse to grant an order for specific performance."

51.The discretion that I must exercise in deciding whether or not to grant specific performance in the present case, where that remedy is sought on the application of contractual principles rather than in consequence of a finding that there was no fair reason for a dismissal, is not limited, it seems to me, by the application of the provisions of section 193(2) of the Labour Relations Act, which regulate the determination of the remedy for an unfair dismissal.

52.In the present case, it is self-evident that the Applicant is a senior employee, the most senior executive in the municipality. He therefore occupies a position which necessarily requires that he enjoy a high degree of trust and confidence on the part of the Executive Mayor and other political office bearers to whom he is answerable.

53.It has not, however, been suggested in these proceedings that the Applicant does not enjoy such trust or confidence. His employment was terminated (invalidly as I have found) for reasons unrelated to his performance or trustworthiness. The letter of termination itself conveys the Executive Mayor's thanks for the "good things" the Applicant has done for the Respondent. There would seem to be no reason on the evidence before me to exercise my discretion against the grant of an order of specific performance.

The alternative claim: unfair dismissal

54.In the light of the conclusion I have reached on the contractual argument that formed the basis of Mr van der Riet's primary submissions, it is not necessary for me to deal with his alternative submission, which was grounded in the unfair dismissal provisions of the Labour Relations Act, 1995. Nevertheless, I think it appropriate that I deal briefly with the alternative submission of the Applicant, because this may place the conclusion I have reached on the contractual argument in proper context.

55.If, contrary to the conclusion I have reached on the contractual argument, the Respondent had succeeded in terminating the Applicant's employment by the memorandum of 4 October 2004, there is little doubt that the Respondent has failed to demonstrate on the papers before me that there was a fair reason for doing so. However, the decision of the majority in *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another (2000) 21 ILJ 142 (LAC)* (at paragraph [73] of the judgment) presents a formidable obstacle in the way of an Applicant seeking to pursue an unfair dismissal claim in this court without following the procedures established in terms of section 191 of the LRA. And I find little support for such a course of action in the judgment of Mlambo J (as he then was) in U*niversity of the Western Cape Academic Staff Union v University of the Western Cape (1999) 20 ILJ 1300 (LC)*, to which Mr van der Riet referred me. That case dealt with the question of urgent interim relief only, and the court was at pains to emphasise (in paragraph [15] of the judgment) that it would be cautious in the exercise of its power to grant urgent interim relief pending the application of the ordinary dispute resolution provisions provided for in the Labour Relations Act.

56.It is also unnecessary, in the light of the conclusions I have reached, for me to deal with the question whether a dismissal that is demonstrated to be unfair may for that reason alone be contractually invalid as well as unfair. That question must no doubt be dealt with in due course in light of certain *dicta*in *Fedlife v Wolfaardt (2001) 22 ILJ 2407 (SCA)* paragraph [14] and in the

dissenting judgment at paragraphs [3] – [4]; and in *Denel (Pty) Ltd v Vorster (2004) 25 ILJ 659 (SCA)*at paragraph [16].

57.The Applicant sought an order directing the Respondent to permit him to perform his duties as municipal manager. There was no suggestion on the papers before me that an order of this nature would be necessary in addition to or as part of an order for specific performance of the employment contract. In my view the order that I intend to make, in particular paragraph 3 of that order, is sufficient to establish the Applicant's contractual rights.

58.In relation to costs, I have considered Mr van der Riet's submission that a special order for costs should be made in relation to the proceedings on 19 October 2004. I am not satisfied that it would be appropriate for me to make such an order. I have no doubt, however, that the Applicant should be awarded costs on the normal scale in respect of the entire proceedings.

Order

I make the following order:

1. The notice of termination of the Applicant's employment given on 4 October 2004 is declared to be of no force and effect.

2. The Applicant remains employed by the Respondent as its municipal manager on terms and conditions of employment contained in the written contract of employment, Annexure "**TEM5**" to the papers.

3.

3. The Respondent is ordered to continue to give effect to the terms of that contract of employment until such time as the contract is lawfully terminated.

4.

4. The Respondent is ordered to pay the Applicant's costs on the High Court scale, including the costs of 12, 19, 26 and 29 October 2004 and 22 November 2004.

C F N TODD

Acting Judge of the Labour Court

Date of hearing:	22 November 2004
Date of judgment:	25 January 2005
Applicant's Representative:	Adv. J G van der Riet SC, instructed by Cheadle Thompson & Haysom
Respondent's Representative:	Adv. A P Laka and Adv. Z S Sibeko, instructed by TMN Kgomo & Associates