**IN THE HIGH COURT OF SOUTH AFRICA**

(FREE STATE PROVINCIAL DIVISION)

Case No : 1885/2003

In the matter between:

**MOTLATSI BARNABAS MOLEFE** Applicant

and

**DIHLABENG LOCAL MUNICIPALITY** First Respondent

**MP JACOBS**
Second Respondent

**GC PRETORIUS**
Third Respondent

**HJ FABRICIUS**
Fourth Respondent

**KE KHABANE**
Fifth Respondent

**OTHER RESPONDENTS : MEMBERS OF THE LOCAL GOVERNMENT** Sixth to Fortythird Respondents

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**CORAM:** HANCKE J

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**HEARD ON:** 31 JULY 2003

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**JUDGMENT DELIVERED ON:** 14 AUGUST 2003

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The applicant was the first respondent's erstwhile municipal manager. On 25 September 2002, the applicant was suspended pending an investigation into allegations of misconduct and for the purpose of laying charges against the applicant. On 1 November 2002 charges were laid against the applicant and he thereafter was suspended pending the outcome of the disciplinary proceedings that were scheduled. The disciplinary proceedings were scheduled to begin on 4 December 2002. On that date the applicant obtained a postponement of the proceedings to 19 December 2002 to enable respondents to consider a request for legal representation as well as to obtain particulars to the charges. Those proceedings were then again postponed to 28 March 2003.

On that occasion the applicant challenged the formal appointment of the Presiding Officer and Prosecutor on the basis that they had not been appointed by the mayor, the second respondent, and were therefore unable to prosecute and preside over the proceedings. The contentions of the applicant were upheld by the then Presiding Officer, who ruled that he was not validly appointed, and withdrew from the proceedings resulting in the further postponement.

Subsequent thereto, the second respondent, in his capacity as mayor, specifically instructed attorneys Webber, Wentzel Bowens to obtain the services of adv Pretorius SC (the third respondent) to act as prosecutor, and adv Fabricius SC (the fourth respondent) to act as Presiding Officer in disciplinary proceedings that were scheduled to commence on 19 May 2003. In the meantime the applicant, on various occasions, requested further particulars to the charges contained in the charge sheet. The first request was dated 15 November 2002 and its reply dated 22 November 2002. The second request is dated 3 December 2002 and there was also a third request during May 2003, and a reply thereto dated 19 May 2003.

The original charge sheet consisted of eleven charges. Three further charges were added for the hearing scheduled for 28 March 2003 and a fifteenth charge was added for the hearing of 19 May 2003. It is important to note that the applicant did not take issue with the particularity which had been provided until the present application was argued, when Mr Olivier, counsel for the applicant, submitted that the applicant was prejudiced due to the fact that certain particulars were supplied at a very late stage.

On 19 May 2003 the applicant contested the legality of the appointment of the third and fourth respondents as the Prosecutor and Presiding Officer respectively. The basis of the challenge was that the second respondent, as the validly appointment mayor of the first respondent, and the person entrusted with the obligation under the disciplinary code to appoint a Prosecutor and a Presiding Officer, had not personally appointed the third and fourth respondents. It appears that the second respondent as mayor wrote the following letter to Webber, Wentzel Bowens:

> "You are hereby requested to assist with the appointment of Advocate Hans Fabricius as Advocate ESJ van Graan SC is unavailable to chair the disciplinary hearing. Please reply promptly on the appointment as Mr Molefe must be informed accordingly."

A similar letter was also written to the said attorneys in respect of the third respondent's appointment as prosecutor. The contentions of the applicant relating to the validity of the third and fourth respondents' appointment were summarily dismissed by the fourth respondent.

At that point, the applicant requested a postponement for the purpose of launching a review application of the fourth respondent's decision. According to the record of the disciplinary hearing, the following transpired between the legal representatives:

**(Applicant's attorney):** "Mnr die voorsitter my instruksies op hierdie stadium om te vra vir uitstel van hierdie verhoor. Vier weke sodat in terme van die reëls van die Hooggeregshof geldend in die Vrystaat, 'n hersieningsaansoek te bring, ten aansien van die beslissing ..... Op advies van 'n snr advokaat van Bloemfontein is ons geadviseer om te vra uitstel vir 'n maand, sodat die nodige aansoek gebring kan word."

**(Fourth respondent):** "U moet natuurlik onthou dat u het altyd die reg om die hele verrigtinge aan die einde op hersiening te neem. ..... U weet ook dat die howe nie geneë is om in hangende verrigtinge in te meng nie. ....."

**(Third respondent):** "..... ek weet ons het vyf dae opsy gesit, ek dink ons kan net vinniger klaarmaak, dat 'n hof moontlik as hy jou op hersiening, dink dat dit verkeerd was, ons is bereid om daardie risiko te neem, ek vra dat die verrigtinge voortgaan. ...."

**(Applicant's attorney):** "Sal u ons dan verskoon mnr die voorsitter? ....."

**(Third respondent):** "Mnr die voorsitter kan ons net kry, die rekord gaan getik word, as daar 'n hersieningsaansoek is, kan ons net duidelikheid kry, mnr Diener en mnr Molefe wat 'n toegelate prokureur is verstaan dat as hulle nou die verrigtinge verlaat, die verrigtinge in hulle afwesigheid gaan voortgaan. Dat getuienis aangebied gaan word en dat ons hier u gaan versoek om tot 'n bevinding te kom en dat ons sal verkies dat as u op daai bevinding kom, as dit getoets is deur kruisverhoor en mnr Molefe die geleentheid gehad het om sy weergawe te stel, ..... natuurlik as mnr Molefe afstand doen van daardie reg wat hy het deur die verrigtinge te verlaat, dan is dit sy keuse."

Before permitting the fourth respondent to make a ruling on the application for postponement, the applicant withdrew from the proceedings and left them in the full knowledge that the proceedings would continue in the applicant's absence, including knowledge that evidence would be led which would proceed unchallenged, and with knowledge of the fact that the matter was set down for five days. The proceedings continued thereafter in the applicant's absence and at the conclusion of the leading of evidence on 19 May 2003,

were adjourned to the next day to allow fourth respondent to consider the evidence and reach a finding.

The next day the fourth respondent found applicant guilty on the majority of charges referred by the first respondent and enquired into factors in mitigation for the purpose of his consideration of an appropriate penalty. After such information as was at the disposal of the third respondent was presented, and after consideration thereof, the fourth respondent concluded that the appropriate penalty would be the dismissal of the applicant and made such a ruling.

Applicant thereafter launched an urgent application seeking an order:

1.Declaring the second respondent not to be the mayor of the first respondent municipality;

2.Reviewing and setting aside:

a)The second respondent's decision to appoint the third and the fourth respondents as the Prosecutor and the Presiding Officer respectively in disciplinary proceedings pertaining to the applicant;

b)Fourth respondent's refusal to postpone the disciplinary hearing on 19 May 2003, and/or the decision to proceed with the disciplinary hearing on 20 May 2003; alternatively, setting aside the disciplinary proceedings of 19 and 20 May 2003.

c)The second respondent's decision terminating the employment contract between the first respondent and the applicant.

3.Against first respondent, to pay the applicant the amount of R23 333,34, being the overdue arrear increments for the period 1 November 2002 to date hereof, as well as the annual bonus

to the equivalent of month's salary, due and payable by the first respondent to the applicant as well as his full monthly remuneration as employee as from 1 May 2003 until the finalisation of this application.

As far as paragraph 3 is concerned, Mr Sutherland, counsel for the respondents, submitted that the subsequent interim order, which was granted by consent, disposed of this issue and the court may ignore it when adjudicating the matter. If a dispute between the parties develops in this regard, the applicant will be entitled to approach this Court to apply for relief on the same papers duly amplified, if necessary.

It should be noted that none of the relief sought in these proceedings was advanced either in fact or in argument at the hearing before the fourth respondent, and they constitute entirely novel grounds in the dispute between the applicant and the first respondent.

Mr Olivier, counsel for the applicant, argued that the applicant has made out a proper case for the relief claimed. I deem it appropriate to deal with the submissions made by Mr Olivier in the sequence advanced by him in his heads of argument, and in argument in this Court.

**DISCIPLINARY HEARING:**

**a)Allegation that the matter lapsed:**

The first alleged irregularity pertaining to the disciplinary proceedings was the fact that the matter allegedly lapsed. According to the argument advanced on behalf of the applicant, only charge nr 15 was a new charge that was introduced in the charge sheet dated 7 May 2003. Applicant was previously charged with the remainder of the charges on the said charge sheet, in respect of which charges he was suspended for both the periods envisaged in paragraph 16 of the code of conduct. It was submitted on behalf of the applicant that the further suspension of one month already lapsed by 28 March 2003 without him having been properly charged.

On a previous occasion, between the same parties in respect of the same issue, Rampai, J stated the following in **MOTLATSI BARNABAS MOLEFE v DIHLABENG LOCAL MUNICIPALITY AND OTHERS** (case nr : 4495/2002 heard on 2 May 2003 and judgment delivered on 5 June 2003) at p 8-10 paragraph 11:

‘‘Paragraph 16(b) states that where the disciplinary prosecutor fails to charge the accused employee within the period of suspension in terms of paragraph 15 then the entire inquiry itself lapses and the employee must return to work. In the instant case there was no failure of any sort on the part of the disciplinary prosecutor. The applicant was timeously charged during the second suspension. The further suspension or the third suspension of 4 November 2002 was really unnecessary since the applicant had already been charged. Implicit in the provisions of paragraph 12 and paragraph 15 read with paragraph 16 is the logical idea that once an accused employee has been formally notified of the charge he or she remains suspended until the disciplinary inquiry is finalized. The moment the employee is charged the mayor’s role of suspending such an employee at intervals ceases. The presiding officer of the disciplinary inquiry becomes ceased with the matter. The practical effect of the charging is that the applicant remains suspended until the end of the disciplinary inquiry. I can find nothing in the Disciplinary Code and Procedure to support the applicant’s restrictive construction that his suspension expired on 5 December 2002 because the mayor did not renew his suspension or that he did not suspend him further. It was not required of the mayor to keep on suspending the employee periodically as long as the disciplinary inquiry endured. The primary purpose of the mayoral suspension be it in terms of paragraph 13 or paragraph 15 is to give the disciplinary prosecutor an opportunity to charge the accused employee and also to protect an accused employee against the agony of unnecessary or deliberate delays on the part of a punitive management. That much is clear upon the proper construction of paragraph 16 read with those two provisions. To

construe those two provisions as requiring that the disciplinary inquiry has to be finalized during the suspension period as the applicant says can lead to absurdity. The matter, in other words, the disciplinary case lapses if the employee is not charged and not **if** the inquiry is not finalized within the suspension period. That is the crux of the matter."

I am in agreement with the aforesaid.

(b) **Further particulars:**

Mr Olivier submitted that the supply of further particulars on the date of the hearing is contrary to the principle that an accused person is entitled to as much information as necessary for a proper preparation of his defence. It is however important to note that the said particulars were only furnished in respect of charge 15 and that applicant's attorney never objected to it at or during the disciplinary hearing. The case relied upon by Mr Olivier in this regard, ie **REX v MOYAGE AND OTHERS** 1958(3) SA 400 (A) is to the effect that deficiencies in the charge sheet could have been corrected without prejudice if raised at the trial and could not be relied upon for the first time on appeal (p 412D-413E), In my view there is no substance in this submission.

(c) **Refusal of request for postponement:**

As far as the continuation of the application is concerned, the applicant's attorney applied for a postponement for a period of four weeks in order to approach this Court for a review. Before the fourth respondent made a

decision not to postpone the proceedings the applicant's attorney excused himself. It appears from the proceedings that the fourth respondent intended to refuse the application for postponement and on the assumption in favour of the applicant that he refused a postponement, the question is whether such decision was irregular, or not. It also appears that only in reply the applicant complains about ill preparedness for the first time. They were specifically not raised before the disciplinary hearing or in the applicant's founding affidavit and they stand to be disregarded, and to be struck out.

The question is whether the applicant was entitled to a postponement to approach this Court for a review and setting aside of third and fourth respondents' respective appointments on the facts as set out at, or **during**, the disciplinary hearing.

In **LAWRANCE v ASSISTANT RESIDENT MAGISTRATE OF JOHANNESBURG** 1908 TS 525 Innes, CJ stated the following at 526:

> "This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter."

In **WAHLHAUS AND OTHERS v ADDITIONAL MAGISTRATE,**

**JOHANNESBURG AND ANOTHER** 1959(3) SA 113 (A) Ogilvie Thompson, JA stated the following on p 119D-120A:

> "If, as appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction. The practical effect of entertaining appellants' petition would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court. .....
>
> It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or *mandamus* - against the decision of a magistrate's court given before conviction. ..... This, however, is a power which is to be sparingly exercised."

In **ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND ANOTHER** 1963(1) SA 1 (A), Steyn, CJ stated the following on p 5G-6A:

> "As to the second ground, I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. ..... A Superior Court should be slow to intervene in unterminated proceedings in a court below, and should, generally speaking confine the exercise of its powers to `rare cases where grave injustice might

otherwise result or where justice might not by other means be attained'. "

Mr Olivier, on behalf of the applicant, relied on the case of **NANKAN v H LEWIS & CO (NATAL) LTD** 1959(1) SA 157 (N) and submitted that the applicant was obliged to take the proceedings on review forthwith in view of the fourth respondent's decision.

In the case of **NANKAN** (*supra*) the following was stated on p 158B-H:

> "The issue as to jurisdiction was set down for hearing separately, by virtue of Magistrates' Courts Rule 22(11), which provides that any defence which can be adjudicated upon without the necessity of going into the main case, may be set down by either party for a separate hearing. The magistrate heard full argument on this issue on 28th November, 1957, and ruled that the court had jurisdiction. .....
>
> Sec 83(*a*) of the Magistrates' Courts Act entitles a party to any civil suit or proceedings to appeal against the judgment, and sec 83(*b*) entitles him to appeal against
>
> `any rule or order made in such suit or proceeding and having the effect of a final judgment .....'
>
> In my view the magistrate's decision overruling the plea to the jurisdiction was not interlocutory and was final and definitive."

The effect of the aforesaid decision is that a decision of magistrate's court that it has jurisdiction has the effect of a final judgment and is, therefore, in terms of section 83(b) of the said Act appealable forthwith and is not apposite to the present facts.

In the case of **VORSTER v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS** (2002)23 ILJ 1899 (LC) the following was stated at paragraph 28:

> "It is unwise or negligent on the part of the applicant in a dispute to abandon the proceedings in order to force a postponement. Even if the decision to refuse a postponement is prejudicial to the applicant, this did not give her a right to abandon the proceedings. The applicant abandoned the proceedings and was therefore the author of her own misfortune. There is therefore no merit in the review based on the refusal to have the matter postponed. The commissioner did not commit any irregularity in refusing the postponement."

See also **VAN WYK v MIDRAND TOWN COUNCIL AND OTHERS** 1991(4) SA 185 (W) at 188B-F; **MENDES AND ANOTHER v KITCHING NO AND ANOTHER** 1995(2) SACR 634 (EC), 1996(1) SA 259 (EC); **HAYSOM v ADDITIONAL MAGISTRATE, CAPE TOWN AND ANOTHER** 1979(3) SA 155 (C); **S v JONES** 1987(3) SA 823 (N).

In the view of the facts of the case I am of the view that the applicant was not entitled to interrupt the proceedings for the purpose of reviewing a ruling of the presiding officer of the disciplinary proceedings. No special reasons exist for the departure from the general principle that the proceedings should not be interrupted in mid stream, to dispose of the issues between the parties on a piecemeal basis. It is important to note that before the disciplinary hearing, the applicant contested the legality of the appointment of the third and fourth respondents as the Prosecutor and Presiding Officer respectively, on the basis

that the second respondent had not personally appointed them. There was no substance in this argument, and correctly rejected by the fourth respondent.

It is also important to note that the disciplinary code provides for the proceedings to take place in the absence of the accused if the accused is not present at the enquiry "without a valid reason". It is quite clear from the facts that the applicant was absent "without a valid reason".

On the facts before the fourth respondent, I am of the view that he did not commit any irregularity not to postpone the disciplinary hearing and to proceed in the applicant's absence.

Mr Olivier also submitted that the continuation of the hearing in the absence of the applicant on the following day was also irregular. In this regard he relied on **S v COTTY** 1979(1) SA 912 (NC). It is however important to note that in that case there was no evidence that the accused was aware of the changed trial date. In the present case the applicant was aware that the proceedings were set down for five days and that, as contemplated by a set down of that length meant that the proceedings were intended to and would be finalised in his absence, including a finding as to an appropriate sentence. The allegation that the applicant had only briefed his attorney for a single day is an averment contained in reply for the first time, and stands to be struck out, or ignored. It is also important to note that at no stage did the applicant, or his attorney, indicate that they were unavailable for this time.

It was also argued that the proceedings continued without notifying applicant and denying him the opportunity to put extenuating circumstances before the fourth respondent. In the circumstances, where the applicant indicated clearly that he did not wish to participate in the proceedings it was, in my view, not

necessary to invite him back to the proceedings for the purpose of hearing evidence in mitigation. I am not persuaded that the fourth respondent committed irregularity as far as the imposition of the applicant's penalty is concerned.

(d) **Termination of employment contract:**

Mr Olivier argued on behalf of the applicant that termination of his employment contract was of no legal force and effect, because clause 31.1 clearly states that the employer may terminate the contract in the event of the employer being dismissed as a penalty for misconduct in terms of the disciplinary code.

The relevant provisions of clause 31 of the employment contract state:

> "**31. Termination of the contract for misconduct by the employer**:
>
> 31.1 The **employer** may terminate this contract in the event of the **employee** being dismissed as a penalty for misconduct in terms of annexure B."

Clause 1.1 of the employment contract identifies the first respondent as the employer.
The disciplinary code stipulates in clause 20:

> "The mayor of the **employer** must appoint a person who is not an employee or a councillor of the **employer** as presiding officer for the enquiry."

In clause 25:

> "If the **employee** is found guilty, and after extenuating and aggravating

circumstances had been submitted and considered by the presiding officer, the presiding officer may:

.....

(i) dismiss him."

In clause 27:

"If the **employee** is dismissed, this contract is terminated in terms of paragraph 31 thereof."

Mr Sutherland, on behalf of the respondents, argued that on a proper construction of the provisions of a contract of employment and the disciplinary code it is plain that if the Presiding Officer decides to dismiss, the employee's contract is terminated. He also submitted that the mayor is the most suitable person to communicate the finding to the employee. It is, after all, the mayor under whose auspices the investigation is conducted, who is responsible for the employment of the Prosecutor and the Presiding Officer, and who has an obligation to oversee the process. In this regard, the second respondent as mayor wrote a letter to the applicant dated 20 May 2003 where he *inter alia* stated the following:

"With reference to clause 31 of your Employment contract with this Council you are hereby informed that your contract was terminated and that your last working day will be 20 May 2003."

Be that as it may, the first respondent at the special meeting of the municipal council held on 14 July 2003 resolved:

> "that the Council note the decision of Fabricius SC, the presiding officer in the disciplinary hearing involving Mr Molefe, to dismiss the aforesaid Mr Molefe, and approve and ratify the communication of such dismissal by the Mayor, Mr MP Jacobs to Mr Molefe."

Even if there is doubt as to the valid termination of the applicant's contract of employment, it has been removed by the last mentioned resolution.

**THE STATUS OF SECOND RESPONDENT:**

It was argued on behalf of the applicant that the election of the second respondent as mayor was flawed in several respects:

His election and that of the speaker and members of the executive took place without having been put on the agenda for the meeting; the mayor was nominated orally without having complied with the prescription that nominations for this office should be made in writing and accepted in writing and that the second respondent, therefore, not be considered as a candidate for the office of mayor because there was no valid nomination.

The attitude of the respondents is that, without acknowledging the merit of the applicant's contention, in order to simplify and shorten the proceedings the first respondent decided to ratify the alleged invalid appointments, including the nomination and election of the second respondent, in an attempt to remove any substance in the applicant's contentions.

**THE PURPORTED RATIFICATION:**

On the assumption that the second respondent was not properly elected, the question arises whether the subsequent ratification was good in law.

In **REID AND OTHERS v WARNER** 1907 TS 961 Innes, CJ stated the following on 971-972:

> "The essentials of a valid ratification are that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be."

Ratification can be in words or by conduct. In the case of **REID** (*supra*) the following was stated on p 976:

> "The position, then, is this: Her ratification of the Baker contract had a retroactive effect, and validated that contract as from the date of its execution, 9th February, 1904. She must be regarded as having on that date incurred certain obligations to the Bakers, and the £2000 was applied by her agent in part discharge of the liability. It was therefore expended for her use and benefit, and she has tacitly acquiesced in that appropriation; and it is now too late for her to go back upon it."

See also **THE LAW OF SOUTH AFRICA**, First Reissue, volume 1 paragraph 1-6 *in fine*.

It is important to note that, prior to the launch of these review proceedings, the applicant had accepted the appointment of the second respondent and indeed advanced various defences premised upon the validity of the appointment. During the disciplinary hearing the applicant's attorney referred to the second respondent as "die huidige burgemeester". Since 5 December 2002 all persons within the first respondent accepted and believed that the second respondent was the properly appointed mayor of the first respondent. On 5 December 2002 he was nominated by the outgoing mayor and was elected unopposed and has presided over the first respondent since that date. I am of the view that, apart from the fact that the first respondent ratified the election of the second respondent as mayor by conduct, since 5 December 2002, they also expressly ratified it on 14 July 2003 by taking a resolution to that effect.

As to the legal consequences of the said ratification it is important to note what Harms, JA stated in **SMITH v KWANONQUBELA TOWN COUNCIL** 1999(4) SA 947 (SCA) on p 952G-953C:

> "The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public. Watson apparently believed on insubstantial grounds that he had the necessary authority to act on behalf of the town council. He was wrong. His expressed intention was to act on behalf of the town council and not on his own behalf. It is a general rule of the law of agency that such **an act of an `unauthorised agent' can be ratified with retrospective effect** .....
>
> It was further argued that, after an objection has been taken to the authority of a person to act on behalf of another, reliance may not be placed upon a ratification that did not exist when the objection was taken. ..... Lest there be any future doubt about the matter, this judgment holds that the point is bad for the reasons that follow." (My underlining)

On p 954 paragraph E he continues as follows:

> "A party to litigation does not have the right to prevent the other party from rectifying a procedural defect."

See also: **MOOSA AND CASSIM NNO v COMMUNITY DEVELOPMENT BOARD**, 1990(3) SA 175 (A) at 180J-181B.

Mr Olivier submitted on behalf of the applicant that non-compliance with applicable standard rules and orders could not be ratified with any legal effect. In this regard he *inter alia* relied on the case of **NEUGARTEN AND OTHERS v STANDARD BANK OF SOUTH AFRICA LTD** 1989(1) SA 797 (A) where Kumleben, JA stated, on p 808H-J, the following:

> "It is well-settled law that there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded (I shall refer to such as a `void agreement'). In **CAPE DAIRY AND GENERAL LIVESTOCK AUCTIONEERS v SIM** 1924 AD 167, cattle were purchased in contravention of Law 28 of 1896 (T) which made it an offence to sell cattle or other livestock on a Sunday. The sale was held to be an unlawful and invalid transaction. The Court *a quo* held that
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> `there cannot be ratification of a bargain which is prohibited by statute'.

(See at 169 of the Appellate Division report of this case.) On appeal Innes CJ at 170, in reference to this point, confirmed that

`ratification relates back to the original transaction, and there can be no ratification of a contract which is prohibited and made illegal by statute'."

From the quotation above it is clear that the respondents' ratification in the present case has nothing to do with a statutory prohibition or illegality. The authority referred to above is therefore not apposite to the present application.

It is important to distinguish between acts which are *ab initio* void and which will never be legal on the one hand, and when "the affair is still in such a condition that the original act could be validly done", on the other hand.

See: **UITENHAGE MUNICIPALITY v UYS**, 1974(3) SA 800 (E) at 807;

**ROODEPOORT CITY COUNCIL v SHEPHERD**, 1981(2) SA 720 (A) at 734C-G.

Therefore, the council had to be in a position, or should have the authority, to act *de novo*. If so, they can validly ratify the acts under consideration.

See: **Silke, JM, THE LAW OF AGENCY IN SOUTH AFRICA** (Third Edition) p 292;

**Baxter, ADMINISTRATIVE LAW** (1991) p 363-4.

Mr Olivier also referred to several cases relating to election procedures and submitted that in matters of election, strict compliance with nomination procedures is required. It is however important to distinguish between a public election on the one hand and procedures followed during an internal election

in respect of office bearers.

It is clear that the applicant has not suffered any prejudice as a result of the appointment of the second respondent as the mayor of the first respondent and the subsequent ratification. The ratification of the appointment in my view removes any doubt about the lawfulness of the appointment of the second respondent.

In conclusion Mr Olivier submitted that Mr Grobbelaar and Mr Marais are in the employ of Hattingh Marais Incorporated from Bethlehem, who apparently is the correspondent attorney, and they attested to some of the affidavits to the answering affidavit of the respondent. He also pointed out that a commissioner of oaths certifying the affidavit of Mr Botha is Mr Harrington, also an attorney from Bethlehem, who is also a serving councillor of first respondent. He submitted that it was contrary to regulation 7(1) of the Regulations governing the administration of an oath or affirmation, GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, by GN R1428 of 11 July 1980 and by GN R774 of 23 April 1982. In **Erasmus, SUPERIOR COURT PRACTICE**, the legal position is, in my opinion, correctly summed up as follows on p E2-3:

> "A failure to observe this requirement can, however, in certain cases be condoned. In **TAMBAY v HAWA** it was held that `interest' in reg 7(1) must be given a limited meaning and cannot be extended to cover the remote and indirect interest which an employee of an attorney has in the matters dealt with in that attorney's office. Consequently a request for the dismissal of an application on the ground that applicant's affidavits had all been attested

before an attorney in the employ of the applicant's attorney was refused."

I agree with Mr Sutherland's submission that while the conduct may amount to a breach of professional etiquette, it is not illegal and insofar as it is necessary I am of the view that it can be condoned in the circumstances.

In the premises, the application cannot succeed. Mr Sutherland, on behalf of the applicant applied for costs on an attorney and client scale. In my view no special circumstances exist to grant such an order. **THE LAW OF SOUTH AFRICA**, First Reissue, Vol 3 par 321. Both counsel were *ad idem* that the successful party will be entitled to the costs of two counsel.

Consequently, the following orders are made:

1.The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

2.Leave is granted to the applicant to approach this Court for relief in respect of prayer 4 and/ or 5, if necessary, on the same papers duly amplified.

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**SPB HANCKE, J**

**On behalf of Applicant** : **Adv WH Olivier, SC**
**assisted by Adv JY Claasen**

**Instructed by**
**Naudes**

**On behalf of Respondents** : **Adv R Sutherland, SC**
**assisted by Adv D Vetten**

**Instructed by**
**McIntyre & Van der Post**
/Jacobs