IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 5238/12

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Applicant**

and

IMBABAZANE MUNICIPALITY	**First Respondent**
MOSES MTHETHELELI NDLELA	**Second Respondent**
COUNCILLOR: M.C. MKHIZE	**Third Respondent**
COUNCILLOR: T.Y NCUBUKA	**Fourth Respondent**
COUNCILLOR: A S NDLOVU	**Fifth Respondent**
COUNCILLOR: M.D MAZIBUKO	**Sixth Respondent**
COUNCILLOR: S.A JIYANE	**Seventh Respondent**
COUNCILLOR: S.W KHUMALO	**Eighth Respondent**
COUNCILLOR: M.N MTHEMBU	**Ninth Respondent**
COUNCILLOR: B.D MAZIBUKO	**Tenth Respondent**
COUNCILLOR: T.P DUBAZANE	**Eleventh Respondent**
COUNCILLOR: L.M MLABA	**Twelfth Respondent**
COUNCILLOR: T.E MCHUNU	**Thirteenth Respondent**
COUNCILLOR: M.T MVELASE	**Fourteenth Respondent**
COUNCILLOR: P.T SHELEMBE	**Fifteenth Respondent**

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Intervening Party**

JUDGMENT

Henriques J

Order:

1. The Second Respondent's contract of employment dated 3 November 2008, concluded with the First Respondent terminated by operation of law on the 17 May 2012, one year after the election held on the 18 May 2011.

2. The appointment and/or continued employment of the Second Respondent by the First Respondent beyond the 17 May 2012, as its Municipal Manager is null, void and invalid.

3. The proceedings of the meeting of the Municipal Council of the First Respondent held on the 20 June 2012 and all resolutions passed at such meeting are null and void *ab initio* and invalid.

4. The respondents are ordered to pay the applicant's and intervening party's costs of this application jointly and severally, the one paying the other to be absolved.

Background

1. This application which was enrolled for hearing on 26 June 2012, was instituted as a matter of urgency, with the founding affidavit deposed to on 22 June 2012. It was envisaged that interim relief would be granted, however, no interim relief was granted.

2. On 26 June 2012, Steyn J granted the respondent's leave to file an answering affidavit in which the constitutional challenge to Section 54 (a) of the Local Government: Municipal Systems Act 32 of 2000 (the "Systems Act") was raised. Initially, only the first to fifteenth respondents were cited. However, when the constitutional challenge was raised, the Minister of Co-Operative Governance and Traditional Affairs, as required to do, sought to intervene.

3. K Pillay J granted an order, on 27 August 2012, giving the Minister leave to intervene and directing that an affidavit be filed by 3 September 2012. It was also recorded that the reason for the postponement of the matter on the 27 August 2012, was the application to intervene, which becomes relevant to the issue of costs.

4. On 20 September 2012, when the matter served before me, there were two preliminary issues namely;

   4.1. an application for condonation for the late filing of the Minister's affidavit;

   4..2 an application to admit documents.

5. I was advised by Mr Dickson SC who appeared for the applicants and Mr Moodley SC who appeared for the respondents, that both applications would not be opposed, and that the respondents did not pursue their challenge to the authority of the deponent to the applicant's founding affidavit. In addition the applicant was seeking final relief.

Issues for determination

6. There were several issues for determination namely:

6.1 whether the applicant was entitled to institute these proceedings as an urgent application;

6.2 whether the applicant, was entitled to the relief based on the principle of legality, or whether the application ought to have being brought in terms of the provisions of the Promotion of Administrative Justice Act, Act 3 of Act 2000 (PAJA);

6.3. whether the applicant had *locus standi* to institute these proceedings;

6.4 whether there exists an inter-governmental dispute between the applicant, the Minister, and the first respondent and whether or not the provisions of the Intergovernmental Framework Act, Act 13 of 2005 (IGFA) applies;

6.5. the validity of the appointment of the second respondent and the resolutions taken at the meeting of the first respondent held on the 20 June 2012;

6.6. the constitutional challenge to Section 54A.

6.7. the costs occasioned by the application.

7. Even though the parties legal representatives were *ad idem* that disputes of fact existed, the application was dealt with based on the questions of law which arose.

Factual Background to the Application

8. The application centred around the employment of the second respondent as Municipal Manager of the first respondent and involved his continued employment beyond the 17 May 2012.

9. The second respondent concluded a written contract of employment with the first respondent on 3 November 2008 for the position of Municipal Manager.

10. He remained in employment with the first respondent in such capacity beyond the 17 May 2012 and still held this position on 20 June 2012.

11. On 4 June 2012 and on 11 June 2012, the second respondent was advised in writing, that his contract of employment with the first respondent had terminated.

12. Despite this a meeting of the first respondent was convened on 20 June 2012, by the second respondent and chaired by him as Municipal Manager. This was irregular as only the Speaker can call meetings of first respondent's council.

13. The applicant first learnt of the continued employment of the second respondent as Municipal Manager on 4 June 2012. On being advised of the impending meeting on 20 June 2012, the applicant sent two officials to attend such meeting and to advise the Council of the first respondent of the illegality of their actions.

14. The meeting went ahead nonetheless in the absence of the officials and certain council members including the Speaker. The meeting concluded with the Speaker, Mayor and Deputy Mayor removed from office. No notice had been given to either the Speaker or the Mayor of the intent to remove them from office

15. A new Mayor and Speaker were elected and appointed, unlawfully, as there was non compliance with the procedure set out in the Local Government: Municipal Structures Act, No 117 of 1998.

The appointment of the Municipal Manager

16. The appointment of the municipal manager is regulated by the provisions of sections 56 and 57 of the Systems Act. On 13 October 2008, Section 57 (6) of the Systems Act was amended by the Local Government Laws Amendment Act 19 of 2008 to provide that the employment contract for a municipal manager must:

> "*a) be for a fixed term of employment up to a maximum of five years, but not exceeding a period ending one year after the election of the next council of the municipality;*…"

17. On the 5 July 2011, the Local Government: Municipal Systems Amendment Act No. 7 of 2011 was enacted. It introduced Section 54 A.

18. The amended Section 56 requires the MEC for local government to be informed of the appointment of the municipal manager within 14 days of the date of appointment. The MEC must within 14 days of receipt of that information submit a copy thereof to the National Minister.

19. Should the appointment of the municipal manager be in contravention of the Systems Act, then section 54A(8), empowers the MEC for local government, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipality which may include an application to court for a declaratory order on the validity of the appointment.

20. The employment contract of the second respondent as municipal manager of the first respondent, was concluded on the 3 November 2008 after the 2008 amendment to the Systems Act became effective. Consequently, by operation of law and having regard to section 57 (6)(a), the second respondent's contract of employment terminated on 18 May 2012.

21. The Systems Act makes it clear that on termination of the second respondent's contract a new municipal manager ought to have been appointed. This was not done and the second respondent was still holding the position of municipal manager on the 20 June 2012.

22. The applicant is thus entitled to the declaratory order in respect of the termination of the second respondent's contract of employment.

Was the applicant entitled to institute these proceedings based on the rule of law and principle of legality as provided for in the Constitution or as the first to fifteenth respondents contend, ought proceedings to have been brought in terms of the provisions of PAJA.

23. In summary the applicant contends that in terms of the Constitution and the principle of legality, no person exercising public power may exercise such power or perform functions beyond those conferred upon them by law. Such exercise of power is reviewable based on the principle of legality. The applicant specifically relies on section 56 and section 57 for the relief its seeks, and places no reliance on section 33 of the Constitution or PAJA.

24. In support of this contention the applicant contends that the MEC has constitutional powers to support, monitor and supervise local government.

This is based on section 151 (3) of the Constitution read with sections 154 (1), 155 (6) and 155 (7). In addition the applicant submits that the application is brought in terms of the powers conferred by section 54 A (8) of the Systems Act. Such section obliges the applicant to take action immediately.

25. In opposition the respondents submit that the conduct complained of constitutes administrative action and decisions as defined in terms of PAJA and consequently fall to be reviewed in terms of PAJA, particularly section 6 thereof. PAJA, is the first port of call when one is reviewing administrative action and decisions, and the principle of legality can only be resorted to when the provisions of PAJA do not apply.

26. In Pharmaceutical Manufacturers Association of SA and Another: In Re: Ex Parte President of the RSA and Others[1], the Constitutional Court confirmed that any exercise of public power must be done within the confines of the law[2] and that a court is entitled, relying on the principle of legality, to review the exercise by a functionary of public power.[3]

27. The applicant has powers expressly conferred by the Constitution to support, monitor and supervise local government. This is apparent from sections 151 (3), 154 (1), 155 (6) and 155 (7).

28. Section 151(3) reads :

> "*A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."*

[1] 2000 (2) SA 674 (CC)
[2] Pharmaceutical supra at paragraphs 33 to 51
[3] Pharmaceutical supra at paragraphs 17 to 20, 85 to 90

29. Section 154 (1) reads:

> *"The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."*

30. Section 155 (6) makes provision for each provincial government to establish municipalities in its province, consistent with national legislation and must by legislative or other measures provide for the monitoring and support of local government in the province and promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

31. Section 155 (7) provides that both national government and provincial governments have legislative and executive authority to ensure the effective performance by municipalities of their functions by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

32. The Supreme Court of Appeal has held that the principle of legality applies to the "*exercise of all public power and is not limited to the narrow realm of administrative action only*." [4]

33. In the court a quo, it was held that the exercise of a public power is reviewable in terms of the principle of legality quite apart from whether it is reviewable in terms of PAJA. This was not challenged on appeal.

[4] Judicial Service Commission, The Chairperson, Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae) Case no 818/2011 delivered on 14 September 2012 at paragraph 21.

34. Section 139 of the Constitution specifically makes provision for provincial intervention in local government. In addition, having regard to section 1(bb) of PAJA the review of the exercise of executive powers and functions of the MEC are excluded. Likewise section 1 (cc) excludes the review of the exercise of executive powers and functions of a municipal council.

35. Consequently, I agree with the submissions of the applicant that it was entitled to institute these proceedings based on the principle of legality. The Constitution also empowers the MEC to supervise, monitor and support local government and intervene and take necessary and appropriate action in local government. It must then follow that the applicant has *locus standi* to institute these proceedings.

Is there an intergovernmental dispute between the applicant, the Minister, and the first respondent and do the provisions of the Intergovernmental Framework Act, Act 13 of 2005 (IGFA) apply

36. The applicant submits that the IGRFA gives expression to Section 41 of the Constitution which deals with the relationship between intergovernmental departments. The applicant submits that the provisions of IGFA do not apply as the applicant invoked the provisions of Section 139 of the Constitution and Section 54 A of the Systems Act. The applicant submits that this is not an intergovernmental dispute but rather a matter in which the applicant is intervening in illegal conduct by a municipality. The conduct complained of is of such a nature that it requires urgent action by the MEC.

37. Even if they do apply, the applicant submits that she did attempt to settle the matter by sending officials to advise the respondents of the illegal

conduct complained of, consequently she acted in accordance with the Act and the matter was only referred within 14 days.

38. The respondents submit that the applicant ought to have followed the procedure of declaring a formal intergovernmental dispute and exhausted the mechanisms provided for in the IGFA before launching these court proceedings. In addition the respondents submit that because Chapter 3 of the Constitution provides that disputes must be resolved at a political level rather than resorting to litigation, this court can, in terms of Section 41 (4) if it is not satisfied that the requirements of sub section (3) have been met, refer the dispute to the organs of state involved.

39. I do not agree that the provisions of the IGFA apply. Section 3 of the IGFA specifically provides that in the event of a conflict with the provisions of the IGFA and another Act regulating intergovernmental relations, the IGFA does not apply. In addition the decision relied upon by the respondents, [5] was decided before the commencement of the IGFA and section 39 specifically excludes an intervention in terms of section 139. I agree with the submissions of the applicant that this is not an intergovernmental dispute. The conduct of the first and second respondents required immediate action by the applicant and constituted an illegality and consequently the provisions of the IGFA do not apply.

40. Even if I am wrong in finding that the IGFA does not apply, then having regard to the facts of this matter, the applicant attempted to settle the dispute. Two officials were sent to the respondents.

<u>The Constitutional Challenge to Section 54 A of the Systems Act.</u>

[5] Uthukela District Municipality and Others v President of the Republic of South Africa and Others 2003 (1) SA 678 (CC)

41. As indicated earlier in this judgment, the contract of employment of the Second Respondent terminated by operation of law on 17 May 2012. The first respondent was then obliged to advertise the post of municipal manager subject to the provisions of Section 57(6) of the Systems Act read with the amendments to the Systems Act introduced by the Local Government: Municipal Systems Amendment Act No. 7 of 2011. Any subsequent appointment of the second respondent as Acting Municipal Manager would have to comply with the provisions of the Systems Act (section 57(6)). The question of the retrospectivity of the Amendment Act consequently does not arise.

42. In addition, I agree with the submissions of Mr Lebala, who appeared for the intervening party, that once a finding is made that the contract of employment of the second respondent terminated on 17 May 2012, *caedit questio*. For reasons mentioned above, it is not necessary to deal with this challenge. I do not agree however, with the submissions of the respondent that section 54 A of the Systems Act infringes against the separation of powers. Having regard to the authorities referred to, I agree with the submission that this relates to the separation between the executive, legislative and judicial arms of government and that this separation can never be absolute.

43. The Constitution[6] and the Certification[7] judgment make this clear. Section 139 of the Constitution specifically makes provision for provincial intervention in local government, in "*extreme cases*"[8] and "*to supervise the*

[6] Section 151(3), 154(1), 155(6) and 155(7)
[7] 1996(4) SA 744 (CC) at paragraphs 370 to 372.
[8] MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council and Others 2007(3) SA 436 NPD

affairs of local governments and to intervene when things go awry".[9] The Systems Act[10] also caters for provincial monitoring of municipalities.

44. In my view, in light of the fact that the Constitution specifically recognises the right of an MEC to intervene when necessary, does not infringe on the separation of powers.

The validity of the appointment of the second respondent and the resolutions taken at the meeting of the first respondent held on the 20 June 2012;

45. By the time the matter was argued, it was admitted that the second respondent who chaired the meeting of council on 20 June 2012, in his capacity of municipal manager was not entitled to do so and consequently any decisions and or resolutions taken at the meeting were not valid.

Urgency

46. Given the facts of this matter, I agree that the application was urgent. The applicant was advised on 4 June 2012, of the continued employment of the second respondent. Immediately on becoming aware of the outcome of the meeting on 20 June 2012, the application was instituted.

Costs

47. During the course of argument Mr Dickson, submitted that given the circumstances all the respondents save the first respondent, ought to pay the costs of the application, jointly and severally the one paying the other to be absolved. This is in keeping with the orders sought in the rule nisi.

[9] Premier, Western Cape and Others v Overberg District Municipality and Others 2011 (4) SA 441 (SCA) at paragraph 1
[10] Section 105

48. It is trite that where constitutional issues are raised, the normal costs order would be that each party would bear their own costs occasioned by such application[11].

49. In instances however, where actions are considered frivolous, vexatious or manifestly inappropriate, the general rule relating to the assertion of constitutional rights does not apply and a cost order maybe granted at the discretion of the court[12]. It is on this basis that the applicant seeks an order for costs.

50. In respect of the third to fifteenth respondents, section 28 of the Local Government: Municipal Structures Act and the decision in Swartbooi & Others v Brink & Others[13] avails the respondents. At paragraph 18 of the judgment, the court held that "*s 28 covers the conduct of members of a municipal council that constitutes participation in deliberations of the full council in the course of legitimate business of that council."*

51. Given the facts of this matter the applicant submits that the third to the fifteenth respondent's ought not to enjoy the protection offered by section 28 and be ordered to pay the costs of the application, jointly and severally with the first and second respondents.

52. It is evident from the papers that the second respondent knew that his contract of employment had terminated. Yet he continued in the position. He convened a meeting of the Council of the First Respondent without compliance with the relevant prescripts. Decisions were taken at the meeting without due process and were tantamount to illegal acts. This despite the warnings issued by the applicant . The conduct in my view fell outside the protection afforded by section 28 and was illegal.

[11] Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC) at paragraphs 21 to 23
[12] Biowatch supra at paragraph 24
[13] 2006 (1) SA 203 (CC)

In the result, I make the following orders:

1. The Second Respondent's contract of employment dated 3 November 2008, concluded with the First Respondent terminated by operation of law on the 17 May 2012, one year after the election held on the 18 May 2011.

2. The appointment and/or continued employment of the Second Respondent by the First Respondent beyond the 17 May 2012, as its Municipal Manager is null, void and invalid.

3. The proceedings of the meeting of the Municipal Council of the First Respondent held on the 20 June 2012 and all resolutions passed at such meeting are null and void *ab initio* and invalid.

4. The respondents are ordered to pay the applicant's and intervening party's costs of this application jointly and severally, the one paying the other to be absolved.

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HENRIQUES J

DATE OF HEARING: 20 SEPTEMBER 2012

DATE OF JUDGMENT: 21 DECEMBER 2012

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