IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No.: C180/2019

In the matter between:

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	**Applicant**
and	
THE BITOU MUNICIPALITY	**First Respondent**
THE SPEAKER OF THE BITOU MUNICIPALITY	**Second Respondent**
THE EXECUTIVE MAYOR OF THE BITOU MUNICIPALITY	**Third Respondent**
LONWABO MNINAWA RONALD NGOQO	**Fourth Respondent**
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Fifth Respondent**

Heard: 9th and 10th July 2019

Delivered: 13th August 2019

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] In this matter the applicant (the MEC) seeks relief relating to the appointment of the fourth respondent as the municipal manager of the first respondent. The exact nature of the relief is not material at this stage and shall be dealt with later. However, two decisions of the first respondent are central to this matter, namely:

1.1 The decision to settle a dismissal dispute between the first respondent and the fourth respondent, in terms of which a commissioner's ruling that the dismissal of the fourth respondent was unfair, became the final ruling on the matter, and the first respondent made certain payments to the fourth respondent.

1.2 The decision to appoint the fourth respondent as municipal manager.

[2] The first respondent is the only respondent who opposes the matter. There is an issue about whether any of the other respondents ought to be liable for costs in the event that the MEC succeeds, but this will be dealt with later.

[3] The application was brought as a matter of urgency and on 17 April 2019 the Court ordered, by agreement, the time periods for the exchange of pleadings and heads of argument and that the matter would then proceed on 24 May 2019.

[4] In preparation for the matter it became clear that it would not be finalised in one day unless the parties agreed to limit their time for argument. They were not prepared to do so (which, with the benefit of hindsight, was a wise decision) but did agree to argue certain points that appeared to be discrete. The rest of the case was argued over 2 days on 8 and 9 July 2019.

[5] I heard the matter on 24 May 2019 and handed down an order on the issues that were argued on that day, on 14 June 2019 in order to facilitate the preparation of argument on the remaining two days. There were issues that required further argument and they will be dealt with later. The reasons for the order handed down follow after the facts have been sketched.

Facts

[6] In order to place the apparent about turn by the first respondent towards the fourth respondent (from dismissing him for misconduct to appointing him) in context, it is necessary to record that it was caused by a change in political control of the first respondent's council. Different political parties are entitled to approach issues differently, provided they do so lawfully.

[7] The fourth respondent was appointed as the municipal manager of the first respondent with effect from 1 March 2008.

[8] On 7 February 2012 he was dismissed by the first respondent on the recommendation of the independent chair of a disciplinary enquiry, who had found the fourth respondent guilty of certain charges. Only two of the charges are relevant for the purposes of these proceedings and the facts relating to them will be captured briefly. At this juncture, it needs to be mentioned that in recording the facts, I endeavour to avoid the strong language that the parties utilised at times. Such language does not contribute to the decisions that the Court has to make in the matter; to the contrary, at times it made the task of the Court more difficult.

The first charge

[9] The first respondent purchased two properties from Wavelenths 252 (Pty) Ltd (Wavelenths) for R28m. The transaction was subject to the condition that the first respondent would secure the purchase price from (the Department of Human Settlements of) the Provincial Administration of the Western Cape. The Department of Human Settlements (the Department) paid an amount of R27,998 million into the account of the first respondent but this was subject to a condition that the properties in question be valued before the funds may be released to the seller. Notwithstanding this condition, the fourth respondent addressed a letter to the seller

advising it that the funds had been received and he could now proceed to sign the documentation necessary to effect transfer of the properties.

[10] The valuation done on behalf of the Department valued the properties at approximately R2,4 million and it informed the first respondent that it had to repay the difference between the valuation and the amount paid over, namely approximately R25 million. The first respondent was thus not able to pay for the properties and this led to litigation between Wavelenths and the first respondent in which the first respondent was successful. The chairperson found that the fourth respondent had transgressed s61(1) of the Local Government: Municipal Finance Management Act[1] (MFMA) in that he had misrepresented to the seller's conveyancers that the first respondent had obtained funds to pay the agreed purchase price without referring to the conditions (the requirement that the properties be valued) and thus giving the false impression that the suspensive condition contained in the deed of sale had been met.

The second charge

[11] The Department prescribed that the funds provided by it may only be used to purchase the properties. Despite this, the Chief Financial Officer of the first respondent utilised the funds to pay other debts of the first respondent. The chairperson found that this amounted to unauthorised expenditure in terms of the MFMA and that, as the accounting officer, the fourth respondent was liable for this unauthorised expenditure.

Further facts

[12] S 57A(3) of the Local Government: Municipal Systems Act[2] (Systems Act) provides that an employee dismissed for financial misconduct (which, it is common cause, the fourth respondent was) may not be re-employed by any municipality for a period of 10 years. Regulation 18(1) of the Regulations on Appointment and Conditions of Employment of Senior Managers[3] (Appointment Regulations), read with schedule 2 thereof, also prohibits the appointment of a person, who had been found guilty of

[1] Act 56 of 2003.
[2] Act 32 of 2000.
[3] GN21 in GG 37245 (17 January 2014).

financial misconduct, as a senior manager for a period of 10 years. "*Senior manager*" includes a municipal manager. However, regulation 18(2) provides that regulation 18(1) does not apply to a senior manager who has lodged a dispute in terms of the applicable legislation.

[13] The fourth respondent referred an unfair dismissal dispute against the first respondent to the South African Local Government Bargaining Council (Bargaining Council). This dispute was not resolved by conciliation and was referred to arbitration. On 22 October 2012 the Commissioner found that the dismissal of the fourth respondent was substantively and procedurally unfair and ordered his reinstatement and the payment of back pay.

[14] The first respondent applied to this Court for the review of the arbitration award, but the parties also attempted to settle the dispute. The negotiations progressed to a point where, on 11 January 2013 the fourth respondent signed a settlement agreement. However, (the previous mayor who is not the third respondent) Mayor Booysen, on behalf of the first respondent, deleted the part of the agreement which excluded the fourth respondent's right to pursue a claim for defamation and a claim for legal costs and sent it back to the fourth respondent. This led to a breakdown of the negotiations.

[15] On 24 October 2014 this Court ordered (the review judgment) that the award be set aside and that the matter be remitted to the Bargaining Council to be arbitrated *de novo* by an arbitrator other than the Commissioner that had dealt with the matter.

[16] On 14 November 2014 the fourth respondent filed an application for leave to appeal to the Labour Appeal Court (LAC). This was not a complete application due to the fact that the fourth respondent had not received the review judgment, for a reason which is not clear on the papers. The first respondent's then attorneys of record sent a copy of the review judgment to the fourth respondent's then attorneys of record during March 2015.

[17] During November 2014 to February 2015 there were intermittent attempts between the first respondent and the fourth respondent to settle the dispute.

[18] Some two years later, on 23 March 2017 the fourth respondent filed a

"Supplementary Notice of Application to Appeal" without an application for condonation.

[19] The first respondent contends that there were further attempts to settle the dispute, but discloses no details thereof, save that they failed during March 2018. The fourth respondent then instructed his legal representatives to proceed with the prosecution of his appeal. It is not clear what steps were taken in pursuit of the appeal.

[20] During November 2018 the first respondent anticipated a vacancy for the position of municipal manager, advertised the post and wished to temporarily fill the vacancy with a secondment. On 5 November 2018 the third respondent contacted the fourth respondent telephonically to enquire about his availability for the secondment. During this conversation the fourth respondent made reference to the dismissal dispute and that an attempt to settle it had failed. The third respondent asked for a copy of the settlement agreement that had been signed by the fourth respondent. This is the document dated 11 January 2013 discussed above[4].

[21] The fourth respondent submitted an application for the post on 10 December 2018.

[22] During the middle of December 2018, the third respondent and the fourth respondent had a further telephone discussion, initiated by the third respondent, during which the third respondent reminded the fourth respondent of his request for a copy of the settlement agreement.

[23] On 1 January 2019, the then attorney of the fourth respondent emailed a draft settlement agreement (and not the copy of the January 2013 partially signed agreement) to the third respondent and officials of the first respondent.

[24] On 14 January 2019, the fifth respondent asked for information on the outcome the review application. The reason for this request apparently was that the fifth respondent was alive to the fact that the fourth respondent had been dismissed for financial misconduct and wished to know what the final outcome of the matter was.

[25] An official of the first respondent noted, after a telephone conversation on 23

[4] *Supra* para [14]

January 2019 with officials of the National Department of Cooperative Government and Traditional Affairs that "*the dismissal of [the fourth respondent] is still standing/valid as he failed to refer the matter to the [Bargaining Council] to be heard by another arbitrator*".

[26] The fourth respondent was interviewed on 28 January 2019. He fared the best of the candidates in the interview and also in the psychometric tests that were conducted (although his test was conducted at an earlier stage and not during the selection process).

[27] On 30 January 2019 the first respondent sought urgent legal advice from HDRS attorneys (who did not represent the first respondent in the dismissal dispute) on whether the fourth respondent may be appointed. These attorneys requested the attorney who had acted for the fourth respondent in the dismissal dispute to furnish it with a note on the merits of the dispute, from the perspective of the fourth respondent. This request led to Ms Ferreira, who acted for the fourth respondent in the dismissal dispute (but who, led by Ms De Vos SC, appeared on behalf of the first respondent), preparing a memorandum in which the merits of the dismissal dispute was dealt with extensively. This memorandum also served before Ms De Vos, whose advice on the issue of the appointment of the fourth respondent was sought by the first respondent.

[28] The advice was furnished on 7 February 2019. On 18 February 2019 the Council of the first respondent passed the following resolution:

> "1. ....
>
> 2. That Council mandate the Executive Mayor to enter into a settlement agreement as full and final settlement with [the fourth respondent] before making an offer of employment and that the settlement be concluded within 10 days of this meeting / resolution i.e. 18 February 2019.
>
> 3. That an offer of employment be extended to [the fourth respondent] as first ranked candidate only after he accepts the full and final agreement.
>
> 4. That the Executive Mayor be authorised to negotiate a contract of employment with the candidate, taking into regard statutory requirements, affordability, and other pre-conditions, only after the settlement mentioned in (2) above is concluded."

(Own emphasis)

[29] On 21 February 2019 the third respondent, acting on behalf of the first respondent, entered into a settlement agreement with the fourth respondent. In terms of the agreement:

29.1 the first respondent abandoned the review judgment and order of this Court in the review application;

29.2 the fourth respondent abandoned a part of the arbitration award and the parties recorded their acceptance that the finding of the Commissioner, that the dismissal of the fourth respondent was unfair, was correct;

29.3 the first respondent would pay compensation in an agreed amount to the fourth respondent; and

29.4 the first respondent would pay an amount of R781 184, in respect of the fourth respondent's legal costs in the dismissal dispute, to him.

[30] Also on 21 February 2019 the first respondent and the fourth respondent entered into an employment agreement.

[31] In a letter dated 25 February 2019, addressed by the state attorney to the third respondent, the MEC recorded that he was concerned that the settlement agreement was unlawful and that, consequently, the appointment of the fourth respondent was contrary to the provisions of the Systems Act and the Appointment Regulations. Accordingly, he sought an undertaking that the settlement agreement would not be implemented.

[32] HDRS Attorneys, on behalf of the first respondent, responded to the letter on 26 February 2019, advising that the first respondent had acted on the advice of counsel and that the appointment of the fourth respondent was completely lawful.

[33] It is clear from the correspondence that both parties firmly and resolutely held their respective views about the validity of the settlement agreement and the appointment of the fourth respondent. Both had been advised by their respective legal teams about the merits of their positions.

[34] Also on 26 February 2019, the first respondent sent a report about the appointment of the fourth respondent to the MEC in terms of the provisions of s 54A(7) of the Systems Act. This report did not contain all the prescribed information and further communications in this regard were exchanged.

[35] On 9 March 2019 the suspension of the invalidity of the Systems Act expired.

[36] On 11 March 2019 the MEC informed the first respondent that he was of the view that the appointment of the fourth respondent was invalid and that litigation would follow unless the fourth respondent vacated the position of municipal manager voluntarily.

[37] The first respondent pointed out that there were statutory mechanisms available for dispute resolution but the MEC adopted the position that only a court of law could resolve the dispute if the first respondent insisted that the appointment of the fourth respondent was valid.

[38] On 19 March 2019 the MEC launched these proceedings.

[39] This then brings the Court to the reasons for the order handed down on 14 June 2019.

Jurisdiction

[40] The parties accepted that the decision by the LAC in *Merafong City Local Municipality v SA Municipal Workers Union and another*[5], which binds this Court, clothes it with jurisdiction to review the decision by a municipality to appoint a municipal manager. The first respondent did so without conceding that the judgment was correct. No more need to be said on this issue.

[41] There is a further jurisdictional issue, namely whether the Court has jurisdiction to review the settlement agreement. It is clear that a finding that the settlement agreement is unlawful may lead to a finding that the appointment of the fourth respondent was unlawful.

[42] Thus, the issue must be approached in the context that a decision on the

[5] (2016) 37 ILJ 1857 (LAC).

lawfulness of the settlement agreement is incidental to a decision on the lawfulness of the appointment of the fourth respondent.

[43] Mr Kahanovitz SC (who appeared for the applicant together with Ms Williams) relied on *Saldanha Bay Municipality v SA Municipal Workers Union on behalf of Wilschut and others*[6] in support of the submission that this Court did have jurisdiction to review a settlement agreement. However, that case concerned a review application arising out of an arbitration award. The commissioner had found that a disciplinary chair did not have the authority to dismiss where a municipal manager had settled the matter with the employee concerned before the disciplinary finding had been reached. The Court upheld the application on the ground that the actions of the municipal manager did not bind the municipality in the context of a disciplinary hearing. The decision did not deal with the jurisdiction of the Court to review a settlement agreement between a municipality and an ex-employee.

[44] In *Hendricks v Overstrand Municipality and another*[7], the LAC dealt with the issue as to whether this Court had jurisdiction to decide a review application brought by a local authority against the decision of a disciplinary chair not to dismiss an employee. The LAC concluded that s 158(1)(h) of the Labour Relations Act[8] (LRA) clothed this Court with jurisdiction. This section provides that this Court may: "*review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law*".

[45] It thus appears as if s 158(1)(h) would clothe the Court with review jurisdiction over a settlement agreement between a municipality and an ex-employee to settle a dismissal dispute, if the decision to enter into the settlement agreement is something done by the local authority "*in its capacity as employer*". If it is not, this Court would not have jurisdiction in terms of s158(1)(h). This issue is not addressed in the authorities to which the Court has been referred.

[46] There can be no doubt that a State entity that is involved in proceedings relating to an unfair dismissal dispute with its ex-employee, is so involved in its capacity as

[6] (2016) 37 ILJ 1003 (LC).
[7] (2015) 36 ILJ 163 (LAC).
[8] Act 66 of 1995.

employer. Accordingly, in setting that dispute, the entity would also be acting in its capacity as employer and this Court would have jurisdiction over the matter in terms of s 158(1)(h).

[47] However, it is also necessary to consider the provisions of s 158(1)(j) of the LRA. In *Inspektex Mmamaile Construction and Fire Proofing (Pty) Ltd v Coetzee and others*[9] this Court said the following about the application of s 158(1)(j):

> "There is a second independent basis upon which I believe that this court also has jurisdiction, namely s 158(1)(j) of the LRA, which provides that the Labour Court may 'deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law'. There are various situations in which it may be necessary for this court to determine whether or not a settlement agreement is valid in the course of determining matters manifestly within its jurisdiction."

[48] In Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union and others[10] the High Court held that

> "Section 158 provides the powers of the Labour Court which are extremely wide and include the making of any appropriate order, including *inter alia* the grant of urgent interim relief, an interdict and an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act.
>
> The last mentioned power in itself is incredibly wide as are the other powers to grant declaratory orders, awards of compensation and damages in any circumstances contemplated in the Act and order compliance with any provision of the Act. Also included are powers of review of the performance or purported performance of any function provided for in the Act or any act or omission of any person or body in terms of the Act, any decision taken or any act performed by the state in its capacity as employer, on any grounds that are permissible in law. Finally the Labour Court is empowered to deal with all matters necessary or incidental to performing its functions in terms of the Act or any other law."

[49] The High Court continued[11] by stating that a multiplicity of court proceedings should

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[9] (2010) 31 ILJ 642 (LC) at para 8.2.
[10] (1997) 18 ILJ 84 (D) at 88I-89B.
[11] Ibid at page 90D-E.

be avoided. This *dictum* was made in the context of the High Court having jurisdiction over certain strike -related incidents and the Labour Court over others. However, the principle applies to this matter. The principle was approved in *Sappi Fine Papers (Pty) Ltd (Adamas Mill) v Paper Printing Wood and Allied Workers Union and others*[12] and *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union and others*[13].

[50] Accepting that the Court has jurisdiction over the appointment of a municipal manager in terms of *Merafong*[14], it must also have jurisdiction in terms of s158(1)(j) to consider the lawfulness of a settlement agreement that paved the way for such appointment.

[51] In the premises, I concluded that the Court had the power to pronounce on the lawfulness of the settlement agreement in terms of both s 158(1)(h) and s 158(1)(h) and ruled accordingly.

Applications to strike out

Legal principles

[52] The Court applied the principles set out hereinafter in deciding the applications to strike out.

[53] Rule of 6(15) of the Uniform Rules of Court provides that:

> "The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[54] In Swissborough Diamond Mines (Pty) Ltd and Others v Government of the

[12] (1998) 19 ILJ 246 (SE).
[13] (2005) 26 ILJ 1458 (LC).
[14] Id fn 5

Republic of South Africa and Others [15] the Court referred with approval to the finding in Vaatz v Law Society of Namibia[16] that the words scandalous, vexatious and irrelevant must have their dictionary meanings; being scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory; vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy and irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.

[55] In *Beinash v Wixley*[17] the Supreme Court of Appeal (SCA) had to deal with a matter which appears to have generated as much tension as this one. The appellant on appeal caused a subpoena to be issued against the applicant (the respondent on appeal). The respondent on appeal made the following statement:

> "The [Appellant's] threats of the implementation of sanctions against me were not lightly received. I have personal knowledge of baseless proceedings he has recently brought for the imprisonment of Reynolds and the chairman of Boland Bank Ltd in related litigation."

[56] The SCA stated the following in response to the respondent's (the appellant on appeal) application to strike out:

> "I have considerable difficulty in appreciating why the narration of the background which preceded the application to set aside the impugned subpoena should be characterised as irrelevant. On the contrary, the substance of this narration appears to be quite relevant and, indeed, very useful in understanding the reason and need for, and the cogency and legitimacy of, the attack made by Wixley on the impugned subpoena. The averments contained in the relevant paragraphs of the founding affidavit are also clearly relevant in assessing whether or not Wixley was justified in his decision to launch the proceedings to set aside the impugned subpoena before the commencement of the trial. They appear to me to impact on whether or not the issue of the impugned subpoena, in all the circumstances, constituted an abuse of the process of the Court."

And further:

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[15] 1999 (2) SA 279 (T) at 337 A - C
[16] 1991 (3) SA 563 (NM).
[17] 1997 (3) SA 721 (SCA) at 733 G – 734 C.

"I am not persuaded that this averment can properly be said to be 'scandalous, vexatious or irrelevant'. It is part of the historical background and it appears to be relevant both to the reasons why Wixley brought an application to set aside the impugned subpoena before the date of the commencement of the trial, and on the issue as to whether or not the impugned subpoena constituted an abuse of the process of the Court. It also impacts on the issue of costs in the Court a quo.

In any event, even if it could properly be said that this or any other part of the averments made in the impugned affidavit were indeed 'scandalous, vexatious or irrelevant', it does not follow that the application to strike out this paragraph should succeed. I am not persuaded that Beinash suffered any prejudice if this allegation, or any other allegation contained in the impugned paragraphs of the founding affidavit, was not struck out. No such prejudice was relied upon in argument. The application was heard by a Judge and not by any layperson. He was able to disabuse his mind of any vexatious, scandalous or irrelevant matter contained in the affidavit."

[57] In *Vaatz*[18] the Court dealt with an application by an attorney to have his disciplinary hearing held in public. He included in his papers, lengthy information about his achievements and standing. The Court held that this was irrelevant to the proceedings and struck it out. The Court also held that an allegation that the chair of the respondent held the same view as the applicant was vexatious as, so the Court held, it was intended to embarrass the respondent.

[58] In *Swissborough*[19] the High Court held that a high volume of scandalous and vexatious and irrelevant matter constituted prejudice in itself.

[59] The Court has a discretion to allow new matter in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. See *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*[20]. An indulgence was also afforded in the case of an urgent matter in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[21] .

[60] This matter is a review application and in the ordinary course of events, the

[18] Id fn 15
[19] Id fn 14 at 338 C.
[20] 2013 (2) SA 204 (SCA) at paras 26 and 27.
[21] 2016 (2) SA 586 (SCA) at para 9.

applicant would have delivered a founding affidavit, procured the record of the proceedings and thereafter have been entitled to deliver a supplementary affidavit. Due to the urgent nature of this application, a lot of the material that ordinarily would have been contained in the record, was contained in the answering affidavit and consequently, the material that ordinarily would have been contained in a supplementary affidavit, is contained in the replying affidavit.

[61] The first respondent ought to be allowed an opportunity to answer to the new matter.

The applicant's application to strike out

[62] The applicant made an application to have paragraphs 37 -112.4, 217 and 221 - 222 of the first respondent's answering affidavit struck out on the ground that it contained irrelevant matter.

[63] The basis for the application was that the paragraphs all related to the reason why the first respondent entered into the settlement agreement with the fourth respondent and that these reasons were not relevant to these proceedings because the settlement agreement was, *per se*, invalid. Mr Kahanovitz submitted that it was not competent for the first respondent to enter into a settlement agreement without the authority of a court, but I was not prepared to decide this issue without having heard further argument.

[64] Section 109(2) of the Systems Act provides that:

> "A municipality may compromise or compound any action, claim or proceedings, and may submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its actions or bylaws."

[65] This provision is in direct conflict with the position adopted by the applicant. There is no reason to deprive a local authority of the power to settle disputes in the absence of a clear provision in this regard.

[66] For these reasons, I dismissed the applicant's application to strike out. However, the question of whether the first respondent required a court to undo the dismissal of the fourth respondent will receive further attention later in this judgment.

The first respondent's applications to strike out

[67] The first respondent sought to strike out paragraphs 98 – 105 and (although 223 is referred to, probably) 225 of the founding affidavit, and paragraphs 128 - 147 and 377 of the replying affidavit on the ground that they refer to an investigation in terms of section 106 of the Systems Act, which is not relevant to these proceedings. To this could be added paragraph 378, which the first respondent sought to strike on the basis that it constituted new matter. The information is irrelevant, it is a fair volume and it would be prejudicial to the first respondent if it stood. Accordingly, it was struck out.

[68] Paragraph 220 is contended to contain hearsay evidence. I did not understand this contention; the paragraph refers to minutes kept by the selection panel of the first respondent. Paragraph 212 was contended to contain vexatious and scandalous matter. It is strongly worded but does not fall on the wrong side of the test set out in *Beinash*[22]. Accordingly, I declined to strike these paragraphs out.

[69] Paragraphs 31, 32, 34, 35, 39, 40, 43.1, 43.2, 44 (in some instances part of the paragraphs) were sought to be struck out on the basis that they contained new matter. They all respond to paragraph 9 of the first respondent's answering affidavit. This paragraph deals with the contention that the Bargaining Council had to convene a new arbitration pursuant to this Court's remittal (on review) of the fourth respondent's dismissal dispute. To deal with the impact of an application for leave to appeal, the duties of the Bargaining Council in this regard, the explanation of the fourth respondent for not pursuing the appeal and the advice that the first respondent received, do not constitute new matter. In fact, the first respondent deals with this aspect in some detail in paragraphs 113 to 129 of the answering affidavit. What remains is a matter for legal argument. These paragraphs were not struck out.

[70] The last sentence of paragraph 72 invites the Court to draw a conclusion and need not be struck out.

[71] Paragraphs 73 (second and third sentence), 74 – 77, 107, 115 (last sentence), 157

[22] Id fn 16

– 165, 177 – 190, 205, 207 – 210, 212, 215, 217 (second and third sentences), 242 – 244, 247 – 249, 257.2, 257.3, 259 (last sentence), 260, 261 (last sentence), 262.1, 262.3, 262.4, 264 (third and final sentences), 265, 267, 268, 269 (first sentence), 281, 282 (the first sentence), 282 (last sentence), 293 (first and second sentences), 294, 299 – 311, 344, 376 (the words: "illustrated by the audits") of the replying affidavit contain new matter but flow from the answering affidavit. The first respondent was afforded the opportunity to file a supplementary answering affidavit to deal with these provisions within 10 days of the order dated 14 June 2019, and the applicant 5 further days to file a supplementary replying affidavit, extent that they deemed it necessary.

[72] Paragraphs 192 – 193, 250, 251, 257.5, 271 – 273, 275 – 277, 295, 297, 371, 373, 275, do not contain new matter and were not struck out.

[73] Paragraphs 196 - 198 contain new matter and were struck out, they might also have been struck on the ground that they were vexatious.

Introduction to the remainder of the judgment

[74] There are a number of questions in this matter, including the questions in respect of which the Court required further argument, which must be answered. The Court shall deal with them in turn.

The invalidity of the Local Government: Municipal Systems Amendment Act[23] (Amendment Act)

[75] In *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* (SAMWU)[24] the applicant sought confirmation of a declaration of constitutional invalidity of the Amendment Act, which features prominently in the dispute between the parties. The order was granted and the Constitutional Court confirmed the principle that a declaration of invalidity ordinarily has the consequence that the impugned legislation is invalid immediately with retrospective effect. However, the Constitutional Court added that retrospectivity could be limited if it would be just and equitable to do so.

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[23] Act 7 of 2011.
[24] (CCT54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017).

[76] The Constitutional Court proceeded[25] to hold that a host of decisions across the country had been taken in terms of the Amendment Act and that retrospective invalidity would plainly cause disruption to the orderly and effective conduct of government. For this reason, the Constitutional Court ruled that invalidity should operate prospectively.

[77] The Constitutional Court further suspended the operation of the invalidity for 24 months, which meant that it only came into effect on 9 March 2019.

[78] *In Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others*[26] the Constitutional Court dealt with the retrospective operation of a suspended order of validity and held[27] that:

> "This court in Executive Council [Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) at para 106] held:
>
> > 'If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue. In the present case that would mean that s 16A and everything done under it would be invalidated.'"

[79] This means that the normal consequence of a failure to remedy the impugned Act is that it would become invalid *ab initio.* Ms De Vos submitted that that was the consequence of *SAMWU*, namely that the Amendment Act became invalid *ab initio* at the expiry of the period of suspension.

[80] Mr Kahanovitz submitted that *SAMWU* expressly decided that invalidity would operate prospectively due to the disruption to the orderly and effective conduct of government that retrospectivity would cause, and that there is no reason why this reasoning should not also apply to the period of suspension. This appears to be correct; a host of (further) decisions, taken in the 24-month period, would become

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[25] Ibid at para 86.
[26] 2015 (5) SA 370 (CC) at para 17.
[27] Ibid at para 15.

tainted after the fact if invalidity would take effect from 9 March 2017. The Constitutional Court described this state of affairs as untenable. Thus, the same principle that motivated the prospective operation of invalidity during March 2017 should be applied during March 2019.

[81] This approach was succinctly underwritten by the Constitutional Court in Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others[28]:

> "Finally, a necessary feature of this suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected. In exercising their powers under the impugned chapters, development tribunals have approved countless land developments across the country.
>
> It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force."

[82] The Court finds that the invalidity of the Amendment Act operates prospectively from 9 March 2019. Thus, its provisions applied when the settlement agreement was entered into and when the first respondent appointed the fourth respondent.

Locus standi

[83] Due to the fact that Ms De Vos did not press this aspect in argument, it is only necessary to deal with it briefly.

[84] On 11 March 2019 (which is 2 days after the invalidity of the Amendment Act commenced) the MEC informed the third respondent that he held the view that the appointment of the fourth respondent was invalid. He recorded that he was acting in terms of his "*monitoring and support function contained in sections 154 and 155 of the Constitution and compliance duties contained in Section 54A of the Systems Act*". S 54A was introduced by the Amendment Act.

[85] The issue that falls to be decided is whether the MEC was entitled and obliged to act in terms of the provisions of s 54A(8) of the Systems Act (which provides that

[28] 2010 (6) SA 182 (CC) at para 85.

the MEC must take take appropriate steps to enforce the provisions of s 54A if a person is appointed as municipal manager in contravention thereof) despite the fact that it had become invalid prior to the institution of the proceedings. If the MEC was unable to do so, he would not have been able to exercise the rights and obligations that he had in terms of the Systems Act and this, as Mr Kahanovitz correctly pointed out, would have had the same effect as an order of retrospective invalidity.

[86] The Court accordingly finds that the MEC had *locus standi* to bring the application.

[87] In any event, the Appointment Regulations have to be considered. Mr Kahanovitz produced a note on the effect of the invalidity of the Amendment Act on the Appointment Regulations. Ms De Vos indicated that the first respondent would submit a further note if it disagreed with the contention that the Appointment Regulations were not affected by the invalidity of the Amendment Act. It did not do so. Regulation 17(3) of the Appointment Regulations requires that a local authority must submit a report to the MEC regarding the appointment process and outcome of, amongst others, municipal managers. Regulation 17(4) prescribed the contents of the report; it requires comprehensive details. Regulation 18(6) requires a local authority to submit a record of the proceedings of the dismissal, for misconduct, of a municipal manager to the MEC. These regulations show that the MEC has an interest in the appointment of municipal managers. It would, after all, serve no purpose to require that this information be submitted to him if he was not able to take steps if he was of the opinion that the local authority did not comply with its legal obligations in appointing a municipal manager.

[88] The MEC has *locus standi*.

Facilitation

[89] The first respondent contended that the MEC was not entitled to approach this Court because he had not complied with the provisions of section 45 of the Intergovernmental Relations Framework Act[29] (IRFA).

[90] The section provides as follows:

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[29] Act 13 of 2005.

"Judicial proceedings

(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful."

[91] In deciding this issue, it must be borne in mind that the dispute between the MEC and the first respondent turned on a very narrow point; namely the validity of the appointment of the fourth respondent as municipal manager.

[92] IRFA was considered by a full bench of the High Court in *City of Cape Town v Premier, Western Cape and Others*[30]. That matter concerned the appointment of a commission by the respondent to investigate alleged misconduct by the applicant. The respondent submitted that the applicant had failed to comply with the provisions of IRFA. The Court dealt with this challenge as follows: [31]

> "The provisions of the Framework Act must be construed consistently with the Constitution. Consequently, although s 45(1) of the Framework Act is couched in peremptory language, it has to be read consistently with the provisions of ss 41(3) and (4) of the Constitution. To disregard the provisions of s 41(4) of the Constitution, which vests in a court a discretion to hear a matter even if not satisfied that the parties have made every reasonable effort to settle the dispute, would run counter to the provisions of s 34 of the Constitution, which guarantee the right of the individual to have any dispute, resolved by the application of law, decided in a fair public hearing before a court. A limitation of this right by the provisions of s 45(1) of the Framework Act would not be reasonable and justifiable in terms of s 36(1) of the Constitution."

[93] The Court ruled that it did have the discretion to entertain the matter even though the parties had not made every reasonable effort to settle it and proceeded[32] to set out the relevant facts that it had to consider in exercising this discretion. It is clear that the fact that the applicant in that matter was faced with the imminent commencement of the commission's proceedings played a significant role in the decision of the Court. In this matter the urgency was caused by the provisions of s

[30] 2008 (6) SA 345 (C).
[31] Ibid at para 17.
[32] Id fn 29 at para 19.

54A(8) of the Systems Act which required the MEC to act within 14 days after the information relating to the appointment of the fourth respondent, prescribed by regulation 17(4) of the Appointment Regulations, had been supplied to him.

[94] There is an additional element in this matter; s 39(1)(a) of IRFA provides that the chapter relating to the settlement of disputes does not apply to disputes "*in respect of which other national legislation provides resolution mechanisms or procedures*". S 54A(8) of the Systems Act is such a procedure or mechanism.

[95] The MEC is thus not non-suited by the provisions of IRFA.

The nature of the decisions in question

[96] There are a number of decisions that feature in this matter, namely, the decision to dismiss the fourth respondent, the decision to oppose the dismissal dispute that he referred to the Bargaining Council, the decision to institute review proceedings against the decision of the Commissioner, the decision to enter into a settlement agreement with the fourth respondent and the decision to appoint him.

[97] Due to the conclusion that the Court has come to, it is not necessary to determine the nature of these various decisions.

Did the first respondent require court intervention in order to enter into the settlement agreement?

[98] Mr Kahanovitz contended that the first respondent has no inherent powers and that, in the absence of a lawful source empowering it to enter into the settlement agreement, it acted beyond its powers and therefore acted unlawfully in doing so. As recorded earlier in the judgment, s 109(2) of the Systems Act provides that:

> "A municipality may compromise or compound any action, claim or proceedings, and may submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its actions or bylaws."

[99] On the face of it, the section empowered the first respondent to settle the dismissal dispute but Mr Kahanovitz developed the argument by contending that cases like

Saldanha[33] and *Overstrand*[34] supported the principle that municipalities ought to approach the courts in disputes relating to the dismissal of senior municipal officials. However, under scrutiny, it appears that these judgments do not provide that municipalities have to obtain court approval in order to settle dismissal disputes involving senior municipal officials.

[100] Mr Kahanovitz developed the argument further by submitting that the review judgment impacted more widely than on the parties to the suit and that it, accordingly, was a judgment *in rem* which could not be abandoned by settlement without the blessing of the Court.

[101] In *Airports Company South Africa v Big Five Duty Free (Pty) Limited*[35] the Constitutional Court unequivocally held that a judgment *in rem* may not be set aside by merely a settlement agreement between the litigating parties on appeal. What is required is court sanction in the form of the settlement agreement being made an order of court on the basis that the setting aside of the judgment was justified by the merits of the appeal. The Constitutional Court referred to the decision of *Tshabalala v Johannesburg City Council* [36] for the explanation of what judgment *in rem* was. The then Supreme Court held as follows[37]:

> "*Mr. Unterhalter,* who appeared for the appellant, submitted that the judgment of the magistrate declaring the bylaw *ultra vires* is a judgment *in rem* which is conclusive against all persons whether parties or strangers, and in all courts. A judicial decision *in rem* as defined by Spencer Bower *Res Judicata*, sec. 209, is one
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> 'which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and, therefore is conclusive for, or against, everybody, as distinct from those decisions which only purport to determine the jural relation of the parties to one another, and their personal rights and equities *inter se*, and which, therefore, are commonly termed decisions *in personam*.'

[33] Id fn 6.
[34] Id fn 7.
[35] 2019 JDR 0964 (CC) at para 1.
[36] 1962 (4) SA 367 (T).
[37] Ibid at 368 H – 369 A.

> Judgments determining matrimonial status, adjudging a debtor insolvent, expelling a member of a profession, declaring a person mentally disordered, deciding issues of paternity (*R v Kriel*, 1939 CPD 221), presuming the death of a person (*Ex parte Welsh: In re Estate Keegan*, 1943 W.L.D. 147), are examples of judgments *in rem* as affecting the status of persons."

[102] The only decision on the issue in the employment law context that the Court could find, was *Maartens and others v SA National Parks*[38] . This matter dealt with the dismissal of a number of employees. One had already unsuccessfully challenged his dismissal in court and when the others endeavoured to challenge their dismissals, the employer contended that the earlier decision, dismissing the application of the one employee, was a judgment *in rem*, which bound the further employees. The Court dealt with this challenge as follows[39]:

> "In *Lazarus Barlow v Regent Estates Co Ltd* [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122 (referred to by Hoffmann & Zeffertt *The SA Law of Evidence* (4 ed) at 338) a judgment in rem was defined as follows:
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> > 'A judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation).'
>
> A judgment in rem is a judgment which is conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless of whether or not they are parties to any legal proceedings are bound by a judgment in rem and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the court has by its judgment declared or made it to be."

[103] The Court then concluded that[40] the judgment handed down by the Court in the case of the first employee did not deal with the status of any of the persons who were parties to the current action. The judgment merely determined whether or not the employee had any claim against the respondent pursuant to the provisions of the LRA, and as such it was a judgment *in personam* and not a judgment *in rem*.

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[38] (2004) 25 ILJ 2222 (LC).
[39] Ibid at para 5.
[40] Id fn 35 at para 7.

[104] Accordingly, a judgment of this Court in a dismissal dispute is not a judgment *in rem*. There is no reason why this position should change due to the fact that the judgment in question is one on review where either party had challenged the decision of an arbitrator to either uphold or overturn a dismissal.

[105] Does this position change if the judgment concerns an employee who is a municipal manager? In *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu-Natal v President of The Republic of South Africa and Others*[41] the Constitutional Court, amongst other things, dealt with the contention that s 82 of the Local Government: Municipal Structures Act[42] (Structures Act) [which has subsequently been repealed] was unconstitutional. In terms of this section a municipal council was obliged to *'appoint a municipal manager who is the head of administration and also the accounting officer for the municipality'* and the Constitutional Court held[43] the following as to the status of municipal managers:

> "It is therefore clear that the municipal manager is a key structure of a municipality and not merely a personnel appointment as contemplated in s160(1)(d) of the Constitution. I am therefore satisfied that the national government has the constitutional authority to enact s 82."

[106] In *Hendricks*[44] the LAC stated:[45]

> "The Constitution and the suite of local government legislation require municipalities to function effectively, efficiently and transparently. One of the principal objects of local government is to provide for democratic and accountable government to local communities."

[107] Further, regulation 18 of the Appointment Regulations provides that any person who had been dismissed for misconduct may not be employed as a senior manager (which includes municipal manager) before the expiry of different periods in respect of different acts of misconduct. The Appointment Regulations also require that a record be kept of such dismissals and that a copy of the record must be sent to the

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[41] 2000 (1) SA 661 (CC).
[42] Act 117 of 1998.
[43] Id fn 41 at para 109.
[44] Id fn 7
[45] Ibid at para 20.

MEC and the fifth respondent. It is thus necessary to consider whether the important position that a municipal manager occupies in a municipal structure affects the consequences of, and remedies against, a dismissal.

[108] In the Court's view it does, there is a difference between the dismissal of an employee in the private sector and that the dismissal of a municipal manager. Some are:

108.1 A municipal manager has important statutory obligations which private sector employees do not have. They are set out in s 55 of the Systems Act, which have not been declared invalid. The municipal manager is the head of the administration of a municipality and is, amongst other things, responsible and accountable for the formation and development of an economical, effective, efficient and accountable administration, for the implementation of the municipality's integrated development plan, for the management of the provision of services to the local community and for advising the political structures and political office bearers of a municipality.

108.2 A municipal manager who has been dismissed for specified misconduct may not be employed as a senior manager by any municipality for specified periods. The dismissal accordingly is akin to the expulsion of a member from a profession, which was considered to be an example of a judgment *in rem* in *Tshabalala*[46].

108.3 The dismissal of a municipal manager is recorded in a register kept by the National Department of Cooperative Government and Traditional Affairs.

[109] Ms De Vos submitted, *albeit* in the context of the legal principle that administrative action stands until it is overturned by a court on review, that the requirement of court involvement cannot be applicable in the case of a dismissal due to the fact that the LRA provides for the setting aside of a dismissal decision by an arbitrator during the arbitration proceedings, and not a court. She developed this argument by contending that the application of this principle would mean that a municipality could never settle a dismissal dispute by agreement before the Bargaining Council,

[46] Id fn 35.

even if it had been advised that it had no prospects of success. This argument does not address the issue of whether the judgment in a review application by this Court, setting aside an arbitration award to the effect that the dismissal of a municipal manager is unfair, is a judgment *in rem.* Further, there are obvious limitations to the requirement of court involvement in the case of dismissals; it would suffice to state that the Appointment Regulations only apply to municipal employees who had been dismissed for specific forms of misconduct and who wish to be re-employed as senior managers and that the requirement would only find application if the Labour Court (or another court) had in fact given a judgment in the matter.

[110] In view of the aforegoing, the Court concludes that the review judgment was a judgment *in rem* and accordingly that the first respondent and the fourth respondent were not competent to enter into a settlement agreement in terms whereof the first respondent abandoned the judgment. As a matter of law, the parties were required to approach the Court and request it to approve the settlement agreement.

[111] Accordingly, the settlement agreement falls to be set aside.

Was it nevertheless competent for the first respondent to appoint the fourth respondent?

[112] This then turns the Court's attention to the question whether the appointment of the fourth respondent was competent in the absence of a valid settlement agreement. Ms De Vos submitted that the appointment of the fourth respondent would still be lawful, even if the settlement agreement was struck down, due to the fact that the fourth respondent had "*lodged a dispute*" against his dismissal as contemplated by regulation 18(2) of the Appointment Regulations. The regulation provides that sub-regulation 18(1) does not apply in such instance. Although s 57A(3) of the Systems Act does not contain a similar provision, the Court accepts that it, too, would not operate against an employee who has challenged his dismissal.[47]

[113] A literal interpretation of regulation 18(2) means that all an employee needs to do to avoid the operation of regulation 18(1) and also s 57A(3) is to lodge a dispute. The Court is of the view that more must be required and the parties seemed to be in agreement that the requirement was that the dispute must be "*live*" although they

[47] These provisions are dealt with *supra* para [12]

differed on the requirements for this issue. However, it is not necessary to decide this aspect.

[114] The first respondent resolved on 18 February 2019 that the appointment of the fourth respondent was conditional on the conclusion of a settlement agreement. The resolution is captured above[48] and need not be repeated. Due to the fact that a condition of the appointment of the fourth respondent, set by the first respondent, namely that the dismissal dispute between him and the first respondent must be settled, has not been fulfilled, the appointment falls to be set aside.

Declarators

[115] The applicant sought a number of the declarators which have become academic in light of the fact that the settlement agreement and appointment of the fourth respondent fall to be set aside. It is thus not necessary to deal with them.

Further application to strike out

[116] Ms De Vos applied to have paragraphs 271, 272, 273 and 375 of the replying affidavit struck out with an order for attorney and client costs. These paragraphs contain averments about the conduct of legal practitioners. (It must be mentioned that the Court requested this application in the event that the parties were not able to settle this issue and that Ms De Vos did not include herself as an offended party.) This matter is unusual in the sense that Mr Hill (of the first respondent's attorneys of record) and Ms Ferreira (the junior counsel for the first respondent) acted for the fourth respondent in the dismissal dispute between the first and fourth respondents. It is their conduct that was criticised.

[117] The Court was initially concerned about their earlier involvement but it became clear as the matter unfolded that there was no conflict of interest between the first respondent and the fourth respondent and that there was thus no reason why Mr Hill and Ms Ferreira could not act for the first respondent. When they gave advice, they did not purport to act independently in the sense of advancing only the first respondent's interests but not those of the fourth respondent; they acted in the interests of both their clients and, by the time that the litigation commenced, they

[48] *Supra* para [[28]]; especially the underlined phrases.

only acted for the first respondent. Further, here is nothing inherently wrong in parties seeking advice on how to achieve a common goal in a lawful manner. It is not unethical to advise on a course of action to achieve this objective. (In any event, in this case the first respondent went further and sought the advice of an experienced Senior Counsel, who was certainly independent, on the lawfulness of its proposed course of action before it acted.)

[118] Although the paragraphs may contain criticism of the legal representatives, they do not cross the line discussed above[49]. There is also nothing wrong with suggesting that a legal representative has expressed herself strongly in a written memorandum. The Court declines the application to strike out.

Costs

[119] Initially, the applicant sought costs against the second respondent, the third respondent and the councillors to had voted in favour of the appointment of the fourth respondent, in their personal capacities. This prayer was moderated to only the third respondent. There is no reason to award such an order; the MEC was successful on a narrow technical aspect and there is no reason to doubt that the fourth respondent did the best in the interview and the psychological test.

[120] The Court shared the principle established by the LAC in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.*[50] with the parties, but both made it clear that the principle should not apply when two levels of government litigated against each other. The Court, on reflection, agrees and will deviate from the normal principles relating to costs. Thus, costs will follow the result.

[121] As far as the applications to strike out are concerned, the MEC should not recover its costs in respect of the portions of its papers that had been struck out and the response thereto. Save for the aforegoing, the Court does not intend to make a specific order as to costs in respect of the striking out applications as they were partially successful, had led to leave to deliver further papers in some instances and not much time had been spent on them.

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[49] *Supra* paras [53] to [58]
[50] (2008) 29 ILJ 1707 (LAC).

[122] That leaves the position of the fourth respondent. He is a party to the proceedings and has as much of an interest in the outcome as the first respondent. However, he did not oppose the application and there is no suggestion on the papers that he dictated or influenced the approach of the first respondent to the matter. He is also not financially in the same league as the MEC and the first respondent. It would be extremely harsh to require him to pay or contribute to the costs of the matter.

In addition to the order made on 12 June 2019 and which is attached hereto, the Court makes the following order:

Order

1. The settlement agreement entered into between the first respondent and the fourth respondent on or about 21 February 2019 is reviewed and set aside.
2. The appointment of the fourth respondent by the first respondent on or about 21 February 2019 is reviewed and set aside.
3. The further application to strike out by the first respondent is refused.
4. The first respondent is ordered to pay the applicant's costs, inclusive of costs of two counsel, save for the costs occasioned by the portions of the papers of the applicant that had been struck out and the response thereto.

pp M Rubbin-Nieuwoudt

H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv C Kahanovitz SC and Adv J Williams
Instructed by: The State Attorney

For the First Respondent: Adv A de Vos SC and Adv L Ferreira

Instructed by: HDRS Attorneys Inc.