

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00311

In the matter between:

ABRAHAM KOTOKENI KANIME

APPLICANT

and

MUNICIPAL COUNCIL OF WINDHOEK

1ST RESPONDENT

CHAIRPERSON: MUNICIPAL COUNCIL OF WINDHOEK

2ND RESPONDENT

**CHIEF EXECUTIVE OFFICER: MUNICIPAL COUNCIL
OF WINDHOEK**

3RD RESPONDENT

**CHAIRPERSON: MANAGEMENT COMMITTEE OF
THE MUNICIPAL COUNCIL OF WINDHOEK**

4TH RESPONDENT

**CHAIRPERSON: SERVICE SELECTION COMMITTEE
OF THE MUNICIPAL COUNCIL OF WINDHOEK**

5TH RESPONDENT

INSPECTOR-GENERAL: NAMIBIAN POLICE

6TH RESPONDENT

MINISTER OF URBAN & RURAL DEVELOPMENT

7TH RESPONDENT

**MINISTER OF HOME AFFAIRS, IMMIGRATION,
SAFETY & SECURITY**

8TH RESPONDENT

CHIEF: NAMIBIAN DEFENCE FORCE

9TH RESPONDENT

DIRECTOR: NAMIBIA INTELLIGENCE SERVICE**10TH RESPONDENT**

Neutral Citation: *Kanime v Municipal Council of Windhoek* (HC-MD-CIV-MOT-GEN-2021/00311) [2023] NAHCMD 396 (13 July 2023)

CORAM: PRINSLOO J

Heard: 27 January 2023

Delivered: 13 July 2023

Flynote: Administrative Review – Pre-emptive Collateral challenge of – First Respondent’s Council Resolution No. 09/02/2021 – Applicant’s relief – Moot due to overtaking of events.

Second Semba application – Settlement agreement nor – Subsequent court order purports to dispose of the review relief sought – by Respondents.

Appointment of Mr Kanime – by virtue of a fixed-term employment contract entered into between – Municipal Council and Mr Kanime – Applicant’s – Employment contract never set aside by this court.

Resolution 09/02/2021 – taken by Council stands to be set aside – Relief has become moot – Same applies to relief – In paragraph 2 and 3 of the Notice of Motion.

Summary: The applicant in this matter is the former Head of the Municipal Police Service for the Municipal Council of Windhoek who seeks amongst other declaratory orders the reviewing, reversing, correcting (as a pre-emptive collateral challenge) and setting aside of the decision taken by the First Respondent Council on or about 11 to 15 February 2021, incorporated in Council Resolution No. 09/02/2021. The first to the third respondents (the respondents) opposed the relief sought by the applicant and filed a counter-application (which is sought whether the main application is granted or dismissed) as well as a conditional counter-application.

Held that to a large extent, the applicant’s application became academic due to the expiry of time and the overtaking of events.

Held that there is no reference made in the second Semba application regarding resolution 121/04/2020, which approved the appointment of Mr Kanime, nor is there any reference to the fixed-term employment agreement entered into with Mr Kanime. This is despite the fact that the second Semba application was instituted more than a month after the appointment of Mr Kanime in terms of the new fixed-term employment agreement.

Held that a settlement was reached in the second Semba application, to the exclusion of Mr Kanime, which provided that Mr Kanime or any other candidate shall be appointed regularly. Regularly is the operative word in paragraph 5 of the settlement agreement. It is clear from the reading of the court order that in making the agreement an order of court, the court did not enter into the merits of the litigation.

Held further that generally, a settlement agreement and the resultant settlement order eliminates the underlying dispute between the parties. Once the matter has become settled and the settlement agreement and the terms thereof is made an order of court, this development in the lis between the parties supersedes the action and creates new obligations between the parties.

Held that in the court's view neither the settlement agreement nor the subsequent court order purports to dispose of the review relief sought. The court did not in any of the applications serving before it set aside the resolutions sought to be impugned. The court order directing the Council to appoint Mr Kanime, the tenth respondent in that matter, and/or another regularly cannot be read as acting retrospectively. None of the resolutions relating to the recruiting and the appointment of the applicant were set aside by this court.

Held further that in addition, thereto it appears that the respondents laboured under the impression that Mr Kanime was appointed by virtue of resolution 121/04/2020 incorporating resolution 58/02/2020. That in the court's view is a misdirection. Mr Kanime was appointed by virtue of a fixed-term employment contract entered into between the Council and Mr Kanime. That employment contract was never set aside by this court either.

Held further that the employment contract of the applicant was not invalidated by the Semba settlement agreement and the subsequent court order.

Held furthermore that to interpret the word 'regularly' appoint as meaning that it sets aside not only CR 58/02/2020, and CR 121/04/2020 but also the employment contract of the applicant is in the court's view without any merits and far-fetched.

Held that Council misconstrued the settlement agreement and passed resolution 09/02/2021 wherein it 'restarted' the recruitment process for the position held by Mr Kanime. The decision by the Council to follow this course of action was clearly unreasonable, unfair and premature as the employment contract of the applicant remained valid and extant. Resolution 09/02/2021 taken by the Council stands to be set aside, however, this relief has become moot. The same applies to the relief set out in paragraph 2 and 3 of the Notice of Motion.

Held that in terms of the Police Act, the Inspector-General is responsible for appointments to the Namibian Police Force. Under s 43(c) of the Police Act, the Minister is authorised to extend any provisions of the Police Act to apply to the municipal police service. The Inspector-General has powers in terms of the Police Act to appoint members of the Namibian Police Force however, reg 5(1) of the Regulations does not extend powers to appoint the Chief: City Police to the Inspector-General.

Held that the applicant's attack on the validity of reg 5(1) is without merit.

Held that Ms Larandja did not differentiate between the counter-application and the conditional counter-application, despite the direct challenge raised by Mr Kanime regarding the authority to institute the main counter-application. Nowhere in the respondents' papers is the averment made that Mr Ngairorue had the authority to institute the main counter-application. Mr Ngairorue only referred to having authority to institute the conditional counter-claim.

Held that it is surprising that no resolutions exist which were passed by the respondents authorising the counter-application and conditional counter-application. The best evidence that proceedings have been authorised by a corporate entity is customarily the production of a resolution by the board (or the council in the current instance),

introduced by an official of the said entity. It is usual and desirable for such a resolution, if it exists, to be annexed and proven by the founding affidavit in motion proceedings.

Held that the court is not convinced that Mr Ngairorue was clothed with the relevant authority to institute the main counter-application and it stands to be dismissed.

Held that it took the respondents 26 months after the appointment of Mr Kanime to institute a self-review. The self-review or conditional counter-application followed 10 months after the institution of the applicant's application.

Held further that the court is of the view that the respondents' delay in instituting the self-review is unreasonable. However, as with many of the relief claimed in the main application, the self-review set out in the conditional counter-application also became moot.

ORDER

Ad main application

1. The applicant's relief sought in paras 1, 2 and 3 as per the Notice of Motion dated 9 August 2021 is granted. The relief granted is with the exclusion of paragraph 1.3, which is dismissed.

Ad counter-application and conditional counter-application

2. The first, second and third respondents' counter- and conditional counter-applications are dismissed.

Ad both applications

3. The first, second and third respondents are to pay the costs of the applicant, such costs to include the costs of two legal practitioners.
4. The matter is finalised and removed from the roll.

JUDGMENT

PRINSLOO J:

The parties

[1] The applicant, Abraham Kotokeni Kanime,¹ was at the time of this application the Head of the Municipal Police Service for the Municipal Council of Windhoek. He was appointed as such for three years in terms of a fixed-term employment contract. At the time of the writing of this judgment, his contract terminated *ex contractu* on 30 April 2023.

[2] The respondents are as follows:

- a) The first respondent is the Municipal Council of Windhoek (the Council), established in terms of the Local Authorities Act 23 of 1992, with its business address at 80 Independence Avenue, Windhoek.
- b) The second to the fifth respondents, who all have their business address at 80 Independence Avenue, Windhoek, are:
 - i) the Chairperson of the Municipal Council of Windhoek;
 - ii) the Chief Executive Officer of the Municipal Council of Windhoek (the CEO);
 - iii) the Chairperson of the Management Committee of the Municipal Council of Windhoek, which Committee is responsible for the recruitment and selection of Head: City Police; and

¹ I will refer to the applicant interchangeably as Mr Kanime or the applicant.

- iv) the Chairperson of the Service Selection Committee of the Municipal Council of Windhoek.
- c) The sixth respondent is the Inspector-General of the Namibian Police (the Inspector-General) appointed in terms of Articles 119 and 32(4)(c)(bb) of the Namibian Constitution and is cited in his official capacity.
- d) The seventh respondent is the Minister of Rural and Urban Development, who is responsible for local authorities and is cited in his official capacity.
- e) The eighth respondent is the Minister of Home Affairs, Immigration, Safety and Security, cited in his official capacity as the political Head of the Namibian Police, in the care of the Government Attorneys, Windhoek.
- f) The ninth respondent and tenth respondent, who is the Chief of the Namibian Defence Force and the Director of the Namibian Central Intelligence Service, respectively, are cited for any interest they may have in the current proceedings.

Background

[3] Mr Kanime was the founding Head of the Windhoek Municipal Police Service and served in the said position from inception to 30 January 2020, when he resigned from the said position.

[4] Following his resignation, the Council took resolution 58/02/2020 on 27 February 2020, to retain the services of Mr Kanime as the Head of the City Police in line with reg 16(3) – (5) of the Windhoek Municipal Police Service Regulations² (the Regulations) to

² (3) The Head, Deputy Head or Senior Superintendent who has attained 50 years of age may, subject to the legislation and the Rules referred to in subregulation (1), retire from the Service before he or she attains 55 years of age and, if he or she so retires –

(a) is deemed to have retired under subregulation (2); and

(b) is entitled to such pension as provided for in the Rules of the Pension Fund to which he or she belongs.

(4) Despite subregulation (1), the Council may retain a member, with his or her consent, in his or her post beyond the age of 60 years for further periods which may not exceed five years in total.

perform certain tasks, and the Management Committee was delegated to negotiate with the applicant the terms and conditions as well as the duration of a new employment contract. The Council resolved as follows in this regard:

- '1. That the notice of termination of the employment contract as tendered by the Head of City Police, Chief AK Kanime, be noted.
2. That the importance of the position being held by Chief AK Kanime, to the safety and security of the residents of Windhoek and to overall delivery of services be noted.
3. That in line with regulation 16(3) to (4) and (5) of the Windhoek Municipal Police Service Regulations, Council retain the services of Chief AK Kanime, head City Police to perform certain tasks pending negotiations as enshrined in the Windhoek Municipal Police Service.
4. That Management Committed (sic) be delegated to negotiate with Chief AK Kanime the terms, conditions and duration of the new employment contract to perform certain tasks and that Management committee report back to Council on the outcome of the negotiations with Chief AK Kanime by March 2020.'

[5] Following the resolution on 27 February 2020, the Management Committee engaged in negotiations with Mr Kanime. It was agreed that Mr Kanime would be employed on a fixed-term contract with specific project-related terms. Some of these terms included, the development and execution of a succession plan, the establishment of a financial and operational sustainability framework, and the creation of a training school, amongst others.

[6] During the negotiations, it was agreed that Mr Kanime would be appointed on similar terms as his previous employment contract, with minor changes in respect of the terms of office and pension fund.

(5) A member may only be retained under subregulation (4) if it is in the interest of the Service or generally in the public interest.

[7] During 2020 the country was under lockdown as a result of the worldwide COVID-19 pandemic. A council meeting was scheduled for 23 April 2020, but was postponed to May 2020 by the then CEO, Mr Kahimise. On 28 April 2020, the Chairperson of the Management Committee called a meeting for the same day and during the said meeting, an acting CEO, Snr Sup Titus, was appointed, who scheduled a meeting for 29 April 2020.

[8] On 29 April 2020, pursuant to the notice by Mr Titus the Council had a meeting during which the Council resolved and approved the terms of the agreement that, Mr Kanime would be appointed for a period of three years in terms of a fixed-term employment contract. The Council further resolved that in the event that Mr Kanime completed the projects assigned to him earlier than three years, he would be free to go on retirement. The Chairperson of the Management Committee was mandated to sign the contract of employment with the applicant.³

[9] The Council Resolution 121/04/2020 dated 29 April 2020, inter alia, read as follows:

‘1. The Council Resolution 58/02/2020 mandating the Management Committee to negotiate with Chief AK Kanime, the terms, conditions and duration of the employment contract to perform certain tasks and to report back to Council on the outcome of the negotiation with Chief AK Kanime by end March 2020, is noted.

2. That it be noted that the Management Committee met with Chief AK Kanime to negotiate the terms, conditions and duration of the new employment contract.

3. That it be noted that as a result of the negotiation, amongst other Chief AK Kanime has agreed to be retained for a period of three (3) years.

3.1 That it be noted that as part of the agreement reached with Chief AK Kanime, should he complete the projects assigned to him earlier than three (3) years, he will be free to go on retirement.

³ Resolution 121/04/2020.

4. That it be noted that the two (2) parties also agreed that Chief AK Kanime's new contract of employment should be the same as his current contract, with minor changes with respect to the terms of office and Pension Fund.
5. That the following strategic themes, as regards to the tasks that Chief AK Kanime will perform during the period of the extended contract be noted.
6. ...
10. That the resolution be implemented prior to confirmation of the minutes.'

[10] Mr Kanime commenced his term in office in terms of the new contract of employment on 30 April 2020.

[11] Following the appointment of the applicant in April 2020 a council member, namely Mr Ignatius Semba, brought an application to this court against the Municipal Council of the City of Windhoek (the first respondent) and eight other respondents.⁴

[12] As there were a number of applications that followed, I will refer to this application brought by Mr Ignatius Semba as the 'first Semba application'. In the said application, Mr Semba sought to obtain an order reviewing and setting aside the first Council resolution 121/04/2020 with specific reference to the applicant's fixed-term employment contract.

[13] Mr Kanime was not joined as a party to the first Semba application despite the fact that his appointment was essentially the crux of the review. The Council in opposition to this application, took the point that the non-joinder was fatal. However, this application, which was brought on an urgent basis, was struck due to a lack of urgency.

[14] On 08 May 2020, a further case was launched in the High Court by Mr Semba under HC-MD-CIV-MOT-REV-2020/00127 with the same parties, however, this time around Mr Kanime was cited as the tenth respondent. I will refer to this application as

⁴ Under case number HC-MD-CIV-ACT-GEN-2020/00115.

the 'second Semba application'. In the second application, Mr Semba sought the following main relief:

'1. Reviewing and setting aside first respondent's Resolution CR 58/02/2020 dated 27 February 2020 that; (a) In line with regulations 16(3) to (4) and (5) of the Windhoek Municipal Police Service Regulations, Council retain the service of Chief AK Kanime, Head: City Police to perform certain tasks pending negotiation as enshrined in the Windhoek Municipality Police Service Regulations, tasks pending negotiation as enshrined in the Windhoek Municipality Police Service Regulations, sub regulation 16(4); and (b) That Management Committee to be delegated to negotiate with Chief AK Kanime the terms, conditions and duration of the new employment contract to perform certain tasks and that Management Committee report back to Council on the outcome of the negotiations with Chief AK Kanime by end of March 2020.'

[15] A settlement was reached on 19 November 2020, between Mr Semba and the Council in respect of the second Semba application. The settlement agreement incorporated the first Semba application, and it was agreed that '*Council shall appoint the tenth respondent and/or another as the Chief of City Police regularly, as per regulation 5(1) of the Regulations for the Municipal Police Services made under the Police Act, 19 of 1990*'. Although Mr Kanime was cited as the tenth respondent, he was not a party to the settlement agreement. The settlement agreement was made an order of court on 19 November 2020. This order finalised the second Semba application.

[16] To complicate matters further, on 16 June 2020 the former CEO, Mr Robert Kahimise, instituted review proceedings on behalf of the first respondent and himself, wherein the applicant was again cited as a respondent.⁵ I will refer to this application as the 'Kahimise application'. Interestingly, the Council of the Municipality of Windhoek was the first applicant in the Kahimise application but also the fifth respondent in the same matter.

[17] Mr Kahimise sought extensive review relief aimed at reviewing and setting aside the Management Committee meeting held on 28 April 2020, in terms of which Mr Titus

⁵ HC-MD-CIV-MOT-REV-2020/00176.

was appointed as Acting CEO and the decisions taken during the said meeting on 28 April 2020. Mr Kahimise further sought an order to review and set aside the resolutions taken by Council on 29 April 2020, including resolution 121/04/2020 taken by Council on the employment contract and conditions of Mr Kanime. The relief by Mr Kahimise sought to include the reviewing and setting aside of resolution 58/02/2020 mandating the Management Committee to negotiate with Mr Kanime the terms and conditions of a new employment contract as well as the contract of employment signed between Mr Kanime and Mr Moses Shiikwa, the Chairperson of the Management Committee on 30 April 2020.

[18] The Kahimise application was withdrawn on 23 April 2021, but the matter remained enrolled on the court roll for another year before it became inactive and was eventually removed from the roll on 9 February 2023 and was regarded as finalised.

[19] Pursuant to the conclusion of the second Semba application in November 2020, the Council took a resolution under number 09/02/2021 on 11 February 2021 wherein the following was resolved:

1. That the Court Order in the matter of Mr Ignatius Semba a former Councillor of the Municipal Council of Windhoek under Case HC-MD-CIV-MOT-REV-2020/000217, be noted.
2. That although cited as a respondent on the matter, Chief AK Kanime be informed of the implications of the said Court Order and effects on his employment contract.
3. That Chief AK Kanime be retained in his current position whilst the recruitment process of the Head: City Police commences as per the Court Order and legal procedure and he is informed of the outcome of the process.
 - 3.1 That the Acting Chief Executive Officer, Mr MG Mayumbelo in consultation, with the Acting Strategic Executive: Human Capital and Corporate Service, Mr AM Nikanor, restart the process of recruitment for the position of Head: City Police in line with regulation 5(1) of the Windhoek Municipal Police Service Regulations.
4. That the Acting Chief Executive Officer notify the Head: City Police on the outcome of this Council resolution.
5. That the resolution be implemented prior to confirmation of the minutes.'

[20] In June 2021, the sixth respondent, the Inspector-General of the Namibian Police, went on social media and posted a notice addressed to the Namibian Police, in terms of which he invited members to apply for the position of Head of City Police. Mr Kanime's legal representative immediately directed a letter to the Inspector-General, demanding the withdrawal of the notice. The Inspector-General conceded and withdrew the notice.

[21] In the interim, despite engagement between the Acting CEO, Mr Mayumbelo, and the applicant's legal practitioner as well as a presentation to the Council regarding the recruitment process for the applicant's position. A similar notice was issued by the Acting CEO inviting members of the City Police to apply for the position of Head of the City Police. The CEO was also quoted in the local media stating that he will proceed with the recruitment process for the position of Head: City Police.

[22] As a result of the continued efforts by the Council to recruit candidates for the position of Head: City Police, the applicant approached the court seeking a number of orders, which included a pre-emptive collateral challenge of the resolution taken in February 2021 to restart the recruitment process for the position held by the applicant, prior to the expiration of the applicant's employment contract.

The relief sought in the main application

[23] The applicant seeks the following relief per the Notice of Motion dated 9 August 2021:

'1. Calling upon the Respondents to show cause why this court should not grant the following orders:

1.1 Reviewing, reversing, correcting (as a pre-emptive collateral challenge) and setting aside the decision taken by the First Respondent Council on or about 11 to 15 February 2021, incorporated in Council Resolution No. 09/02/2021.

1.2 Declaring the underlying decision and Council Resolution 09/02/2021 taken at First Respondent's Council on or about 11 to 15 February 2021 as invalid, unfair, irrational and setting it aside.

1.3 Declaring Regulation 5(1) of the Regulation made by the Sixth Respondent by Government Notice 184 published in Government Gazette 2833 on 16 October 2022 (as amended) as invalid and unconstitutional, and inconsistent with and ultra vires Article 118 and 119 read with section 43(c)(2) of the Police Act 19 of 1990, and setting it aside.

2. Declaring a notice issued by the First Respondent's Acting Chief Executive Officer, Mr George Mayumbelo, on 23 July 2021 calling on members of the City Police to apply for the position currently held by the Applicant as invalid, unfair and irrational, and setting it aside.

3. Restraining and interdicting any of the Respondents from taking and undertaking any process aimed at recruiting and appointing a person into the position of and to replace the Applicant prior to the termination of the Applicant's employment contract on 30 April 2023.

4. Cost of suit at a scale of attorney and own client against the First Respondent and party/party costs against any other Respondent in the event of opposition.

5. Further and/or alternative relief.'

Counter-application

[24] The first to the third respondents (the respondents) opposed the relief sought by the applicant and filed a counter-application in the following terms⁶ (which is sought whether the main application is granted or dismissed):

'1. The applicant is directed to pay back to the first respondent all the amounts paid to him under the contract of employment since its inception on 1 May 2020 (together with interest), which comprises:

1.1 N\$ 115 685 per month, multiplied by thirteen for each of the three years of the contract, representing the applicant's salary (including a thirteenth cheque);

⁶ Amended notice of the respondents' orders in their counter-application dated 23 January 2023.

- 1.2 N\$24 198 per month, representing the applicant's car allowance, for the period of three years;
- 1.3 N\$40 490 per month, representing the applicant's housing allowance.'

[25] The first to the third respondents further indicate that, in the event that the main application is not dismissed, they intend to counter-apply in a conditional counter-application for the following relief (over and above the relief in prayer 1 under para [23] above):

'2. The following decisions taken by the management committee of the Municipality of Windhoek (constituted by Moses Shiikwa, Loide Kaiyamo, Teckla Uuwanga, Immanuel Paulus, Fransina Kahungu and Ian Subasubani) at its meeting on 28 April 2020 are reviewed and set aside:

- 2.1 the February 2020 resolution;
- 2.2 by which Mr Titus was appointed as the acting CEO of the first respondent is reviewed and set aside; and
- 2.2 by which Mr Titus was instructed to issue and sent out a notice for a meeting in the following terms:

“NOTICE is hereby given of a Council meeting of the MUNICIPAL COUNCIL OF WINDHOEK that was supposed to take place on 23 April 2020, at 14:00, unduly and procedurally, and now to be held on Wednesday 29 April 2020, at 14:00 in the Council Chambers, Windhoek.

Signed

ACTING CHIEF EXECUTIVE OFFICER

ENQUIRIES: Snr. Sup. Titus

TELEPHONE: 290 2759

DATED 28TH APRIL 2020”

3. All the resolutions taken by the first respondent (constituted by Moses Shiikwa, Loide Kaiyamo, Emmanuel Paulus, Teckla Uuwanga, Fransina Kahungu, Ian Subasubani, Priska Kahuure, Ananias Niizimba, Hileni Ulumbu and Agatha Ashilelo) on 29 April 2020 are reviewed and set aside, including but not limited to the resolution CR 121/04/2020;
4. The contract of employment signed by the applicant and Moses Shiikwa (for the first respondent) on 30 April 2020 is reviewed and set aside.

5. Those parties that oppose this counter-application shall pay the costs of the counter-application, jointly and severally, the one paying, the other to be absolved, including the costs of one instructing and two instructed counsel; and
6. Further and/or alternative relief.'

Founding papers

[26] In order not to burden the judgment I do not intend to repeat the background of this matter, but the history ties in with the affidavits deposed to by the parties.

[27] In his papers, Mr Kanime took issue with the Semba and Kahimise applications wherein there were attempts to impugn his appointment by attacking the relevant resolutions. The applicant criticised the fact that the Council relied on the settlement agreement reached in the second Semba application in order to restart the recruitment process despite the fact that he was not a party to the settlement reached on 19 November 2020. The applicant is of the view that the settlement agreement and the subsequent court order did not invalidate his employment or the Council Resolution 121/04/2020, which remained valid and extant.

[28] Upon the finalisation of the Semba applications, the Council took resolution 09/02/2021 during February 2021, which in the view of the applicant, was ill-advised as regards the terms of the resolution which the recruitment process for the position that he held, had to be restarted. Mr Kanime submitted that it would appear that the Council understood the court's order in the Semba matter to have set aside resolution 121/04/2020.

[29] Mr Kanime further submitted that there was a perception with the Council that he was occupying his position in terms of resolution 121/04/2020 instead of the fixed-term employment contract which only terminated on 30 April 2023. This wrong perception, according to the applicant, is clear from the resolution taken to 'allow' him to remain in his position whilst the recruitment process for Head: City Police was ongoing.

The Council's decision incorporated under resolution 09/02/2021

[30] The applicant insisted that the Council failed to properly understand the meaning and impact of the court order issued in the Semba application on 19 November 2020. Additionally, he claimed that the Council misinterpreted the order's significance and implications.

[31] It is further submitted that the Council did not give him the opportunity to provide input before the decision was made. As a result, the applicant believes the Council's decision is unfair according to common law and Article 18 of the Constitution.

[32] The applicant further pleaded that the Council's decision suffered lack of rationality both at the procedural and substantive level. He further pleaded that the decision was also unreasonable on the basis that no reasonable decision-maker would have made such a decision in view of the following:

- a) The Council respondents failed to obtain an order or agree to terms to the effect that the applicant's employment contract was invalid in concluding the Semba matter nor did they obtain an order to the effect that it sets aside Council's Resolution 121/02/2020;
- b) Having not sought such an order and having not reached such an agreement, the first respondent, acting reasonably, would not have started a recruitment process in the face of the fact that resolution 121/02/2020 remained valid.
- c) No reasonable decision maker would have made such a decision whilst engaged in litigation directly pertaining to the applicant's employment contract in the application brought by Mr Kahimise.
- d) It, therefore, follows that the first respondent's decision taken per resolution 09/02/2021 is liable to be set aside as invalid, unfair and irrational.

Regulation 5(1) of the Regulations for the Municipal Police Services made under the Police Act 19 of 1990

[33] In respect of his attack on the validity of reg 5(1) of the Regulations for the Municipal Police Services⁷ made under the Police Act 19 of 1990, the applicant stated as follows:

- a) Regulation 5(1) was made by the eighth respondent, who is a member of the executive and he made these regulations whilst acting in that capacity. By doing so, he purportedly added additional powers to the sixth respondent, beyond the powers that he, as the Inspector-General, had under Article 119 of the Constitution and the Police Act.
- b) Article 118 of the Constitution provides that the Namibian Police Force, of which the sixth respondent is the head, will be established by an Act of Parliament. The powers and duties will be prescribed in the Act establishing the Namibian Police Force. The sixth respondent can therefore only make suitable appointments to the Namibian Police Force.
- c) The impugned regulation is not an Act of Parliament, and it follows that reg 5(1) is invalid as the eighth respondent purported to exercise plenary powers reserved for the Legislature in a manner ultra vires Articles 118 and 119 of the Constitution and the Police Act.

[34] The applicant submitted that the respondents were not entitled to proceed with the recruitment and selection process and that his fundamental right to a fair, valid and rational process and decisions, and he would suffer irreparable harm. The applicant concluded that he is entitled to the court's protections through an interdict at common law or through a constitutional remedy under Article 25(3).

The answering papers

⁷ Regulation 5(1) of the Regulations made by Government Notice 184 published in Government Gazette 2833 on 16 October 2002 (as amended).

[35] The answering affidavit on behalf of the first, second and third respondents (the respondents) was deposed to by Mr Benedictus Ngairorue. Mr Ngairorue is the corporate legal advisor of the Council.

[36] The respondents opposed the applicant's relief sought on the following basis:

a) The respondents deny that the appointment of the applicant remained valid and extant and that it was never set aside by a court. In this regard, the respondents relied on the settlement and court order in the Semba applications.

b) The respondents averred that in the second Semba application filed on 8 May 2020, Mr Semba sought to have the appointment of the applicant reviewed and set aside on the basis that the decision taken by the first respondent was ultra vires the Regulations. This application culminated in a settlement agreement between Mr Semba and the first respondent which was made an order of court.

c) The Council's resolution 09/02/2021, which is the subject matter of the application (the impugned resolution), did nothing more than implement the Semba order as there was non-compliance with reg 5(1).

d) By direct implication, the Semba order sets aside the February 2020 (CR 58/02/2020) and April 2020 (CR 121/04/2020) resolutions, which cannot survive as long as the Semba order is operative. Therefore, the entire process that flowed from resolution 58/02/2020 was unlawful and invalid as the Semba order makes it plain that the re-appointment of the applicant after his resignation was irregular. The respondents contended that if the April 2020 resolution in terms of which the applicant was appointed stood unassailed, there would have been no need to include para 5 of the settlement agreement, which directs that '*Council shall appoint the tenth respondent and/or another as the Chief of City Police regularly, as per regulation 5(1)...*' This, in the view of the respondents, is the 'central substantive pillar' of their defence.

e) The respondents submitted that the applicant was the tenth respondent in the second Semba application and he chose not to participate in the matter, therefore the applicant cannot now, through the current application, seek to unsettle the Semba

order, instead of seeking to set the Semba order aside. As a result, the Semba order remains effective and extant.

[37] The respondents deny that reg 5(1) is at odds with the Constitution or that it extends the powers of the Inspector-General to appoint, as the decision to appoint will not be his, as it always remains that of the Council.

[38] It is further submitted that even if reg 5(1) is found to be in breach of the Constitution or the Police Act, there is no need to declare it invalid. If the court finds the constitutional attack to be sound, then that portion providing that the Inspector-General be consulted falls to be read down or severed, and the remaining portion of the regulation remains effective.

The counter-application

[39] The respondent's counter-application consists of two components, i.e.:

- a) If the main application fails, then the respondents seek the repayment of the amounts paid to the applicant under the fixed-term employment contract;
- b) If the main application succeeds, then the respondents seek repayment as well as the declaratory relief in prayer 2 of the counter-application, in which instance, prayer 1 will follow from the relief in prayer 2 *et seq.*

[40] Mr Ngairorue contended that the object of prayer 2 *et seq* is to seek an order to review and set aside the unlawful decisions taken by the Council and its Management Committee, as well as the contract entered into as a result of those decisions. The relief sought in prayers 2 *et seq* of the counter-application is similar terms to the Kahimise application.

[41] Mr Ngairorue stated that, shortly after the Semba order was handed down, the Council was advised that events had overtaken the Kahimise application as the Semba

order meant that the unlawful appointment of Mr Kanime in the period February to April 2020 was undone and therefore the Kahimise application was no longer necessary and therefore the application was withdrawn.

[42] In respect of the appointment of the applicant in 2020, Mr Ngairorue stated that the appointment of Mr Kanime was unlawful for the following reasons:

- a) Pursuant to protracted disciplinary proceedings that started in 2019, Mr Kanime resigned in January 2020. Therefore, Mr Kanime could not have been re-appointed in terms of reg 16(3) – (5) of the 2013 Regulations as the said regulation pertains to retirement and provides that the Council may retain a member in his post beyond the age of 60 years for a further period which may not exceed five years. The regulation does not apply when an employee resigns.
- b) The Council was advised by Mr Kahimise of the procedure that must be followed to fill the position of Head: City Police. However, the Council mandated the Management Committee to negotiate the terms of an employment contract with Mr Kanime. (CR 58/02/2020).
- c) Hereafter, Mr Kahimise also addressed the Management Committee and advised the members of the regulations and procedures in order to fill the position of Chief of City Police, however, his advice was disregarded again, and the Management Committee proceeded to discuss the issue of re-appointment with Mr Kanime.
- d) The meeting of 29 April 2021, during which it was resolved by the Council to approve the terms and conditions of Mr Kanime's fixed-term employment contract, was an irregular and unlawfully convened meeting as it was convened contrary to s 14 of the Local Authorities Act 23 of 1992 and Standing Rules causing the resolution taken to be a nullity.

Replying affidavit

[43] Mr Kanime raised a point in time in his replying affidavit, i.e. lack of authority of Mr Ngairorue to oppose the application and institute a main counter-application as well as his locus standi to do so. In this regard, the applicant refers to a memo issued under the hand of Ms Larandja, who is the Chairperson of the Management Committee wherein Ms Larandja questioned the authority of Mr Ngairorue to depose to an affidavit without the authority of the Council.

[44] Mr Kanime further drew the court's attention to the answering affidavit wherein Mr Ngairorue stated that he had the authority to oppose the main application and to institute a conditional counter-application. The applicant impressed on the court to note that no mention is made by Mr Ngairorue that he had the authority to institute the main (monetary) counter-application. Mr Kanime further stated that he, despite a diligent search could not locate any meeting records and proceedings for both the Council and the Management Committee evidencing any decision to clothe Mr Ngairorue with the authority to oppose the application or institute the counter-application.

[45] The applicant further denied that Mr Ngairorue had insight into the majority of the events he related in the affidavit deposed to.

[46] Mr Kanime also addressed the issue of the disciplinary hearing and submitted that the respondents are not entitled to rely on abandoned disciplinary charges and stated that at all material times he was prepared to face the charges and prove his innocence.

[47] Mr Kanime contended that there is nothing wrong with his employment contract and the benefits it provided for. He further states that he has provided services to the Council in terms of the fixed-term employment contract. As a result, there is no legal basis, as a matter of law, public policy or equity (even assuming that the contract was unlawful), that the Council, who benefitted from his service and work, could be repaid the amount paid to him for services rendered.

Arguments advanced by the parties

On behalf of the applicant

[48] Mr Namandje arguing on behalf of the applicant made the following submissions.

[49] As the respondents had been advised that the fixed-term employment contract that the applicant concluded with the Council was invalid, it was incumbent on the respondents to approach the court within a reasonable time for self-review or at least seek those orders in the Semba or Kahimise applications.

[50] The Semba settlement agreement did not invalidate the employment contract of the applicant, and if it did, it would have been clearly stated, which it was not. This is over and above the fact that the applicant was not a party to the settlement agreement. To add insult to injury, the Council then took resolution no 09/02/2021 as a result of the misconstruing of the settlement agreement reached in the Semba application.

[51] The Council made decisions, which had administrative and labour characteristics, without affording the applicant the opportunity to make representations on the proposed decisions.

[52] Mr Namandje referred the court to *Pamo Trading Enterprise CC and Another v Chairperson of the Tender Board of Namibia and Others*⁸ wherein the Supreme Court highlighted the requirements for public functionaries to make procedurally fair decisions, and in the current instance the Council was not a reasonable decision maker when it made resolution 09/02/2021, for the following reasons:

⁸ *Pamo Trading Enterprise CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) NR 834 (SC).

- a. The Council on its own accord approached the applicant after he resigned and offered him a three-year fixed-term employment contract;
- b. The Council identified specific tasks and projects which the applicant was required to complete within the three-year period; and
- c. The Council was a party to the Semba application where an attack was launched against the applicant's three-year fixed-term employment contract, yet the Council did not insist that the court incorporated an order dealing with the employment agreement of the applicant as invalid and same be set aside.

The declarator sought to declare reg 5(1) invalid and unconstitutional

[53] Mr Namandje submitted that Article 118 of the Constitution prescribes that an Act of Parliament must establish the Police and Article 119 sets out the powers of the Inspector-General read with the powers stipulated in terms of the Police Act. In this regard, the Minister of Safety and Security had no power to extend the powers and duties of the Inspector-General, which he did by clothing the Inspector-General through reg 5(1) with the powers and functions to be involved in the recruitment of the Head of City Police. Mr Namandje was of the view that such action is ultra vires and inconsistent with the provisions of Articles 118 and 119 and s 43(c) of the Police Act as the Minister acting as a member of the Executive (not legislature) made the Inspector-General a joint decision-maker with the Council through reg 5(1).

[54] Mr Namandje further submitted that reg 5(1) is also unlawful in that the Minister has no prescribed guidelines or limits in exercising the discretionary power he sought to exercise when he made reg 5(1), which amounts to an unlawful delegation of plenary law-making powers without statutory guidelines and limits.

Opposition to the main counter-application

[55] Mr Namandje made the following submissions in support of his contention that the main counter-application stands to be dismissed:

- a) The relief sought is extraordinary and of alien character.
- b) Mr Ngairorue filed an unauthorised main counter-application as he stated in the respondents' papers that he was authorised to oppose the application and to bring a conditional counter-application. No mention was made of the main counter-application where payment of money is sought, hence it is unauthorised.
- c) Mr Ngairorue's authority was pertinently called into question by Ms Larandja, the Chairperson of the Management Committee, on 14 July 2022, when she authored a memorandum to the CEO. Ms Larandja filed a confirmatory affidavit dated 2 September 2022, stating that Mr Ngairorue had the authority to bring the counter-application and that it was authorised by both her and the Acting CEO. However, Ms Larandja did not explain the inconsistency with her memorandum dated 14 July 2022.
- d) Mr Namandje indicated that the issue is not that Mr Ngairorue had deposed to the affidavit as a witness, but the applicant avers that Mr Ngairorue could not file an opposition on behalf of the respondents without the relevant authority to do so.

[56] Mr Namandje, despite his views that the main and counter-applications are not properly before the court, chose to make the following submissions on the merits of the main counter-application:

- a) The respondents employed the applicant on a fixed three-year contract in terms of which the applicant rendered the services and in terms of which the respondents were under the peremptory legal obligations under s 11(1) of the Labour Act 11 of 2007 to pay the applicant's remuneration. An order for the applicant to repay the remuneration he worked for would be ultra vires the provisions of Chapter 3 of the Labour Act.
- b) The mandatory order directing the applicant to repay the already paid remuneration in the circumstances of the case cannot be granted by this court. In this regard, Mr Namandje referred to *Nakin v MEC, Department of Education Eastern Cape*⁹

⁹ *Nakin v MEC, Department of Education Eastern Cape* 2008 (6) SA 320 para 50.

wherein the court held that this kind of claim for payment of money does not fit easily, or even at all, into review proceedings.

c) The order seeking monetary repayment of salaries paid for work done is effectively an attempt at an inequitable and skewed restitution, i.e. to pay back money to the Council without being able to reciprocally place the applicant in the position he was in before payment. The fact that the applicant worked for three years is irreversible, therefore restitution will be a legal impossibility as the applicant, on the instructions of the Council, carried out his work as an employee and had to be paid as a matter of law.

The opposition to the conditional counter-claim

[57] Mr Namandje submitted that the respondents filed their conditional counter-claim, which amounts to a self-review, more than two years after the respondents took the decision to offer the applicant a new three-year fixed-term employment contract in April 2020.

[58] Counsel submitted that the application must be dismissed on the combination of preemption, waiver and election on the basis that the counter-claim was filed by Mr Ngairorue, the Council's Chief Legal Advisor. Mr Namandje pointed out that Mr Ngairorue claims to have known from the onset about all the decisions made by the respondents, but provided no explanation to the court as to why he did not take action in April 2020 if he was aware that the employment contract offered to the applicant was unlawful.

[59] In addition thereto the relief sought in the Semba application to invalidate the resolution of February 2020 to offer the applicant a three-year fixed-term employment contract was not incorporated in the settlement agreement, and the applicant was not part of the settlement agreement. Mr Namandje submitted that the further attempt sought to impugn the said resolution also came to naught as the Kahimise application was withdrawn.

[60] It is further Mr Namandje's submission that the respondents took 26 months to institute their self-review and chose to do so a few months before the expiry of the employment contract of the applicant. Mr Namandje submitted that the delay was unreasonable, however, the issue of self-review has become academic at best as at the time of arguing the matter the applicant had three months left before the expiry of the contract.

[61] In conclusion, Mr Namandje highlighted the fact that despite the knowledge of the purported irregularity, the applicant was expected daily to execute his duties in the performance of his employment contract and would continue to do so until the agreement terminates *ex contractu*.

On behalf of the respondents

[62] The main thrust of the respondents' argument is that the Semba order disposes of this matter and the decision of the Council was taken to give effect to the court order. The respondents' point of departure is that the meetings and decisions (relating to the appointment of the applicant) were palpably unlawful for lack of compliance with the various rules and statutory provisions which will be discussed during the course of the judgment.

[63] Mr Kauta argued that the case before the court is a simple one which deals with two main issues to be determined by this court, i.e. a) the court must determine the construction of the Semba court order and b) the fact that Kanime must repay all the salary moneys he received dating back from 1 May 2020 to date.

The Semba order

[64] Mr Kauta submitted that stripped to the bone, the order directed that the Council must appoint the tenth respondent (Mr Kanime) or any other candidate regularly in terms of reg 5(1).

[65] This order deals with both Council resolutions relating to the appointment of Mr Kanime, i.e. the February 2020 resolution wherein the Council authorised the Management Committee to approach and negotiate a contract with Mr Kanime and the April 2020 resolution where the Council approved the appointment of Mr Kanime.

[66] Council submitted that it is important to consider who the respondents were in the Semba application and that the court should note that the applicant was the tenth respondent in that application. Mr Kauta further submitted that the context of the Semba applications is that there were two applications. The first one with Part A and Part B was brought on 17 April 2020. In part A, the applicant sought to interdict the implementation of the February 2020 resolution pending part B. In part B, he sought to review and set aside that resolution and all the relief that was based on it or that stems from it. At that time the applicant was not appointed as yet. This first application was struck for lack of urgency.

[67] The Council meeting went ahead well knowing that the resolution to appoint Mr Kanime was being challenged and appointed Mr Kanime. A second application was brought on 8 May 2020, which resulted in a settlement agreement. Mr Kauta argued that this order was wide enough to encompass the resolutions taken in February 2020 and April 2020, and therefore there is reference to the tenth respondent (Mr Kanime). The applicant was a party to this court order, and he had various remedies in respect of this order, yet Mr Kanime did not apply for the rescission of the order, nor did he attack it on the grounds raised in the current application, i.e. that he was not a party to the settlement agreement, that he was not consulted and that it was irrational. However, Mr Kanime failed to exercise any of the remedies available to him, so argued counsel.

[68] Mr Kauta contended that grammatically, the order is clear and that the word 'regularly' in para 5 of the settlement agreement, which was reduced to a court order, and viewed in the context of the facts, incorporated the unlawfulness of the February 2020 resolution and all that was set in motion by that resolution. The Semba order

remedied the unlawfulness even though the said order did not expressly declare the February 2020 resolution as reviewed and set aside, but according to Counsel that was the object of the order and therefore, properly construed the effect of the order.

[69] Mr Kauta argued that the applicant attacking the resolution of the Council giving effect to the Semba order amounted to a collateral attack, which is not permissible. As the applicant's primary objective is to review and set aside the decision of the Council enforcing the court order, and when he had the opportunity to challenge the Semba order he did not. In this regard, Mr Kauta referred the court to *Black Range Mining (Pty) Ltd v Minister of Mines and Energy NO*¹⁰ wherein the court summarised the principles of collateral challenges. The court held that a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of the act or decision.

[70] On the issue of authority, Mr Kauta submitted that this point is without merit as the legal position is that what must be authorised is the institution of proceedings and not who deposed to the affidavit. In this instance, Mr Ngairorue stated clearly that he was authorised to institute the counter-application.

Mr Kanime's appointment and the challenge in respect of regulation 5(1)

[71] Counsel further argued that the applicant was appointed contra reg 5(1) and the applicant cannot dispute this fact. Further to this, Mr Kauta argued that reg 5(1) provides that a municipal council must, in consultation with the Inspector-General and upon recommendation of the CEO, appoint a fit and proper person as the City Police Chief. Mr Kauta submitted that the CEO was circumvented during the appointment process as the Chairperson of the Management Committee at the time called a meeting for 28 April 2020, during which meeting an acting CEO, Snr Sup Titus, was appointed. A meeting was hereafter scheduled by the acting CEO for 29 April 2020. Mr Kauta argued that the calling of the meeting and the appointment of the acting CEO was irregular and

¹⁰ *Black Range Mining (Pty) Ltd v Minister of Mines and Energy NO* 2014 JDR 0566 (NmS).

he argued further that such an unlawfully called meeting cannot produce lawful results, which in this instance was inter alia the approval of the appointment of the applicant.

[72] Mr Kauta submitted that there is no basis for the attack on reg 5(1) if the court has regard to the legal framework under the Police Act, wherein Inspector-General has powers in relation to the appointment of members of the Namibian Police Force. Accordingly, no plenary powers is exercised when the Minister extends a power, as he is entitled to do, that exists in the Police Act so that it applies to a municipal police service.

[73] It is further Mr Kauta's submission that, all that reg 5(1) does is to require that the Inspector-General be consulted. His powers of appointment is not extended.

Repayment by Mr Kanime

[74] In the responsive heads of argument the respondents makes out the case that Mr Kanime must repay the money (salary and benefits) that were paid to him under a void contract. Mr Kauta submitted that the respondents' claim that Mr Kanime must repay the money paid to him is based on *condictio indebiti*. Mr Kauta submitted that the respondents bear the onus to demonstrate that, a) Mr Kanime was enriched (he received remuneration), b) the Council was impoverished (it paid remuneration), c) Mr Kanime's enrichment was at the Council's expense, and d) the enrichment was unjustified as there was no valid contract under which the Council was obliged to pay and under which Mr Kanime was entitled to receive remuneration.

[75] Counsel further submitted that the defence by Mr Kanime that he provided services to the Council under the (non-existing) contract and conferred a benefit on the Council and thus should retain the remuneration he received is not a defence to the Council's enrichment claim. Mr Kauta referred the court to *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*¹¹ where Rogers AJA emphasised that the

¹¹*Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* 2018 (1) SA 513 (SCA).

requirement of impoverishment in the *condictio indebiti* is concerned with whether the plaintiff suffered loss in the act of making payment or performance giving rise to the *condictio*. Whether a party received anything it was not entitled to, as there is no contract, is not a contract but the subject-matter of a counterclaim.

[76] Accordingly, Mr Kanime should have brought a counter-claim to recover the value of the services he allegedly rendered, and in that instance, the onus would be on him to prove that he provided the services (impoverished) to the benefit of the Council (enrichment) in circumstances where those services were not contractually owed.

[77] In sum, Mr Kauta submitted that the respondents made out a case for Mr Kanime to pay back the money and prayed that the applicant's application be dismissed with costs.

Discussion

General principles relating to the review of administrative action or decision

[78] The grounds for reviewing the acts of administrative bodies and officials are those set out in Article 18 of the Namibian Constitution. These principles are founded upon common law and the Constitution of Namibia, respectively.

[79] Article 18 of the Namibian Constitution provides as follows:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[80] In *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*¹² O' Reagan AJA stated at para 31:

'[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

Onus

[81] In *Kamuhanga v The Master of the High Court of Namibia*¹³ Parker AJ stated:

'[7] The grounds for the review of the acts of administrative bodies and officials are those set out in Article 18 of the Namibian Constitution. I should say those grounds encompass the common law grounds of review; for, as Levy J stated in *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265E-F, Article 18 embraces the common law. It must also be signalled that 'there is no onus on the respondent whose conduct is the subject-matter of review to justify his or her conduct. On the contrary, the onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of. (*Gideon Jacobus du Preez v Minister of Finance* Case No. A 74/2009 (Unreported) para 5).'

¹² *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at 736.

¹³ *Kamuhanga v The Master of the High Court of Namibia* (A 381/2010) [2013] NAHCMD 144 (30 May 2013).

The main application

[82] From the onset, it is necessary to make it clear that to a large extent, the applicant's application became academic due to the expiry of time and the overtaking of events.

[83] The purpose of the applicant's application was to stop the respondents from recruiting candidates for the position that he as Chief of the City Police, held by virtue of the three-year fixed-term employment contract. This contract terminated on 30 April 2023 *ex contractu*. The relief sought by the applicant however remained relevant in the face of the counter-application of the respondents wherein they claim the repayment of all the applicant's earnings for the entire period of his contract with the Council.

[84] The main question for determination is what was the effect and the impact of the Semba order of 19 November 2020.

[85] From my discussion on the background of the matter, it is clear that three different applications served before court, but the only application that yielded results was the second Semba application, wherein the court made the settlement agreement reached between the applicant (Mr Semba) and the first respondent (the Council) an order of court. The court did not consider the merits of the matter as it was not required.

[86] The respondents contended that Council Resolution 58/02/2020 was taken on the wrong premises, i.e. that the applicant be retained in his position in terms of reg 16(3) to (5) of the Regulations, and everything that flowed from that resolution and the subsequent resolution confirming the appointment of Mr Kanime and the employment contract was unlawful. As a result, the respondents placed their reliance on para 5 of the settlement agreement (which was effectively incorporated into the court order) for the subsequent resolution made by the Council to restart the recruitment process for the position of Chief: City Police.

[87] Paragraph 5 of the settlement agreement provided that the '*Council shall appoint the tenth respondent and/or another as the Chief of City Police regularly, as per regulation 5(1) of the Regulations for the Municipal Police Services made under the Police Act, 19 of 1990*'.

[88] The respondents invited this court to interpret the word 'regularly' and referred the court to *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*,¹⁴ wherein the court held that:

'In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

[89] I was further referred to the locus classicus in our jurisdiction on the interpretation of documents, wherein our Supreme Court in *Total Namibia v OBM Engineering and Petroleum Distributors*¹⁵ held that:

'Interpretation is the process of attributing meaning to the words used in a document... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstance attendant upon its coming into existence.'

[90] The respondents emphasized the importance of taking into account the entirety of the Semba application and the context that resulted in the Semba order when interpreting the court order. Moreover, as per the court's acceptance of the settlement agreement between the parties, the paragraphs of the settlement agreement were incorporated as terms of the court order.

¹⁴ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) para 13.

¹⁵ *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) para 18.

[91] According to the respondents, when viewed in context, it is evident that paragraph 5 of the court order declared the February 2020 resolution and its subsequent actions as unlawful. As a result, the Semba order corrected the unlawfulness by instructing the Council to comply with reg 5(1). The respondents argued that the Semba order would be meaningless if it did not overturn the February and April 2020 resolutions.

[92] In this context, the respondents submitted that the meaning of para 5 of the settlement agreement became clear and that means that the unlawfulness of the February 2020 resolution and all that it set in motion was remedied by the Semba order.

[93] First and foremost, this court must determine whether the Semba order invalidated resolution 09/02/2020 and the employment contract concluded between the first respondent and the applicant.

[94] If one considers the history of the matter, it is clear that the Council had three opportunities to specifically seek the orders invalidating or setting aside the applicant's employment contract. The first Semba application went no further than the urgent application, which was struck due to the lack of urgency. In the second Semba application, the main relief sought was the reviewing and setting aside of the resolution 58/02/2020, more specifically that a) in line with reg 16(3) to (5) of the Regulations, to retain the services of Mr Kanime as Head: City Police to perform tasks pending negotiations as enshrined in the Windhoek Municipality Police Service Regulations, and b) that the Management Committee be delegated to negotiate with Mr Kanime the terms, conditions and duration of the new employment contract to perform certain tasks and that the Management Committee report back to Council on the outcome of the negotiations with Mr Kanime by end of March 2020.

[95] It is noticeable that there is no reference made in the second Semba application regarding resolution 121/04/2020, which approved the appointment of Mr Kanime, nor is there any reference to the fixed-term employment agreement entered into with Mr

Kanime. This is despite the fact that the second Semba application was instituted more than a month after the appointment of Mr Kanime in terms of the new fixed-term employment agreement.

[96] It was only in the Kahimise application that there was an attempt to review and set aside the April 2020 resolution (CR121/04/2020), which incorporated (CR 58/02/2020) and the employment contract. Again, this application was not pursued with to the end. This matter was withdrawn by the Council in April 2021.

[97] A settlement was reached in the second Semba application, to the exclusion of Mr Kanime, which provided that Mr Kanime or any other candidate shall be appointed regularly. Regularly is the operative word in para 5 of the settlement agreement. It is clear from the reading of the court order that in making the agreement an order of court, the court did not enter into the merits of the litigation.

[98] Generally, a settlement agreement and the resultant settlement order eliminates the underlying dispute. Once the matter has become settled and the settlement agreement and the terms thereof is made an order of court, this development in the lis between the parties supersedes the action and creates new obligations between the parties. In the words of the South African Constitutional Court *in Eke v Parsons*:¹⁶

‘The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes *res judicata* (literally, “a matter judged”). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*’.

¹⁶ *Eke v Parsons* 2016 (3) SA 37 (CC) para [31].

[99] In my view, neither the settlement agreement nor the subsequent court order purports to dispose of the review relief sought. The court did not, in any of the applications serving before it, set aside the resolutions sought to be impugned. The court order directing the Council to appoint Mr Kanime, the tenth respondent in that matter, and/or another, regularly, cannot be read as acting retrospectively. None of the resolutions relating to recruiting and the appointment of the applicant were set aside by this court. In addition, thereto it appears that the respondents laboured under the impression that Mr Kanime was appointed by virtue of resolution 121/04/2020 incorporating resolution 58/02/2020. That, in my opinion, is a misdirection. Mr Kanime was appointed by virtue of a fixed-term employment contract entered into between the Council and Mr Kanime. That employment contract was never set aside by this court either.

[100] As indicated earlier, Mr Kanime was not a party to the settlement agreement between Mr Semba and the Council. He was never consulted on the terms and conditions and had no role in shaping the agreement or legally consented thereto. If there was a judgment on the merits in this matter, Mr Kanime would have been bound to it, but the court only recorded a private agreement between two parties which was made an order of court by agreement. Mr Kanime did not sign that agreement and he did not agree to be bound by those terms. I am in agreement with Mr Namandje that the employment contract of the applicant was not invalidated by the Semba settlement agreement and the subsequent court order.

[101] To interpret the word 'regularly' as meaning that it sets aside not only CR 58/02/2020, and CR 121/04/2020, but also the employment contract of the applicant is in my view without any merits and far-fetched. The respondents argued that the decision and the resolutions taken by the respondents were irregular or unlawful for a multitude of reasons and therefore all the actions flowing from these resolutions were invalid and without any force. However, until such time that these resolutions and thus also the consequences of the resolutions 'are set aside' by a court in proceedings for judicial review, it exists in fact, and it has legal consequences that cannot simply be

overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.¹⁷

[102] The Council misconstrued the settlement agreement and passed the resolution 09/02/2021 wherein it 'restarted' the recruitment process for the position held by Mr Kanime. The decision by the Council to follow this course of action was clearly unreasonable, unfair and premature as the employment contract of the applicant remained valid and extant. Resolution 09/02/2021 taken by the Council stands to be set aside, however, this relief has become moot. The same applies to the relief set out in para 2 and 3 of the Notice of Motion.

Regulation 5(1) of the Regulations

[103] The applicant sought to impugn this regulation on the basis that the Minister purported to exercise plenary powers reserved for the Legislature when the Minister added additional power to the Inspector General, beyond the powers that the Inspector-General had under Article 119 of the Constitution and the Police Act.

[104] I do not intend to discuss the legal framework that empowers the appointment of the Chief: City Police, but must point out that in terms of the Police Act, the Inspector-General is responsible for appointments to the Namibian Police Force. Under s 43(c) of the Police Act, the Minister is authorised to extend any provisions of the Police Act to apply to the municipal police service.

¹⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at 241G-242B para 26.

[105] The Inspector-General has powers in terms of the Police Act to appoint members of the Namibian Police Force, however, reg 5(1) of the Regulations does not extend powers to appoint the Chief: City Police to the Inspector-General. Regulation 5(1) reads:

'A municipal council must, in consultation with the Inspector-General and upon recommendation of the Chief Executive Officer appoint a fit and proper person as City Police Chief to Head of the Services of its municipality.' (my emphasis)

[106] I agree with Mr Kauta that the attack on the validity of reg 5(1) is without merit.

The counter-application

[107] The applicant raised a number of issues with the counter-application and conditional counter-application. The main issue raised is the issue of authority. The applicant took the point that Mr Ngairorue did not have the authority to oppose the main application and had no authority to institute the counter-applications.

[108] Mr Ngairorue deposed to the answering affidavit on behalf of the respondents and in para 2 of the affidavit, he stated that 'I am authorized by the first, second and third respondents to oppose this application on their behalf, as well as to bring the conditional counter-application that I address below and in respect of this I enclose a notice of the counter-application.' Mr Ngairorue in reply to the point raised by Mr Kanime, submitted that there is no basis for the assertion that he was not duly authorised by the respondents. He further stated that he is 'merely a factual witness who has been requested by the municipal respondents to provide facts that support their opposition to the application and bring the counter-application. The opposition to the application and the bringing of the counter-application has been authorised by those endowed with those powers'.

[109] This statement made by Mr Ngairorue is an interesting one, especially in light of the memorandum directed by Ms Larandja, the Chairperson of the Management

Committee, to the Acting CEO on 14 July 2022 wherein she implored the Acting CEO to withdraw the defence to the application of the applicant. Ms Larandja stated in no uncertain terms that Mr Ngairorue deposed to an affidavit without the authority of the Council. She further states that the affidavit contained certain factual inaccuracies that amount to perjury. Ms Larandja felt so strongly about the conduct of Mr Ngairorue that she proposed that remedial steps be taken against him as a result of this conduct.

[110] This memo by Ms Larandja is the elephant in the room that the respondents skirt around without explaining, neither in the replying affidavit by Mr Ngairorue nor the confirmatory affidavit of Ms Larandja on the issue of authority. During oral argument, Mr Kauta also did not address the memorandum at all. Instead, Mr Kauta argued that there is no merit in the authority point raised by Mr Kanime and that the court cannot second guess the affidavits of public officials. The memorandum is however undisputed, and the court would have reasonably expected Ms Larandja to explain her 180-degree about-turn from the pencilling of the memorandum on 14 July 2022, to the confirmatory affidavit deposed to on 2 September 2022. In his replying affidavit Mr Ngairorue in response stated that Ms Larandja will pertinently address what is set out in Mr Kanime's answering affidavit. This is however glaringly absent from Ms Larandja's confirmatory affidavit.

[111] This raises a definite question as to the authority of Mr Ngairorue to institute the counter-application against the applicant. The respondents attempted to resolve this challenge by the applicant by filing a confirmatory affidavit of Ms Larandja. The issue of Mr Ngairorue's authority is unfortunately not laid to rest with the questionable confirmatory affidavit of Ms Larandja.

[112] Ms Larandja states in the confirmatory affidavit that she 'confirms that both the opposition and the bringing of the counter-application in this matter is properly authorised by her and the acting CEO'. She did not differentiate between the counter-application and the conditional counter-application despite the direct challenge raised by Mr Kanime regarding the authority to institute the main counter-application. Nowhere in

the respondents' papers is the averment made that Mr Ngairorue had the authority to institute the main counter-application. Mr Ngairorue only referred to having authority to institute the conditional counter-claim.

[113] I also find it surprising that no resolutions exist which were passed by the respondents authorising the counter-application and conditional counter-application. The best evidence that proceedings have been authorised by a corporate entity is customarily the production of a resolution of the board (or the council in the current instance), introduced by an official of the said entity. It is usual and desirable for such a resolution, if it exists, to be annexed and proven by the founding affidavit in motion proceedings.

[114] In each case, the court must decide whether sufficient evidence has been placed before it to warrant the conclusion that it is indeed the applicant that is litigating and not some unauthorised person purporting to act on its behalf.¹⁸

[115] During the argument for the respondents, it was stated that a person making an affidavit for motion proceedings does not need to be authorized by the party involved. However, the applicant's concern is not about the authorization of the deponent to the affidavit, but rather the fact that the institution of the proceedings and the prosecution thereof must be authorised. As long as the proceedings are authorized by a party, there is no need for additional authorisation of a witness.

[116] Having considered all the papers before me, I am not convinced that Mr Ngairorue was clothed with the relevant authority to institute the main counter-application and it stands to be dismissed.

[117] However, before I conclude the discussion on the main counter-application, I must make the following remarks.

¹⁸ *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 354 A-B.

Confirmatory affidavit by the CEO

[118] As discussed above, Mr Ngairorue deposed to the affidavit on behalf of the respondents. The applicant denied that Mr Ngairorue was privy to the majority of the events and facts set out in the affidavit. Mr Ngairorue denied this assertion stating that he was privy to most of the events set out in his affidavit and attached the confirmatory affidavits of Messrs Robert Kahimise and O'Brien Hekandjo, being the erstwhile CEO and Acting CEO.

[119] Mr Kahimise, as the CEO at the time of the appointment of the applicant, was not only the one who made the recommendations to the Council and the Management Committee, but was also the second applicant in the Kahimise application. Despite these facts, the respondents chose to file a bare basic confirmatory affidavit by Mr Kahimise.

[120] In *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another*,¹⁹ the court stated the following on the use of these types of confirmatory affidavits:

'[T]he Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.' (my emphasises)

[121] In *Eskom Holdings SOC Ltd v Masinda*²⁰ the South African Supreme Court criticised the practice of witnesses adducing hearsay evidence by way of hearsay

¹⁹ *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) para [31].

²⁰ *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) para 3 at 388 – 389.

allegations in its main answering affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what had been said in the main affidavit 'insofar as reference [has been] made to me', as a slovenly practice.

[122] The so-called confirmatory affidavits filed by the respondents are exactly what the South African Supreme Court refers to. No further evidence is contained in the confirmatory affidavits and to simply make common cause with the averments in the answering affidavit. In my view, the confirmatory affidavit of Mr Kahimise is generic and meaningless.

Unreasonable delay and general remarks

[123] Mr Kanime raised the issue of the unreasonable delay in instituting the self-review, which was only done in June 2022, when the conditional counter-claim was filed by the respondents.

[124] I am perplexed by the fact that Mr Ngairorue professes to have known of the majority of the events relating to the appointment of Mr Kanime, yet as the Legal Advisor of the respondents he failed to properly advise the respondents and take immediate steps to have the resolutions and appointments set aside by a court of law.

[125] On the contrary, it took the respondents 26 months after the appointment of Mr Kanime to institute a self-review. The self-review or conditional counter-application followed 10 months after the institution of the application by the applicant, which in my view appears to be reactionary at best.

[126] Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*²¹ discussed the principles in respect of unreasonable delay as follows:

²¹ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC).

[41] In *Ebson Keya v Chief of Defence Forces and Three Others*²² the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by the courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

- (i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty. The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.
- (ii) If the delay was unreasonable, the court has discretion to condone it.
- (iii) There must be some evidential basis for the exercise of the discretion: The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.
- (iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.
- (v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.
- (vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.

[42] Writing for a two-judge bench of this court in *Disposable Medical Products (Pty) Ltd v The Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132D Strydom JP (as he then was) said:

²² *Ebson Keya v Chief of Defence Forces and Three Others* Case No A 29/2007 (NmHC) unreported judgment delivered on 20 February 2009 at 9 – 11 paras 16 – 19.

“In deciding whether a delay was unreasonable two main principles apply. Firstly whether the delay caused prejudice to the other parties and secondly, the principle applies that there must be finality to proceedings. Although the Court has discretion to condone such delay it is seldom if ever, prepared to do so where the delay caused prejudice.”

[43] I wish to repeat the following remarks in the *Keya* case at 10 – 11, para 19:

“In my experience, every review and setting aside of an administrative decision causes prejudice of one or other kind to a respondent in a review application. Proof of prejudice, without more, should not take the matter very far. Otherwise a Court would not grant review. What is needed is proof of prejudice which could have been averted if notice were had of an impending review. The more substantial such prejudice, the more it strengthens the conclusion that the delay in bringing a review application was unreasonable. In exercising the discretion whether or not to condone unreasonable delay, the Court may have regard to the conduct of a respondent insofar as it may have contributed to the delay.”

[44] To the above, I wish to add the following: the length of time that had passed between the cause of action arising and the launching of the review is not a decisive factor although no doubt important. The crucial consideration is the extent to which passage of time — in view of the nature of relief and the subject to which it relates — either weakens or has no or little bearing on the efficacy of the relief sought. The less efficacious the relief sought or the more serious the prejudice it causes on account of the delay, the stronger the inference that the delay was unreasonable.’ (my underlining)

[127] Mr Kanime was appointed on a 36-month fixed-term employment contract, which commenced on 1 April 2020. The respondents filed their self-review in June 2022. This is 10 months before the contract terminated *ex contractu*.

[128] Mr Kanime and the Council were in an employer-employee relationship for many years until he resigned. Despite all sorts of allegations made by the respondents regarding disciplinary proceedings that were instituted against Mr Kanime in 2019, the Council resolved in February 2020 that the Management Committee should approach and engage Mr Kanime to stay on as an employee. Mr Kanime was offered an

employment contract with clear directives as to which projects he should complete within the fixed-term period of employment.

[129] Mr Kanime did not even take up office when litigation started, and he had been central stage for the duration of the three years that he held the position as Chief of the City Police. Mr Kanime's contract terminated at the end of April 2023. Logic dictates that the applicant was severely prejudiced in how the respondents dealt with this matter and the delay in bringing their self-review. It went to the extent that Mr Kanime had to approach this court in order to retain his position with the respondents. On the one hand, it was expected of Mr Kanime to do his job, so much so that he could not even attend the proceedings of 27 January 2023, as he was on duty. Yet on the other hand, the respondents, continuously litigated in an attempt to remove Mr Kanime from his position and to place the proverbial cherry on the cake, reclaim the salary he earned for the duration of his employment period. This is indeed a sorry state of affairs.

[130] Having considered the facts against the backdrop of the history of this matter, I am of the view that the delay in instituting the self-review is unreasonable. However, as with many of the relief claimed in the main application, the self-review set out in the conditional counter-application also became moot.

Costs

[131] The remaining issue to consider is cost, but in my view, there is no reason why cost should not follow the result.

[132] My order is as follows:

Ad main application

5. The applicant's relief sought in paras 1, 2 and 3 as per the Notice of Motion dated 9 August 2021 is granted. The relief granted is with the exclusion of paragraph 1.3, which is dismissed.

Ad counter-application and conditional counter-application

6. The first, second and third respondents' counter- and conditional counter-applications are dismissed.

Ad both applications

7. The first, second and third respondents are to pay the costs of the applicant, such costs to include the costs of two legal practitioners.
8. The matter is finalised and removed from the roll.

JS Prinsloo
Judge

Appearances:

Applicant:

S Namandje
of Sisa Namandje & Co Inc.
Windhoek

First to Third Respondents:

P Kauta
of Dr Weder Kauta Hoveka Inc.
Windhoek