IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No.: 1347/2019

Date heard: 30 May 2019

Date delivered: 17 June 2019

In the matter between:

GRAY MOODLIAR INC. **Applicant**

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY **First Respondent**

SPEAKER OF THE COUNCIL, NELSON MANDELA BAY METROPOLITAN MUNICIPALITY **Second Respondent**

JUDGMENT

BEARD AJ

[1] The applicant is a law firm which, together with its predecessor (the unincorporated version of the applicant firm), has represented the first respondent's interests in what is described as *"a wide variety of litigious and non-litigious matters, covering most areas of local government"* over the past two decades. Most recently, these services were provided in terms of a service level agreement ("the SLA") concluded between the

first respondent ("the municipality") and the applicant on 11 September 2018. The SLA has as a commencement date 18 June 2018, as this is the date upon which the applicant was listed as an accredited service provider on the municipality's panel, and is to endure for a period of 36 months, terminating on 18 June 2021, unless terminated earlier in terms of the provisions of the SLA. Notwithstanding that the SLA still has some time to run, on 17 April 2019, the applicant received correspondence dated 16 April 2019 from the acting municipal manager in which is stated:

> *"The Council of the Municipality resolved at its meeting on 4 April 2019 to terminate all your existing mandates and this letter serves as notification of that resolution."*

Thus ostensibly ended a relationship spanning two decades.

[2] The receipt of this correspondence prompted this application, launched as urgent, and in which the applicant seeks an order reviewing and setting aside *"the decisions of the first respondent Council taken on 28 February and / or 4 and / or 9 April 2019, in which the Council resolved to withdraw all current cases of the applicant in which the applicant was instructed."* The municipality has opposed the application and, in so doing, has raised two points *in limine* and has brought a striking application, all of which require resolution prior to any consideration of the merits of the application. The points *in limine* are that the application is not urgent and that the applicant was bound, in terms of the SLA, to have submitted to alternative dispute resolution processes, in the form of mediation and

arbitration, before approaching the court. It is convenient, however, to set out certain of the relevant background facts to the application before embarking upon a consideration of the points *in limine* and the striking application.

BACKGROUND FACTS

[3] The pertinent events begin on 14 March 2019, when the applicant was informed by the acting municipal manager at the time, Mr Pieter Nielson ("the municipal manager"[1]), that the municipal council had, at the council meeting held on 28 February 2019, resolved that all matters dealt with by the applicant be withdrawn by the municipality. However, the municipal manager assured the applicant that, contrary to the council resolution, it would continue to represent the municipality, save in those matters that he might withdraw.

[4] On 15 April 2019 and in furtherance of the assurance given by the municipal manager on 14 April 2019, the municipal manager, the directors of the applicant, a senior associate employed by the applicant and an advocate met to discuss a matter pending before the High Court. At this meeting, the council resolution of 28 February 2019 was discussed. The municipal manager commended the applicant on the manner in which it had handled the municipality's litigation thus far and indicated that he

[1] It appears from the papers that the position of municipal manager is referred to within the municipality as the city manager. However, as both the Local Government; Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 both refer to a municipal manager, that is how I will refer to the position.

would, notwithstanding the council's resolution, advise the executive mayor that he would not be withdrawing all the matters in which the municipality had instructed the applicant, as certain of these were at an advanced stage and to withdraw the instruction would result in fruitless and wasteful expenditure. The municipal manager indicated that he would only recommend that litigation be halted where the municipality patently enjoyed no prospects of success and once again instructed the applicant to continue to represent the municipality in all matters in which it had been instructed to do so. During the course of this discussion, the municipal manager provided certain further details concerning the manner in which the resolution was introduced in the council meeting and undertook to provide the applicant with an audio recording of those portions of the council meeting relevant to the resolution. This audio recording was made available to the applicant on 28 March 2019.

[5] Thereafter, both parties continued to act in accordance with the assurance given by the municipal manager. The applicant continued to represent the municipality in matters in which it was instructed, and the municipal manager continued, on behalf of the municipality, to attest to affidavits in matters when required to do so. In addition, the municipality gave the applicant instructions in a fresh matter. This position endured for approximately a month, during which period the municipal manager, when delivering the audio recording of the council meeting of 28 February 2019, repeated his instruction that the applicant continue to represent the municipality in matters in which it had been instructed, for the third time.

[6] All of this abruptly changed, however, when the applicant received the municipal manager's correspondence, enforcing the council resolution, on 17 April 2019. This correspondence, as I have set out above, records that the resolution in question was taken on 4 April 2019. The applicant had learned that the council had had two further meetings, on 4 April 2019 and 9 April 2019, at which the resolution adopted at the meeting on 28 February 2019 was discussed. As a result the applicant requested, by correspondence dated 18 April 2019, *inter alia* reasons for the council's resolution, as well a copy of the audio recordings for all three aforementioned council meetings. This correspondence failed to elicit a response from the municipality. Accordingly, by correspondence dated 25 April 2019, the applicant repeated its requests. Similarly, this correspondence was met with silence.

[7] Between these two requests and on 24 April 2019, the municipality's chief operating officer wrote to the applicant requesting that it hand over the files in its possession by 26 April 2019. Self-evidently, this was not a response to the applicant's request for reasons or the audio recordings of the council meetings. However, it appears that all of this culminated in a meeting between the directors of the applicant and the municipal manager, held on 27 April 2019. At this meeting, the municipal manager indicated that the applicant should not hand over the requested files until such time as a further meeting, between the applicant's directors, the municipal manager and the municipality's director of legal services had been held. Finally, on 29 April 2019 the applicant received the audio recording of the council meeting held on 9 April 2019 (the council meeting

of 4 April 2019 having been adjourned to that date). Both this audio recording, as well as that of the council meeting of 28 February 2019, were then transcribed on 3 May 2019, owing to an intervening public holiday.

[8] The transcripts of the two council meetings reveal that the motion was introduced at the meeting of 28 February 2019 by the executive mayor of the municipality. The minutes of the council meeting of 28 February 2019 indicate that the resolution adopted was:

> *"That all cases being considered by [the applicant] be withdrawn from [the applicant] and that such cases be considered by the Legal Division in order to determine the way forward on (sic) each case."*

[9] At the council meeting of 9 April 2019, this resolution was amended to read:

> *"That all current cases, be it disciplinary and / or any other cases, and be it on 90% or 99% completion, must be withdrawn from [the applicant] with immediate effect."*

It was this resolution that led to the withdrawal of the applicant's mandates.

URGENCY

[10] The applicant bases its assertion that the application is urgent upon three grounds. They are:

10.1. The applicant was only aware, when the final council meeting of 9 April 2019 had been transcribed, of precisely what it was that the

council had resolved, as it was at this meeting that the resolution taken at the council meeting held on 28 February 2019 was amended. As a result, the applicant could not have launched the application earlier than it did.

10.2. The council's resolution, once implemented, is likely to result in fruitless and wasteful expenditure, as defined in the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA"), which is itself unlawful.

10.3. The applicant itself is suffering and will continue to suffer prejudice as a result of the implementation of the council's resolution, as it is, in terms of the SLA, precluded from acting against the municipality and thus from practising in the area of municipal law within the geographical area of Port Elizabeth.

[11] In response to these grounds of urgency, the municipality objects, averring that the application is not urgent. In support thereof, it asserts that the urgency is self-created; there is no evidence that the resolution will result in fruitless and wasteful expenditure; the prejudice to the applicant's business is not relevant to the question of urgency; and the applicant has advanced no reason why it could not be afforded substantial redress at a hearing in due course.

[12] I shall deal with each of these grounds of objection in turn. As to the first

ground, namely that the urgency was self-created, the municipality argues that the applicant was aware of the council resolution to withdraw its mandates on 14 March 2019, having been so informed by the municipal manager. Therefore, so the argument goes, the applicant ought to have launched the present application shortly thereafter and the applicant's delay in doing so and only launching the application on 6 May 2019 has resulted in the urgency being of the applicant's own making. In my view, there is no merit in this assertion.

[13] Whilst it is correct that the applicant was appraised of the existence of the council resolution on 14 March 2019, not only had this resolution not yet been implemented, but the municipal manager assured the applicant that, the resolution notwithstanding, its mandates would not be withdrawn and that it could continue to act for the municipality in the matters in which it had been instructed. The municipal manager also assured the applicant that he would prepare a recommendation to the Executive Mayor recording that he had no intention of withdrawing all matters from the applicant, as some matters were at an advanced stage, the applicant having handled them for some years. Had the applicant launched an urgent application in the face of these assurances, one can easily imagine the response from the municipality. They would have questioned the need for urgent proceedings on the basis that the resolution had not been implemented and that, should the municipal manager's recommendation that the entirety of the applicant's mandates not be withdrawn be accepted, the issue would become moot.

[14] The municipality asserts further, however, that the applicant ought not to have placed any reliance upon the assurances of the municipal manager as it ought to have realized, being a firm specializing in municipal law, that the municipal manager's assurances had no legal effect in the face of the council resolution. Assuming, for the purpose of determining the challenge to urgency, this assertion is correct, this would be to ignore what, as a matter of fact, happened after the first assurance was given by the municipal manager, namely that the applicant continued to act for the municipality and received a new instruction. There was thus no factual situation requiring redress and in respect of which the applicant could have been expected to seek relief.

[15] Moreover, the applicant could not, realistically, have launched the application any earlier than it did. The applicant was only informed of the implementation of the resolution when it received correspondence to that effect on 17 April 2019. The applicant only became aware of the precise terms of the resolution, and the reasons advanced in support of its adoption, on 28 March 2019, when its director listened to the audio recording of the council meeting of 9 April 2019, the council meeting at which the resolution of 28 February 2019 was amended. Thereafter, the applicant had the audio recordings of the council meetings of 28 February 2019 and 9 April 2019 transcribed. As a result, after being notified of the implementation of the resolution, the applicant (a) ascertained the precise terms of the resolution; (b) sought to obtain the reasons for the adoption of the resolution; (c) transcribed the audio recordings in order to inform this Court of the terms of the resolution and the reasons advanced for its

adoption; and (d) then launched the application. As a result, *"[i]n these circumstances, it cannot be said that the … applicant has been dilatory in bringing the application".*[2]

[16] The applicant asserts that the implementation of the council resolution to withdraw all of its mandates will, in all probability, result in fruitless and wasteful expenditure.

[17] Fruitless and wasteful expenditure is defined in the MFMA as being *"expenditure that was made in vain and would have been avoided had reasonable care been exercised".* It is thus expenditure which, at the time that expenditure is made, will achieve no purpose (and thus is 'in vain') and had reasonable care been exercised, would have been avoided. Section 173(1)(a)(iii) of the MFMA renders it an offence for the accounting officer[3] of a municipality to fail to take all reasonable steps to prevent fruitless and wasteful expenditure if that failure is deliberate or grossly negligent. The accounting officer is also, in terms of section 32(1)(d) of the MFMA, liable for any fruitless and wasteful expenditure incurred as a result of the implementation of a decision of the municipal council unless the accounting officer has informed the council, in writing, that the expenditure is likely to be fruitless and wasteful. The MFMA thus eschews fruitless and wasteful expenditure and seeks to achieve this aim through the imposition of liability and criminal sanction upon those who deliberately or grossly negligently incur fruitless and wasteful expenditure.

---

[2] *Nelson Mandela Bay Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at para. [34].

[3] The accounting officer is the municipal manager, as is made clear definition by of 'accounting officer' in the MFMA, read with section 60 thereof.

[18] It is clear that the council resolution has the potential to result in fruitless and wasteful expenditure. This will come in the form of legal fees paid to new attorneys who will have to familiarise themselves with each matter; a process that will involve considering the documentation relevant to the matter, the steps already taken in the matter and the further steps required to be taken in order to bring the matter to finality. This process will result in the incurring of expenditure for work already done and it is thus expenditure which achieves no purpose. Of greater concern are those matters in which the municipality is represented by the applicant and which have been allocated hearing dates in the very near future. It is improbable that new attorneys would be in a position simply to fill the applicant's shoes and continue with the litigation – they will require time to prepare the matter and acquaint themselves with its intricacies. As a result, these matters (and the applicant has provided one such example) will, in all likelihood, be postponed at the municipality's cost, and without bringing these matters any closer to finalization. That there exists this potential for fruitless and wasteful expenditure flows naturally from the municipal council's resolution; it is not, in my view, a question of the applicant providing evidence of such expenditure. The mere potential that exists for the municipality to incur this fruitless and wasteful expenditure as a result of the implementation of the council resolution is a factor favouring the present application being heard as a matter of urgency, albeit that it is not, in and of itself, decisive of the issue.

[19] I turn then to the final objections, which are such that they are conveniently considered together. They are that the prejudice to the

applicant's business is not relevant to the question of urgency and the applicant has advanced no reason why it could not be afforded substantial redress at a hearing in due course. The ongoing prejudice the applicant avers it is suffering as a result of the council resolution is, in its view, part and parcel of the reason it cannot achieve substantial redress at a hearing in due course. The allegations made in support of the council resolution are defamatory of the applicant and received attention in the press. Moreover, if the applicant's mandates are withdrawn, the income stream it derives from the municipality will, in so far as those matters are concerned, terminate. This will have an adverse economic effect upon the applicant. In this regard, it is trite that the *"urgency of commercial interests, as in casu, may justify the application of Rule 6(12) no less than other interests and, for the purposes of deciding upon urgency, I must assume that the applicant's case is a good one and that it has a right to the relief which it seeks."*[4] Assuming then that the applicant is entitled to the relief it seeks, this relief would prevent the harm to the applicant's economic and commercial interests from eventuating, as the applicant would retain the right to act as the municipality's attorneys in those matters in which it has been instructed. Accordingly, *"I regard it as appropriate for the Court to hear this case as one of urgency."*[5]

THE DUTY TO SUBMIT TO ALTERNATIVE DISPUTE RESOLUTION

[4] Per Chetty J in *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213E – F. See too *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G.
[5] *Stock and Another v Minister of Housing and Others* 2007 (2) SA 9 (C) at 13B.

MECHANISMS

[20] I turn then to a consideration of the second point *in limine* raised by the respondents, namely that the applicant ought to have submitted to the alternative dispute resolution procedures provided for in the SLA before approaching the Court. Clause 12.1 of the SLA provides that *"all disputes, differences or questions between the parties on any matter arising from this agreement, shall first be referred to mediation…"*. Clause 12.2 goes on to provide that either party may, in the event that the mediation is unsuccessful, submit the dispute to arbitration, whilst clause 12.9.1 provides that the parties irrevocably consent to alternative dispute resolution proceedings and *"no party shall be entitled to withdraw therefrom or to claim at any such proceedings that it is not bound by"* the provisions of clause 12. This, so the municipality argues, obliges the applicant to have submitted the dispute concerning the withdrawal of its mandates to the compulsory alternative dispute resolution mechanisms delineated in clause 12 of the SLA.

[21] Such a clause is required to be inserted into an SLA in terms of section 116(1)(b)(ii) of the MFMA. No doubt the intention is to provide for the expeditious and comparatively inexpensive means of resolving disputes involving local government. However, there are certain issues that cannot validly form the subject-matter of an arbitration. Section 109(2) of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") reads as follows:

"109 Legal Proceedings

> *(2) 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 by-laws."*

[22] The matters excluded from the ambit of arbitration *"lie at the core of a municipality's constitutional status".*[6] As a result, decisions lying at the core of a municipality's status as a constitutional organ of state cannot be determined by private arbitration, as *"a court of law is the only institution that can give a binding decision".*[7]

[23] One need only examine the relief sought by the applicant to appreciate that this is a matter that cannot be determined by private arbitration. The relief sought is the review and setting aside of a decision taken by a municipal council, in which the executive and legislative authority of the municipality vests.[8] It is clearly a matter involving the validity of an action taken by the municipal council which necessitates a consideration of the scope and ambit of the municipal council's powers. Consequently, it is not a matter that can be determined by arbitration, as it is not competent for an arbitrator to grant the relief sought in this application. Mr Vermeulen SC who, together with Mr Raizon, appeared for the respondents, submitted that the application of section 109(2) of the Systems Act in this manner would mean that no decision of a municipal council to cancel an agreement would ever be capable of being subjected to arbitration, rendering clauses relating to compulsory alternative dispute resolution

---

[6] N. Steytler and J. de Visser *Local Government Law of South Africa* Issue 11 (November 2018) at 16-38.
[7] *Ibid.*
[8] Section 151(2) of the Constitution, 1996.

mechanisms as required by section 116(1)(b)(ii) of the MFMA nugatory. This, however, ignores the fundamental premise of the application; the applicant bases its entitlement to have the council's decision reviewed and set aside on the basis that the council, in adopting the resolution, exercised a public power. Obviously, should a municipality, in terminating an agreement or contract not be exercising a public power, the decision to terminate would be capable of determination by reference to arbitration. In this instance, however, where the decision involves the purported exercise of a public power (an aspect with which I deal below), questions relating to its exercise cannot be resolved through arbitration.

THE APPLICATION TO STRIKE

[24] The respondents launched an application to strike out large swathes of the applicant's founding affidavit, certain of its annexures and the supplementary founding affidavit and annexures in its entirety. This application to strike out was trimmed down significantly during argument. During argument respondent's counsel indicated that all that was sought to by struck was the annexure to the applicant's supplementary founding affidavit. That this annexure be struck is sought on the basis that it constitutes an unsworn statement by the respondent's municipal manager which is in breach of Rule 6(1) and that the affidavit to which it is annexed merely requests that the court have regard to the contents of the annexure, without identifying the portions thereof upon which the applicant would place reliance.

[25] The statement and annexures thereto were not in the applicant's possession when the application was launched, for the simple reason that the statement only came into existence on 6 May 2019. It was annexed to a supplementary founding affidavit deposed to the following day. The supplementary founding affidavit states of the contents of the statement and annexures thereto:

> *"It deals with matter which I submit are very germane to this application. It sets out the circumstances in which the impugned resolutions were taken and the events which took place thereafter."*

[26] This, says the respondents, is insufficient. They rely upon the following *dictum* of Joffe J in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*:

> *"Regard being had to the function of affidavits, it is not open to an application of a respondent to merely annnexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."*[9]

[27] The respondent is correct in its assertion that the deponent to the supplementary founding affidavit failed to indicate with precision those portions of the annexure (which is in excess of 200 pages) upon which reliance would be placed. The respondents are also correct in that the statement of the former acting municipal manager is unsworn. However, urgent applications are customarily treated with a degree of indulgence

[9] 1999 (2) SA 271 (T) at 324F – G.

and hearsay evidence may be admitted. In my view, no purpose would be achieved in striking out the annexure to the supplementary affidavit and it would be an improper exercise of my discretion to do so. All the documents contained within the annexure do is provide a context to the matter. Moreover, most of the facts leading up to the adoption of the resolution are, in any event, common cause. Consequently, I do not intend to grant the respondents' application to strike out.

THE EXERCISE OF PUBLIC POWER AS OPPOSED TO THE EXERCISE OF PRIVATE CONTRACTUAL RIGHTS

[28] The exercise of public power *"is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution".*[10] Stated differently, *"the control of public power is always a constitutional matter".*[11] The foundation of this constitutional control of public power is to be found in section 2 of the Constitution and is expressed as follows:

> *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligation imposed by it must be fulfilled."*

[29] The effect of this is that the exercise of all public power must comply with

---

[10] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para. [29].

[11] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para [22]. This principle has been expressed many times by the Constitutional Court. See, for example, *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras. [19] and [20] and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras. [40], [56] and [58].

the Constitution, as the supreme law of the Republic, and the doctrine of legality, which forms part of the rule of law.[12] As a result, *"all public power must be exercised lawfully, rationally and in good faith".*[13] That the exercise of public power is subject to constitutional control and must be exercised lawfully, rationally and in good faith was not disputed by the municipality. The municipality asserts, however, that when its council took the decision sought to be reviewed and set aside, it was not exercising public power, but rather a private contractual right; an issue to which I now turn.

[30] There exists no universally applicable definition of the concept of public power; to define the concept has been described as *"undesirable, if not presumptuous"*.[14] As a result, the notion of 'public power' remains something of an 'elusive concept',[15] as there exists no bright dividing line permitting of an easy and relatively simple classification of the type of power exercised and difficult boundaries may have to be drawn.[16] However, a reading of the authorities reveals that there are a number of features which, if present, will show that public power has been exercised or, depending upon the legality thereof, purportedly been exercised.[17] Consequently, *"a series of considerations may be relevant to deciding on*

---

[12] As set out in section 1(c) of the Constitution. See too *SA Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089 (GNP) at para. [14.3].
[13] *Supra* at para. [19].
[14] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T) at 564B.
[15] *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another (No 1)* 2008 (3) SA 91 (E) at para. [53].
[16] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para. [143].
[17] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T) at 564B.

which side of the line a particular action falls".[18] Among these considerations are that

"the source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters … and on the other to the implementation of legislation…"[19]

[31] Not included in this list of relevant considerations is the identity and legal nature of the body exercising the power. However, the list enumerated above is not, upon a proper reading of the authorities, intended to be exhaustive. In considering this aspect, it is tempting to conclude that, as the entity exercising the power is an organ of state, the powers it exercises must necessarily be public in nature. However, this is not always the case. The identity of the body exercising the power is not the overriding, determinative factor to be taken into consideration when deciding whether a public or private power was exercised. Thus, as Du Plessis J stated,[20] referring to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*:

"Borrowing a phrase, 'what matters is not so much the functionary as the

[18] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others supra* at para. [143].
[19] *Ibid.* Although these comments are made within the context of section 33 of the Constitution and thus concern primarily the hallmarks of 'administrative action' prior to the enactment of the Promotion of Administrative Justice Act 3 of 2000, they do, in my view, encapsulate certain of the considerations relevant to the determination of whether or not the power exercised or purportedly exercised was public.
[20] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T) at 563H – 564A.

function'. [21]

[32] Whilst the focus is thus not on the actor or on whether or not that actor belongs to an arm of government, the identity of the actor exercising the power does remain a relevant consideration to be taken into account and balanced against those other considerations which are indicative of whether or not a public power has been exercised.

[33] I turn then to the nature of the power exercised, as this lies at the heart of the issue in this application. In this respect, it has been said that a hallmark of the exercise of a public power is that its exercise impacts on the public at large. After all, the *"concept 'public power' connotes the exercise of power that 'concerns or affects the public'".*[22] Whilst this feature may seem relatively straightforward, the concept of public power is not limited exclusively to exercises of power that impact upon the public at large. Plasket J (as he then was) gives, as an example of this: a decision by the Truth and Reconciliation Commission grant a person amnesty from the civil and criminal consequences of his or her politically motivated crimes. Such a decision would only have a significant impact upon the individual to whom amnesty is granted and those who suffered some consequence as a result of that individual's politically motivated actions. Of such a decision Plasket J states that *"what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest and not in his or her own*

[21] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others supra* at para. [141].
[22] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (T) at 564B – C.

private interest or at his or her own whim".[23]

[34] This was precisely the principle relied upon by Schreiner JA in *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others* in his dissenting judgment.[24] In that matter, the then Minister of Native Affairs terminated a statutory permit to occupy land, for predominantly racially discriminatory reasons.[25] The majority of the Appellate Division (as it then was) reasoned that since the permit was embodied in a contract, the termination thereof constituted *"an absolute and unqualified contractual power, rendering the racial discrimination permissible or at least irrelevant".*[26] This reasoning, it has since been held, *"'virtually severs the agreement from the statute', which was at least in part the contract's 'progenitor'. This in turn conferred on the agreement 'an ineffaceable orientation' which rendered its termination an inescapably public exercise of power."*[27] As I have noted, Schreiner JA dissented. In so dissenting, he stated:[28]

"Although a permit granted under sec. 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the sub-section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who

---

[23] *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another (No 1) supra* at para. [53].
[24] 1958 (3) SA 343 (A). Although the judgment of Schreiner JA is a dissenting minority judgment, it has since been recognised by the Supreme Court of Appeal as being correct. See *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para. [13].
[25] Reasons that would, self-evidently, not survive scrutiny in our Constitutional democracy.
[26] *Logbro Properties CC v Bedderson NO and Others supra* at para. [12].
[27] Cameron JA (as he then was) criticising the 'artificiality' of the majority reasoning of in *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others supra* in the decision of the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO and Others supra* at para. [13] (references omitted).
[28] *Mustapha and Another v Receiver of Revenue, Lichtenburg, and Others supra* at 347D – G.

need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised . . ."

This, in essence *"encapsulates the essential difference between public and private power".*[29]

[35] The respondents aver that in withdrawing the applicant's mandates, the municipal council did not exercise a public power, but rather a private contractual right, under the SLA, the exercise of which is governed by the common law of contract and the express terms of the SLA. The respondents contend that a litigant's common law right to terminate the mandate of his or her attorney at any time[30] has been incorporated into the SLA and point to the provisions of clauses 2.1 and 2.2 thereof. These clauses provide that the applicant agrees to provide the services to the municipality on an *"'as and when' required basis"*; that the applicant's appointment does not guarantee that any particular volume of work or instructions will be allocated to it; and that the allocation of work to the applicant will fall within the sole discretion of the municipality. In my view, the municipality's contention is flawed. Clauses 2.1 and 2.2 of the SLA do not relate to the revocation of instructions. They relate to the furnishing of

[29] *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another (No 1) supra* at para. [53].
[30] Voet *Commentary on the Pandects* (Gane's translation) 17.1.17 and *Pugin v Pugin* 1963 (1) SA 791 (W) at 793F – H.

instructions by the municipality. These clauses simply concern when instructions are furnished, the number of such instructions, and the consistency and frequency with which instructions are furnished, if they are furnished at all.[31] A reading of the SLA reveals no clause that provides the municipality with a contractual entitlement to revoke instructions already given; the contractual right the municipality has in terms of the SLA is to cancel the SLA itself for breach or on any of the grounds enumerated in clause 11. It is noteworthy, in relation to this issue, that it is not the respondents' case that the municipality terminated the applicant's mandates in accordance with the provisions of clause 11 of the SLA, the clause which sets out those instances in which the SLA may be terminated by the municipality. This could not be the respondents' case as the municipality accepts that the SLA itself was not terminated. As a result, I am unable to conclude that the decision amounted to the exercise of a private contractual right expressly conferred upon the municipality by SLA.

[36] Moreover, the municipality is not in the same position as an ordinary litigant. It cannot approach any attorney it pleases with a request that that particular attorney provide it with legal services, in the manner in which an ordinary litigant can. A municipality, as an organ of state, is enjoined, in terms of section 217(1) of the Constitution, to contract for goods or services *"in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."* The MFMA has, in chapter 11 thereof,

[31] As against this, and notwithstanding that the applicant may not receive instructions at all, the applicant is, in essence, obligated to ensure that it has the necessary capacity and resources to provide the specified legal services to the municipality for the duration of the SLA.

provided for a detailed supply chain management system for the procurement of goods or services. The municipality has adopted such a supply chain management system, as it is required by the MFMA to do. As a result, the provision to the municipality of legal services by an attorney or firm of attorneys, can only occur after the municipality has followed the process and procedures of its supply chain management policy; an attorney or firm of attorneys cannot simply be 'appointed' to provide such services. The manner in which the applicant firm was appointed to provide legal services to the municipality is an example of that which is required. In order to be appointed to the municipality's list of accredited service providers, the applicant had to submit to the competitive bidding process outlined in the municipality's supply chain management system policy (its SLA was to endure for a period in excess of one year rendering this process applicable). This competitive bidding process requires that a bid be submitted, after the public invitation to do so has been published, which bid is then opened, in public. The bids received are then evaluated and, if the bidder is successful, the process culminates in the bidder being placed on the panel of accredited service providers and the conclusion of a contract between the bidder and the municipality. This is hardly akin to the process an ordinary litigant goes through before appointing an attorney to act for him or her, even if that ordinary litigant is frugal and compares the fees charged by different attorneys before making his or her choice.

[37] It is this very context, that of the competitive bidding process and the manner in which the SLA was concluded, and thus the framework within

which the applicant came to receive instructions to provide legal services to the municipality in the first place that, in my view, constitutes an important consideration in determining whether the decision to revoke those mandates amounted to the exercise of a public power. The process followed in order to instruct the applicant firm was one involving the exercise of public power and, having regard to the particular facts of this matter, so too was the decision taken by the municipal council to revoke those instructions. I hold this view for the following reasons.

[38] The municipal council is a public body; it performs the executive and legislative functions of local government. When the decision was taken, the council elected to take that decision whilst sitting as the executive branch of the municipality. This factor is not decisive, but it is instructive and, when weighed with fact that the municipal council was not exercising a contractual power conferred upon them by the SLA, but interfering in the procurement process, leads to the conclusion that the decision was taken in the purported furtherance of the exercise of a public power. Stated differently, central to this application is a decision taken by a public body, concerned with a public procurement process, the foundation for which is contained in the Constitution and statute. The mere fact that that procurement process is executed through the conclusion of contracts is insufficient to render the decision taken to interfere with that process the exercise of a private power.

[39] This situation is distinguishable from that in *Cape Metropolitan Council v*

Metro Inspection Services (Western Cape) CC and Others.[32] In that matter the Supreme Court of Appeal was concerned with whether or not the decision by the appellant, an organ of state, to cancel a contract it concluded with the respondent amounted to 'administrative action' as intended by section 33 of the Constitution. Streicher JA answered this question in the negative. His reasoning therefor is contained in the following passage:[33]

"The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution."

Central to this reasoning was the fact that the public authority was cancelling the contract, in accordance with the terms agreed to by contracting parties, who stood on an equal footing. A reading of the decision reveals that the public authority cancelled the agreement as a result of the respondent's breach of its terms. Importantly, Streicher JA

[32] 2001 (3) SA 1013 (SCA).
[33] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others supra* at para. [18].

found that, had the public authority cancelled the agreement in terms of regulation 22(1) of the Financial Regulations for Regional Services Councils R1524 of 28 June 1991, *"it would have been exercising a public power which would have constituted 'administrative action' in respect of which a fair procedure in terms of section 33 of the Constitution would have required compliance with the audi rule".*[34] It is the fact that the pubic authority cancelled the contract on the basis of the respondent's breach thereof, in accordance with its clear contractual entitlement to do so, that distinguishes the decision in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* from the present matter.

[40] Even if I am incorrect in characterising the exercise of the power as public, in my view, constitutional principles continue to govern the contractual relationship between the applicant and municipality. In *Logbro Properties CC v Bedderson NO and Others* the Supreme Court of Appeal was called upon to consider whether the Kwa-Zulu-Natal provincial government was required, in exercising its contractual rights in the tender process, to act lawfully, procedurally and fairly. It held that, even if *"the conditions constituted a contract … its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship and the province in exercising its contractual rights in the tender process was obliged to act lawfully,*

[34] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others supra* at para. [20].

procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation."[35]

[41] This principle is clearly applicable to the present matter. In this respect, I can do no better than paraphrase that stated by Cameron JA (as he then was) in *Logbro*:[36]

"even if the terms the [municipality] stipulated for [through] the [procurement] process entitled it to withdraw the [applicant's mandates], it could exercise that power only with due regard to the principles of [fairness]. It could not withdraw the [applicant's mandates] capriciously or for an improper or unjustified reason."

[42] Consequently, the municipality was required to act fairly and, whilst I do not propose to define *"the exact ambit of the ever-flexible duty to act fairly"*[37] this duty does entail, at the very least that the decision conform to the precepts of legality and rationality. It is thus to a consideration of whether or not the decision taken conformed to the precept of rationality that I now turn.

THE RATIONALITY OF THE DECISION

[43] The reasons for the proposal and subsequent adoption of the resolution to

---

[35] *Logbro Properties CC v Bedderson NO and Others supra* at para. [7].
[36] *Logbro Properties CC v Bedderson NO and Others supra* at para. [14].
[37] *Logbro Properties CC v Bedderson NO and Others supra* at para. [8], citing *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231H – 233C and *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para. [39].

withdraw the applicant's instructions appear most clearly from the transcript of the council hearing of 28 February 2019. But first, some background.

[44] At a municipal council meeting held on 4 December 2018, a report produced as part of an ongoing review into disciplinary matters instituted by the municipality and conducted by an independent firm of attorneys, was tabled under the heading *"Suspended Employees"*. The report contained recommendations, which were debated, and which culminated in the council adopting the following resolution:

> *"(a) That the report regarding the disciplinary suspensions of employees, as tabled, hereby be noted by the Council.*
>
> *(b) That any recommendations received from the lawyers who are currently reviewing all the disciplinary matters be reported to the Council in the first instance, and that the Council's resolutions in this regard by implemented by the Acting City Manager as a matter of priority.*
>
> *(c) That the Acting City Manager submits regular reports to the Council regarding the progress with all disciplinary hearings, including suspensions of all employees.*
>
> *(d) That the Acting City Manager provides to the Council progress reports on all disciplinary hearings, including the suspension of employees on a regular basis."*

The reasons for the adoption of this resolution appear from the minutes of that council meeting. These read:

> *"It was explained that a forensic investigation should be conducted into the manner in which [the applicant] were charging the municipality as the former had been paid more than R100 million in one year by the Municipality, and be reported to the Law Society for over-charging the Municipality while the forensic investigation was underway. The Executive Mayor said that in addition to the aforesaid forensic investigation, the allocation of work to other law firms … would also be initiated in order to*

establish how these firms charged the Municipality, and furthermore that all suspension and civil cases that were being dealt with by these law firms would be withdrawn by the Municipality."

[45] Pursuant to the adoption of this resolution on 4 December 2018 the acting city manager prepared and placed before council a report on the disciplinary matters, which report contained several recommendations concerning the disciplinary matters reviewed. A reading of this report reveals that it contains no recommendations pertaining to the applicant firm. The recommendations contained in this report were introduced for debate during the council meeting of 28 February 2019 by the executive mayor. After noting certain of the recommendations, the executive mayor went on to state that the municipality was facing a *"serious problem"* in that the files relating to suspended cases and litigious matters were all held by the applicant firm. This had resulted in significant delays in the finalization of certain matters, as the applicant firm was, according to the executive mayor, refusing to make available to the municipality the file contents. The executive mayor then continued:

"Now as the [mayoral committee], we have agreed that anything that deals with [the applicant] we do not want anything to deal with [the applicant] (sic) because [the applicant] is milking the money of this municipality.

I'm having (sic) a report here whereby [the applicant] within a period of 5 years, he claimed more than 100 million – only one company. I have got that report. This is a white company, this is a waste of the tax payers' money. Now we have agreed as the [mayoral committee] that all those cases must be reviewed and settled.

…

And then in the next Council meeting, we must be able to bring to Council the amount of money that has been used by these lawyers – and our external lawyers are busy with that."

[46] This introduction then sparked a debate amongst those councillors present. Certain aspects of this debate are of not insignificant concern. The first of these is that, notwithstanding having stated that he is in possession of a report indicating that the applicant firm has overcharged the municipality, that report was at no stage produced by the executive mayor, nor did any councillor request that it be produced. In fact, absent from the executive mayor's introduction of the report was any substantiation of the serious allegation to the effect that the applicant had systematically, over a period of five years, overcharged the municipality for its services. Despite this glaring deficiency, certain councillors simply accepted this unsubstantiated allegation, accusing the applicant of *"eating a lot of money out of [the municipality's] coffers"*.

[47] In his response to what was said during the course of the debate, the executive mayor persisted in making unsubstantiated allegations. He stated:

> *"And then for [the applicant] … we terminate the services of [the applicant]. we put a forensic investigation (sic). There should be something why this guy is not giving us the files. So that it can be checked whether this particular people (sic) are [overcharging] us in terms of the law society… So … there's someone who's milking at the back. because this [applicant] has been … doing this for years. And out black companies, our black lawyers firms are getting nothing. White firms are … the only ones benefiting here… so we just terminate, or, if we cannot terminate, [the applicant] maybe legal implications (sic), all we do … we just … tell him to close the files and give us all our files and give that [work] to out black attorneys that are in the panel (sic)."*

[48] The minutes of the council meeting of 28 February 2019 do not record the detail of the municipal council's debate and express the reasons given for

the resolution in more elegant language. The relevant extract of the minutes reads:

"The Executive Mayor introduced the item to the Council and then pointed out that some of the recommendations from the internal review committee were contrary to that of the review attorneys and recommended that the recommendations from the review attorneys be accepted. The Executive Mayor expressed concern over the exorbitant amounts paid to [the applicant] and suggested that the Municipality should terminate all current cases from the firm and that the services of competent previously disadvantaged attorneys be engaged. He further noted with concern that a number of disciplinary cases were currently outstanding and recommended that the relevant files … be retrieved from their respective lawyers and the cases be finalized by the Legal Division."

[49] It is clear from the debate that the council's reasons for adopting the resolution it did were three fold: (a) the council laboured under the impression that the applicant firm was a white firm; (b) the council was of the view, pursuant to the statements of the executive mayor, that the applicant was guilty of significant overreaching in relation to the fees charged; and (c) the applicant firm had certain files in its possession which the municipality required in order to finalise certain disciplinary matters.

[50] In order to be rational, there must a be a cogent link between the means adopted and the goal sought to be achieved.[38] Decisions not rationally related to the purpose for which the power is given are arbitrary and will not pass constitutional scrutiny. As the Constitutional Court stated in *S v Makwanyane*:

"We have moved from a past characterised by much which was arbitrary

[38] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa supra* at para. [85].

and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order." [39]

Thus, a constitutional State

"should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state."[40]

[51] The enquiry into the rationality of the actions of a public authority is an objective one. After all, as is stated in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*:

"[o]therwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."[41]

In order to pass this objective test of rationality, the decision must be *"based on accurate findings of fact and a correct application of the law".*[42]

Thus in *Pepcor Retirement Fund and Another v Financial Services Board*

[39] 1995 (3) SA 391 (CC) at para. [156].
[40] *Pinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para. [25].
[41] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa supra* at para. [86].
[42] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) at para. [40].

and Another, Cloete JA held:[43]

> *"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alios, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires."*

[52] This does not, however, entitle a court, under the guise of an enquiry into rationality, to usurp the power of the public authority. In *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* the Constitutional Court made it clear that courts cannot and should not substitute their own opinions for those of the functionaries in whom the power has been vested. A court cannot interfere with a decision taken by a public authority simply because it disagrees with it or considers that the power was exercised inappropriately.[44] A court thus cannot

> *"take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. … Provided a legitimate public purpose is served, the political*

[43] 2003 (6) SA 38 (SCA) at para. [47].
[44] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa supra* at para. [90].

merits and demerits of disputed legislation are of no concern to a court."[45]

Where the decision is polycentric a court does not have a free hand to intervene; a degree of judicial deference is required.

[53] As I set out above, the municipal council took the decision to revoke the applicant's mandates ostensibly for three reasons. The first of these, to use the words of the executive mayor as contained in the answering affidavit to which he deposed, is the *"consideration relating to a more equitable distribution of the [municipality's] work amongst a broader spectrum of attorneys on the [municipality's] panel."* The municipality thus denies that the decision was based solely on the municipality's misconception as to the race of the applicant's directors. This, however, is not borne out by a reading of the transcript of the council hearing. It is clear that the decision taken was informed, in large part, by a material mistake of fact. The applicant firm cannot be characterized as a 'white' firm. The respondents concede that the applicant firm is not a white firm. The resolution was thus based, at the very least in part, on a material mistake of fact. Moreover, it is not clear how the 'more equitable' distribution of work among attorneys was to be achieved, when the resolution taken expressly required that the *"cases be finalized by the Legal Division"*, as the minutes indicate. This is reinforced by the terms of the resolution adopted on 28 February 2019. The adopted resolution provides that *"all cases being considered by [the applicant] be withdrawn from the firm and that such cases be considered by the Legal Division in*

[45] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para. [63].

order to determine the way forward on each case." Whilst this resolution was amended on 9 April 2019 so as to make provision for the retraction only of the applicant's mandates, the latter portion relating to the consideration of the matters by the municipality's own legal department being deleted, this was done on the basis that certain 'critical aspects' were inadvertently omitted from the resolution of 28 February 2019.

[54] The second stated reason for the decision was to investigate the amounts charged by the applicant firm for the services it rendered. On the face of it this appears to be a reasonable and rational course of action; municipalities must be astute as to the allocation of their financial resources and must guard against over-spending and improper over-charging by their service providers.[46] However, when one examines this issue more closely, it becomes evident that it too rests upon a foundation that can only be described as irrational. The issue of the applicant firm overreaching was first raised by the executive mayor in an open letter to the then executive mayor of the municipality dated 22 May 2018. In this letter, the present executive mayor alleged that the applicant firm had been paid *"over R100 million for 2015/2016; 2016/2017 and 2017/2018 financial year (sic)"*. In other words, it was alleged that the applicant firm was paid over R100 million in fees over a three-year period. A comprehensive audit of the fees paid to the applicant firm was demanded on the basis of this allegation of overreaching. However, at the council meeting of 4 December 2018, the detail of the allegation differed, in that it was alleged that the applicant firm had been paid over R100 million in a

[46] Section 195(1)(b) of the Constitution and various provisions of the Systems and Municipal Finance Acts require as much.

single year. Subsequently, at the council meeting of 28 February 2019 this allegation was altered for a third time; at this stage to one in which it was asserted that the applicant firm had been paid in excess of R100 million over a five-year period. It was at this point that the executive mayor stated quite clearly that he was in possession of a report that established this.

[55] Aside from the ever-changing detail relating to the period within which the figure of over R100 million was supposedly paid to the applicant firm by the municipality, no further detail is provided. The source of the report and whether it is contained in documentary form is not disclosed. Neither is any detail concerning the services provided by the applicant and for which it was supposedly paid so handsomely, provided. There was no attempt to distinguish between the fees charged by the applicant, on the one hand, and the amounts it paid out as disbursements on the municipality's behalf on the other. As the applicant's director points out, the amounts paid to the applicant firm would include not only the professional fees due to the applicant but also disbursements made by the applicant on the municipality's behalf in respect of the briefing of senior and junior counsel and payments to expert witnesses employed on the municipality's behalf and independent officers presiding over internal disciplinary matters, to name but a few. Most tellingly, despite repeated demands for a forensic investigation into the fees charged by the applicant prior to the council meeting of 28 February 2019, when the executive mayor made the assertion that the applicant is *"milking"* the municipality, nothing was said about whether the issue has been investigated at all or whether any steps had been taken in an attempt to ascertain the veracity of the 'report'.

[56] As a result, to the extent that this speculative and unsubstantiated allegation informed the council's decision to terminate the applicant's mandates, it was irrational. The decision was made in ignorance of facts material thereto and which therefore should have been before the council when the decision to adopt the resolution was taken. Moreover, the applicant's director has stated that the applicant has not been paid as much as or close to R100 million by the municipality in any single one or single five-year period over the past 20 years it has been providing legal services to the municipality. Any contention to the contrary, in light of the complete absence of any substantiation therefor, is thus factually inaccurate and a decision based thereon is consequently one based upon a material mistake of fact.

[57] As regards the final point, namely that the applicant firm was in possession of certain files which the municipality required, the simple expedient of requesting copies of those files would have resolved the problem (to the extent that this could conceivably be described as a problem considering the municipality's own legal department did not take issue with the fact that the applicant firm had the files in its possession). Moreover, the withdrawal of the applicant firm's mandates is not rationally connected to this stated purpose; the withdrawal of the applicant's mandates results in it being in a position to exercise a lien over the files pertaining to matters in which the applicant has not been fully paid for its services.

CONCLUSION

[58] Consequently, I am of the view that the decision was irrational and must therefore be set aside. Costs must follow the result. Both parties employed the services of two counsel and were in agreement that the costs order made should include provision for the recovery of the costs of two counsel. I will therefore make such an order. However, there remains one further troubling aspect to this matter. During the council meeting of 28 February 2019, when the issue of the return of the files was raised, one councilor addressed those assembled and, in so doing, made the following comments:

> *"I do not know why we are afraid of Gray Moodliar. Because we can simply walk and go and take what belongs to the municipality, if it needs be, by force. Because I do not know why we are negotiating, negotiating, negotiating and not getting files form people like Gray Moodliar, I think that's [what] we must be able to do, use a little bit of force.*
>
> *…*
>
> *All of us we go there and say 9 o'clock on Monday that we are going to this Gray Moodliar to go and take these files. We enter these offices. Because it seems like it is difficult to get the files. We do not send anybody.*
>
> *…*
>
> *I think the Herald can report that tomorrow, that we will go and fetch the outstanding files from Gray Moodliar on Monday."*

[59] Among the definitions of the word 'force' in the Shorter Oxford English Dictionary appears *"physical strength or power exerted upon an object; esp violence or physical coercion"*. The councillor, in making the comments he did, could be understood to be advocating for the removal of files from a firm of attorneys, by the duly elected councilors of a

municipality, using violence to overcome any resistance proffered. Of great concern is not only that these comments were made in the first place, but also that no-one among those assembled, at any stage, condemned these statements. In this regard, elected officials would be wise to recall the following words of Langa J (as he then was) in *S v Makwanyane and Another*:

> *"Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. I this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society."*[47]

Consequently, *"the State and, self-evidently, the officers through which it exercises its powers and performs its functions, are meant to serve as role-models for the populace".*[48]

[60] Advocating for the use of violence is the very antithesis of the more mature society referred to by Langa J. Such statements have no place in a society founded upon the rule of law and the principles of social justice and fundamental human rights. They are thus to be condemned in the strongest of terms.

[61] In the result, the following order will issue:

1. The respondents' application to strike out is dismissed.

2. The decisions of the first respondent Council taken on 28

[47] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para. [222].
[48] *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another (No 1) supra* at para. [82].

February and 4 and 9 April 2019, in which the Council resolved to withdraw all current cases of the applicant and in which the applicant had been instructed, are reviewed and set aside.

3. The respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed.

_____

M L BEARD
ACTING JUDGE OF THE HIGH COURT