IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 6062/2020P

In the matter between:

TAHLEHO JOHANNES MOTLOUNG	**FIRST APPLICANT**
CONSTANCE THANDIWE BUTHELEZI	**SECOND APPLICANT**
LEPHLA SIZAKELE HOFFMAN	**THIRD APPLICANT**
NTHABISENG CYNTHIA XULU	**FOURTH APPLICANT**
NTOMBFIKILE SAMKELISIWE MKHIZE	**FIFTH APPLICANT**
LEHLOHONOLO CYPRIAN MOLOI	**SIXTH APPLICANT**
SIMANGELE GRACE KUNENE	**SEVENTH APPLICANT**
MOSES SIPHO KEVIN GUMBI	**EIGHTH APPLICANT**
GOODWILL FUKANG MOLEFE	**NINTH APPLICANT**
SIBUSISO MANDLENKOSI CHARLES ZIKODE	**TENTH APPLICANT**
NLEBUHENG MAUREEN KHANYE	**ELEVENTH APPLICANT**

and

NQUTHU LOCAL MUNICIPALITY	**FIRST RESPONDENT**
COUNCIL OF NQUTHU LOCAL MUNICIPALITY	**SECOND RESPONDENT**
BONGINKOSI PAUL GUMBI	**THIRD RESPONDENT**

WELCOME SAKHILE MPANZA **FOURTH RESPONDENT**

MPUMELELO BALDWIN JIYANE **FIFTH RESPONDENT**
ZANELE SITHOLE **SIXTH RESPONDENT**

RICHARD SIKHUMBUZO LANGA **SEVENTH RESPONDENT**

EMMANUEL MBEKEZELI MKHWANAZI **EIGHTH RESPONDENT**

MBONGENI EPHRAIM MNGUNI **NINTH RESPONDENT**

EMMANUEAL LINDOKUHLE SHABALALA **TENTH RESPONDENT**

NJABULO MBONGISENI BUTHELEZI **ELEVENTH RESPONDENT**

SIFISO MSALOFY BUTHELEZI **TWELFTH RESPONDENT**

SABELO PRAISEGOD MATHE **THIRTEENTH RESPONDENT**

FANA ALFRED HLETSHWAYO **FOURTEENTH RESPONDENT**

SIYABONGA MABILABILA KUNENE **FIFTEENTH RESPONDENT**

JERRY NATHI KHOZA **SIXTEENTH RESPONDENT**

JOYCE ZANDILE NDIMA **SEVENTEENTH RESPONDENT**

SAKHILE DERRICK MASIMULA **EIGHTEENTH RESPONDENT**

PERTUNIA PHINDILE NTOMBELA **NINETEENTH RESPONDENT**

NTOMBIKAYISE GOODNESS MDLALOSE **TWENTIETH RESPONDENT**

MENGIWE RONIT NGOBESE **TWENTY FIRST RESPONDENT**

THAMSANQA ABION DLAMINI **TWENTY SECOND RESPONDENT**

BONGINKOSI INNOCENT ZWANE **TWENTY THIRD RESPONDENT**

EVELYN THULISILE NHLEBELA **TWENTY FOURTH RESPONDENT**

HOLIHLAHLA MNTOMBUHLE SHELEMBE **TWENTY FIFTH RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS RESPONDENT **TWENTY SIXTH**

THE MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE AND TREASURY KWAZULU-NATAL **TWENTY SEVENTH RESPONDENT**

SITHEMBISO BLESSING MTHEMBU RESPONDENT **TWENTY EIGHTH**

NOMBUSO ZANDILE MBONGWA **TWENTY NINTH RESPONDENT**

BHEKANI BRIAN SOKHULU **THIRTIETH RESPONDENT**

ABSA BANK **THIRTY FIRST RESPONDENT**

FIRST NATIONAL BANK **THIRTY SECOND RESPONDENT**

THE STANDARD BANK OF SOUTH AFRICA RESPONDENT **THIRTY THIRD**

NEDBANK RESPONDENT **THIRTY FOURTH**

INVESTEC BANK **THIRTY FIFTH RESPONDENT**

Coram: Mnguni J

Heard: 29 January 2021

Delivered: 17 May 2021

O R D E R

The following order shall issue:

As to the main application

(a) The first impugned decision be and is hereby declared invalid.

(b) The declaration of invalidity shall take effect from the date of this order.

(c) The first, sixth to twenty second respondents and twenty eighth respondent are directed to pay the costs, jointly and severally, the one paying the other to be absolved.

As to the counter application

(a) The counter-application be and is hereby dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

J U D G M E N T

Mnguni J

[1] Two applications (the main and counter-application) are before this court for determination. In the main application, the applicants seek to declare invalid the decisions taken on 2 September 2020 relating to the appointments of the 28th to 30th respondents to the positions of Acting Municipality Manager, Acting Chief Financial Officer and Acting Director of Planning, Housing and Land Administration respectively of the first respondent, Nquthu Local Municipality (the Municipality) (the first impugned decision). In the counter-application, the 26th respondent, the Member of the Executive Council for Cooperative Governance and Traditional Affairs (the MEC) seeks to declare invalid the decision taken on 26 March 2020 appointing the 10th respondent to the Executive Committee (the Exco) of the second respondent, the Council of Nquthu Local Municipality (the Council) and his subsequent election as the Mayor of the Municipality.

[2] The applicants are all councilors and representatives of the African National Congress (the ANC) in the Municipality. The 6th to 22nd respondents are all councilors and representatives of the Inkatha Freedom Party (the IFP) in the Municipality. The 9th respondent was the speaker of the Council at the time of the events giving rise to these applications. The 23rd to 25th respondents are each councilors and representatives of the Democratic Alliance (the DA), National Freedom Party (the NFP) and Economic Freedom Fighters (the EFF) respectively. I shall refer to the 6th to 25th respondents collectively as the municipal respondents and individually as cited in these proceedings.

[3] The 27th respondent is the Member of the Executive Council for Finance and Treasury, KwaZulu-Natal. The 31st to 35th respondents are ABSA Bank, First

National Bank, Standard Bank of South Africa, Nedbank and Investec Bank respectively. I shall refer to the 31st to 35th respondents collectively as the banks and individually as cited in these proceedings. The banks are cited because they provide banking services and hold certain deposits on behalf of the Municipality. No relief is sought against the banks.

[4] The issues arising in these applications will be better understood against the background that follows. Following the local government elections on 3 August 2016 the political composition of the Council of the Municipality comprised of 33 Councilors of which 15 were IFP, 14 were ANC, two were the NFP and one each for the DA and EFF. The 3rd to 5th respondents were employed as senior managers of the Municipality pursuant to contracts concluded on 24 August 2015. On 23 June 2017, the Council resolved to renew and extend their contracts for a period from 23 June 2017 to until a year after the next local government elections which were held on 3 August 2017. The contracts giving effect to those arrangements were signed two days later after the passing of the resolution. The then MEC was not happy with those arrangements and considered the contracts to be illegal on the basis that the contracts did not comply with the legislation governing that level of employment. She subsequently sought, in her monitoring and oversight role, to obtain the necessary documents pertaining to those contracts with the aim of establishing whether the contracts were compliant with all the legal requirements and processes applicable to the senior managers' appointments.

[5] When the documents were not forthcoming, the then MEC instituted an application to compel delivery of the documents and, simultaneously sought an order suspending the 3rd to 5th respondents' appointments. On 28 November 2017 Mahabeer AJ granted the interim relief substantially as asked for. Notwithstanding Mahabeer AJ's order, the information requested was only partially responded to and the 3rd to 5th respondents continued to hold themselves out as the officials of the Municipality in defiance of Mahabeer AJ's order.

[6] As a result of the 3rd to 5th respondents unlawful conduct, the then MEC brought an application reviewing and setting aside their appointments on the basis that the contracts underlying their appointments were illegal and ultra vires. That

application served before Gorven J on 12 August 2019 who granted the order substantially as asked for. On 11 September 2019 the Council and the 3rd to 5th respondents sought and were refused leave to appeal Gorven J's order. Aggrieved by that outcome the Council and the 3rd to 5th respondents petitioned the Supreme Court of Appeal for leave to appeal which petition met the same fate on 13 November 2019.

[7] As the 3rd to 5th respondents continued to hold themselves out as the officials of the Municipality the MEC brought a further urgent application in February 2020 to, inter alia, compel the 3rd to 5th respondents to comply with Mahabeer AJ's order and to direct them to vacate their respective unlawful appointments with immediate effect and not to return to the Municipality's offices and premises until those proceedings were finally determined. On 3 August 2020 Moodley AJ confirmed Mahabeer AJ's order of 28 November 2018. By that time the 3rd to 5th respondents had already approached the Supreme Court of Appeal for reconsideration of its decision to refuse leave to appeal Gorven J's order under s 17(2(f) of the Superior Courts Act.[1] On 5 March 2020 the Supreme Court of Appeal refused the reconsideration application. Subsequently the 3rd to 5th respondents applied to the Constitutional Court for leave to appeal Gorven J's order which application was dismissed on 24 June 2020.

[8] The next episode of relevance to the present applications occurred on 15 March 2020 when the President of the country declared a National Disaster in terms of the Disaster Management Act[2] (the DMA). That declaration was followed by the issuing of the COVID 19 Regulations[3] by the Minister of Cooperative Governance and Traditional Affairs (the Minister) on 18 March 2020. On 19 March 2020 the 9th respondent issued a notice convening a meeting of the Council which he scheduled for 26 March 2020.

[9] On 23 March 2020 the President announced that the country would enter a National Lockdown for 21 days with effect from midnight on 26 March 2020. On 24 March 2020 the IFP advised the 9th respondent that it had removed the 16th

[1] 10 of 2013.
[2] 57 of 2002.
[3] Regulations published in GN 318, *GG* 43107, 18 March 2020.

respondent from the Exco and from his position as the Mayor. The IFP advised the 9th respondent that it had elected the 10th respondent to be in the Exco and to the position of Mayorship in the 16th respondent's stead. On 25 March 2020 the Minister published directions applicable to the provinces and municipalities in respect of certain matters in response to the COVID 19 pandemic.[4] Shorn of words not now relevant regulation 6.7.2(e) directed the municipalities to suspend all ordinary council meetings. In line with the Minister's direction, the MEC issued circular No 8 of 2020 (annexure 'TJM5') on the same day setting out such things that the municipalities could do during the period of lockdown. The MEC's circular also suspended the council meetings and all plenary sittings of Municipal Council and their structures during the period of the lockdown.

[10] On 26 March 2020, the Deputy Director (Mr T A Mdadane) in the office of the MEC addressed a letter to the 9th respondent confirming a telephone conversation between him and the 9th respondent regarding the scheduled meeting of 26 March 2020 and advised the 9th respondent to postpone the meeting on the ground that a continuation with the meeting would be unlawful given the directives issued by the Minister on 25 March 2020. However, due to some other reasons, the meeting scheduled for 26 March 2020 did not proceed.[5] More about this meeting later as it is central to the MEC's counter-application.

[11] Pursuant to Moodley AJ's order, on 5 August 2020 the 9th respondent issued a notice convening a special council meeting for 13 August 2020 to be conducted through virtual platforms. This meeting did not proceed due to technical glitches. On 24 August 2020 the 9th respondent issued another notice convening a special council meeting for 27 August 2020 which he later cancelled. On 31 August 2020 the 9th respondent issued another notice convening another special council meeting for 2 September 2020. In the notice convening this meeting the 9th respondent stated the following: 'Councilors are requested to bring along special council agenda for 13th

[4] Regulation Gazette No 11063 vol. 657, *GG* 43147, 25 March 2020.
[5] According to the applicants the Council meeting did not proceed because members of the community who gathered in the Council chamber made it impossible for that meeting to proceed resulting in the 9th respondent moving the Council meeting to another venue in contravention of the standing rules of the Municipality.

August 2020'. This aspect is one of the issues which is hotly contested by the parties, and I shall return to it later.

[12] Although the 1st applicant has not given specific date(s) in relation to this, he asserts that he had asked the 9th respondent whether the meeting of 2 September 2020 would be a continuation of the adjourned or discontinued meeting of 13 August 2020. In response the 9th respondent had answered in the affirmative. The 1st applicant asserts that in his subsequent interaction with the 9th respondent about this meeting the 9th respondent had produced a document which from a cursory gleaning appeared to be a report on the appointments of the 28th to 30th respondents. The 1st applicant asserts that he directed the 9th respondent to the provisions of clause 13 of the standing rules and orders (the standing rules) which prohibit the introduction of new items to a meeting which is a continuation of a meeting that was adjourned previously.

[13] On 8 September 2020 the 9th respondent made available to the Council the minutes of the council meeting held on 2 September 2020 (annexure 'TJM12'). A perusal of annexure 'TJM12' reveals that all applicants attended this meeting. It also records, inter alia, that a decision was taken and the resolution was passed appointing the 28th to 30th respondents to fill the positions in the first impugned decision. The applicants are asserting that annexure 'TJM12' is a fraudulent document because no appointments were made in any Council meeting. They also assert that these vacancies were never advertised and that no request was made to the MEC to second any person to fill those positions on a temporary basis whilst the Municipality was embarking on the recruitment process to fill them. They assert that these appointments are unlawful. I hasten to record that whether annexure 'TJM12' is a fraudulent document remains an allegation which cannot be determined by this court in these proceedings on the basis of untested allegations on paper.[6]

[14] On 15 September 2020 the 9th respondent issued another notice convening a special council meeting for 18 September 2020. The meeting of 18 September 2020

[6] *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others* 2014 (5) SA 406 (SCA).

did not proceed as it was not quorate. This meeting was adjourned to 22 September 2020. Seventeen councilors attended the meeting on 22 September 2020. The meeting proceeded and councilors unanimously resolved to appoint Mlungisi Ndlovu[7] (Mr Ndlovu) and the 28th and 29th respondents in acting capacities for a period of three months as Senior Manager of Planning, Housing and Land Administration, Municipal Manager and Chief Financial Officer respectively. I interpose to record that Mr Ndlovu is not a party in the proceedings and that the decisions taken at this meeting are not challenged in these applications.

[15] Against this background, the applicants launched the main application on 17 September 2020 contending that the first impugned decision is susceptible to challenge on two main grounds. First, they contend that the municipal respondents have contravened the provisions of s 54 of the Local Government: Municipal Systems Act,[8] (the Systems Act) in that the 28th respondent was appointed as a municipal manager without the Council adhering to the procedures embodied in the Systems Act and its Regulations. They contend further that flowing from the 28th respondent's unlawful appointment, the 28th respondent had unlawfully appointed the 29th and 30th respondents in the first impugned decision, without following the provisions of s 56 of the Systems Act.

[16] Second, they contend that the Council meeting of 2 September 2020 was irregularly convened in that the 9th respondent had failed to give the applicants clear 72 hours' notice of the meeting as required by s 4.2(b) of the standing rules and that the 28th to 30th respondents' appointments were made in contravention of clause 13.1 of the standing rules. The linchpin of the complaint is that the first impugned decision could not be dealt with in the meeting of 2 September 2020 because clause 13.1 prohibits introducing of new item in a meeting which is a continuation of a meeting that was adjourned. Allied to that is their contention that the Municipality had not yet declared those positions at the time and that the agenda of 13 August 2020 did not have any item relating to those appointments.

[7] He was one of the Managers in the Municipality during that time.
[8] 32 of 2000.

[17] The MEC has aligned himself with the main relief which the applicants are seeking. And on his part, he also launched the counter-application challenging the second impugned decision on two grounds. First, he contends that the special council meeting of 26 March 2020 was unlawful because it was held in contravention of COVID 19 directions issued by the Minister on 25 March 2020. Second, he contends that there was non-compliance with the standing rules in respect of a change of the venue of the meeting, the 10 minutes' rule for quorum for the commencement of the meeting and s 43 read with schedule 3 and ss 48(4), (2) and (3) of the Local Government: Municipal Structures Act[9] (the Structures Act) when the 10th respondent was elected to the Exco and eventually the Mayor of the Municipality. In consequent, the MEC seeks to declare all the decisions taken in this meeting invalid.

First impugned decision

Standing rules

[18] Though the parties initially held a divergent view as to which standing rules are applicable for the purposes of adjudication of these applications, by the time the applications were heard, it had become common cause that the applications fall to be considered in light of the standing rules published in Provincial Gazette no 25 of 2009 dated 17 April 2009 (2009 standing rules). The 2018 standing rules devised by the MEC were not gazetted although they were approved by the Municipality were not published by the Municipality as envisaged in s 13 of the Systems Act. In the result, this aspect had withered in the vine as an issue for determination in these proceedings.

Sections 54 and 56 of the Systems Act

[19] Section 54 of the Systems Act deals with the Code of Conduct for councilors contained in Schedule 1 to the Systems Act. It provides that the Code of Conduct contained in Schedule 1 applies to every member of the municipal council. Schedule 1 of the Systems Act enumerates the particular obligations imposed on each municipal councilor together with the sanctions which a municipal council may impose on a particular municipal councilor for a breach of such Code. The applicants

[9] 117 of 1998.

have not specified on which of the provision(s) in Schedule 1 they are relying on nor do they make reference to any particular transgressions of the Code in relation to any particular respondent who may have contravened the Code. The allegations are broadly asserted with no specificity to any identifiable breach by any of the respondents. In the circumstances, I am not persuaded that the applicants have established any ground for a review emanating from s 54. The applicants' contentions under this section is built on a foundation of sand, and is obviously unsustainable.

[20] In any event, it was s 54A of the Systems Act which dealt with the appointment of municipal managers and acting municipal managers. This section was introduced by the Local Government: Municipal Systems Amendment Act[10] (the Systems Amendment Act). On 9 March 2017 the Constitutional Court declared this section unconstitutional in *SAMWU*[11] and such declaration was suspended for a period of 24 months to allow the legislature an opportunity to correct the defect. When the Constitutional Court was approached to extend the period of suspension of the declaration of invalidity, it refused the application. On 9 March 2019 the declaration of invalidity became final when the legislature failed to correct the defect. Consequently, the sections introduced or amended by the Systems Amendment Act have since been inoperative. The first impugned decision was taken on 2 September 2020 at the time when s 54A was inoperative.

[21] In any event, it was s 56 of the Systems Act which dealt with the appointment of managers directly accountable to municipal managers. As is the case with s 54, the amendment to this section introduced by the Systems Amendment Act was declared unconstitutional and invalid in *SAMWU.* [12] Prior to the amendment, s 56(1)(a) provided that 'A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager'. Section 56(1)(b) provided that 'A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties

[10] 7 of 2011.
[11] *South African Municipal Workers' Union v Minister of Co-operative Government and Traditional Affairs and others* 2017 (5) BCLR 641 (CC).
[12] *SAMWU* above.

associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination'. The amendment introduced by the Systems Amendment Act in which s 56 in its original form was substituted by s 3 and amended by s 4 of the Systems Amendment Act and read 'A person appointed in terms of paragraph (*a*)(i) must at least have the skills, expertise, competencies and qualifications as prescribed'. At the time of the first impugned decisions, s 56 in its unamended form would have been applicable and in that form, what s 56 required was that a municipal council must make the appointments after consultation with the municipal manager and that the person appointed as a manager must have the relevant skills and expertise to perform the duties associated with the post in question.

[22] Of significance, the letters of appointment (annexures 'TJM2' and 'TJM3') make it clear that the Council resolved to appoint the 29th and 30th respondents on the first impugned decision at a special meeting held on 2 September 2020. It is not the applicants' case that these acting appointments were made by the Council without consultation with the municipal manager and that the 29th and 30th respondents did not have relevant skills and expertise to perform such functions. In the circumstances, the applicants have not shown any cause of action or basis for a review based on a breach of s 56 of the Systems Act.

Non-compliance with s 4.2(b) of the standing rules

[23] The applicants' complaint under this head is that when the 9th respondent scheduled the special council meeting for 2 September 2020, he did so without complying with s 4.2(b) of the standing rules. In its relevant part this section provides that notice to attend a meeting in terms of sub-rule (1) shall be given at least 72 hours prior to a special meeting. The applicants assert that a notice convening this special meeting was issued on 31 August 2020 and the special meeting was scheduled to be held on 02 September 2020. For that reason, they contend that the notice fell short of the threshold required by s 4.2(b).

[24] The municipal respondents disagree. They contend that the meeting of 2 September 2020 was the return date of an adjourned special council meeting which was previously set down for 13 August 2020 which notice was issued on 5 August

2020, which is more than 72 hours' notice. They contend that rule 13.1 which deals with the adjourned meeting provides that when a meeting is adjourned, notice of the continuation meeting shall be served in terms of rule 2 of these standing rules. They observe, correctly in my view, that the standing rules do not have rule 2 instead they have s 2 which deals with the frequency of council meetings. In terms of rule 12.1 a council meeting may be adjourned to any day or hour. Rule 12.1 does not impose a 72-hour limitation on the adjourned meeting.

[25] As I see it, the applicants do not dispute that the meeting of 2 September 2020 was the return date of an adjourned special council meeting previously set down for 13 August 2020. They also do not dispute that the notice for the meeting of 13 August 2020 was issued on 5 August 2020. I say this because the 1st applicant deposed in the founding affidavit that he had asked the 9th respondent whether the meeting of 2 September 2020 was a continuation of the meeting of 13 August 2020 which had been adjourned or discontinued because of the glitches. The 1st applicant states that the 9th respondent had answered this question in the affirmative. The 1st applicant deposed further that the 9th respondent had shown him a document which purported to be a report on the appointments of the 28th to 30th respondents as acting managers and that at that point he directed the 9th respondent to rule 13 of the standing rules. It seems to me that the force of the applicants' assertion that the 9th respondent had failed to comply with s 4.2(b) is diminished by the 1st applicant's aforesaid version of the events recorded in this paragraph.

Was there a report presented to Council on 2 September 2020 regarding the appointment of an acting municipal manager?

[26] It is common cause that the 9th respondent issued the notice on 31 August 2020 (annexure 'JM11') in which at paragraph 3 thereof he requested all councilors to bring the agenda of 13 August 2020 (annexure 'TJM7'). It is common cause that annexure 'TJM7' did not have any item concerning the appointment of the acting municipal manager or the item dealing with the decision of the Constitutional Court on the appointment of the 3rd respondent as the acting municipal manager. The main thrust of the applicants' attack in this regard is their contention that there is no evidence pointing or establishing as a fact that a report on the appointment of the acting municipal manager was discussed on 2 September 2020 or that there was an

item or report to be discussed by Council on 2 September 2020 relating to the appointments of the senior managers.

[27] The municipal respondents accept that rule 13.2 of the 2009 standing rules precluded the taking of the first impugned decision because it constituted a decision on a new business that could not be transacted at a continuation meeting of 2 September 2020 as it was not specified in the notice for that meeting. However, they sought to overcome this difficulty by contending that this was a procedural error which arose solely because the Council was under the impression that its adoption of the 2018 standing rules entitled them to conduct the meetings on the basis of the 2018 standing rules which in terms of s 26(a) allows general items of an urgent nature to be placed on an agenda by the municipal manager or by any member of the Council with prior consent of the speaker or chairperson. They contend that although the 2009 standing rules make no reference to nor give any consideration to urgent matters which require deliberation s 160(1) of the Constitution[13] empowers the Council to make decisions concerning the exercise of all of their powers and the performance of the functions of the Municipality as long as the pre-requisites of s 160(3) dealing with the necessary quora are met.[14]

[28] According to the municipal respondents those decisions that could not have been dealt with on 2 September 2020 were then tabled for proper consideration on 22 September 2020 for new decisions to be taken. The Council meeting of 22 September 2020 was not merely a continuation of the 2 September 2020 otherwise the 30th respondent would have been retained as Acting Director of Planning, Housing and Land Administration. The agenda for the meeting of 22 September 2020 also made it plain that the meeting was an entirely new meeting and that the removal of the 30th respondent and the new appointment of Mr Ndlovu demonstrates that entirely new decisions were taken at that meeting resulting in the first impugned

[13] The Constitution of the Republic of South Africa, 1996.
[14] Section160(3) of the Constitution provides: '(a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.'

decision to be superseded and replaced by further decisions taken on 22 September 2020.

[29] I point out at the outset that I shall refrain from expressing any definitive view one way or the other in respect of the decisions and resolutions taken at the meeting of 22 September 2020 because those decisions and resolutions are not the subject of these applications. The structure, powers and functions of municipalities and their functionaries are provided for in chapter 7 of the Constitution, to be read primarily with the provisions of the Structures Act and Systems Act together with the schedules to those Acts. The 2009 standing rules dealing with procedures in the conduct of the affairs of the Municipality were adopted by the MEC and published by the Municipality on 17 April 2009. They are binding on the Municipality. The word used in rule 13.2 of the standing rules is 'shall' and it appears to be peremptory.

[30] The municipal respondents sought to argue that the need to take the first impugned decision should be considered as urgent in the light of the following. The Municipality urgently needed to fill the vacant positions so that it could have access to its finances because after the 3rd to 5th respondents were removed by Moodley AJ's order of 3 August 2020 the Municipality was left without any authorised signatories to transact on its bank accounts. The Municipality was unable to process any transactions for the month of September 2020 onwards and was faced with the prospect of being unable to pay its creditors, its employees and to provide service to the general community after the attempts to access its money through other authorised personnel were refused by the banks. The absence of the municipal manager effectively left the Municipality without its accounting officer.

[31] It seems to me that the short answer to the municipal respondents' concerns raised above is what was said by Brand JA in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd.*[15] The learned Judge of Appeal stated:

[15] *Minister of Environmental Affairs and Tourism and others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Smith* 2004 (1) SA 308 (SCA) para 31.

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so….' (References omitted.)

There appears to be no discretion afforded to the Municipality in rule 13.2 in this matter.

[32] In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others*, Froneman J said:[16]

'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(*a*) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(*b*). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.' (Footnotes omitted.)

[33] In JR de Ville Judicial Review of Administrative Action in South Africa (2003) at 331 the following is said: 'A finding that the action in question is invalid (because a ground of review is present) will not necessarily mean that the action is to be set aside or declared invalid with retrospective effect or even at all. …. a retrospective declaratory order of invalidity could have extremely disruptive effects (especially where a number of actions had already been taken…).' It is important to point out that the 28th and 29th respondents have been attending to their functions and making decisions for the period of March 2020 onwards and in the process took a number of decisions pertaining to, inter alia, awards of tenders, engagement of services providers, the employment of personnel, etc. I shall deal further with this aspect under the head relief and remedy below.

Was the meeting of 22 September 2020 convened in accordance with rule 8 read with ss 4 and 5 of the standing rules?

[34] It is common cause that the special meeting of 22 September 2020 was originally scheduled for 18 September 2020 and that all 33 councilors were advised

[16] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) para 25.

of the meeting by requisite notice accompanied by an agenda and the report[17] to the 9th respondent's supplementary affidavit. The item to the agenda with reference SC/01/09/02 dealt with the rectification of the current acting appointments which are the subject of this application. This meeting could not go ahead as a full council quorum could not be achieved. This meeting was adjourned to 22 September 2020. On 22 September 2020 the meeting proceeded with only 17 councilors in attendance after the applicants refused to attend.

[35] The applicants' contentions are that whoever attended the meeting of 18 September 2020 did not have the standing and could not by way of passing a resolution, convene or resolve to adjourn the meeting to a specific date because, such number of persons present, did not have quorum or were not a majority to make a decision. They assert that the meeting of 22 September 2020 was not a meeting of Council because it was not convened by the 9th respondent as envisaged in s 4 of the standing rules. The applicants have also placed reliance on s 5 and rule 8 of the standing rules in support of this contention. Section 5 of the standing rules deal with service of notices. Subsection 5.1 provides:

'Notice to attend a meeting, and any other official communication from the Council, shall be collected/delivered to

(a) a physical address within the area of jurisdiction of the municipality; or

(b) an email address, supplied by each councilor to the municipal manager in writing within two days of their election and, thereafter, whenever the councilor wishes to change either address.'

Subsection 5.7 provides:

'In addition, notice to attend a meeting shall be displayed on the public notice board at the municipality's heads office.'

Rule 8.3 provides that when a meeting is adjourned as a result of no quorum, the meeting shall be convened as a continuation meeting in terms of rule 5 of the 2009 standing rules.

[36] In the Council meeting of 22 September 2020 the decision was taken to rescind the appointment of the 30th respondent as Acting Director: Planning, Housing

[17] Annexures 'SA4' and 'SA5' respectively.

and Development of the Municipality and that decision was replaced with the appointment of Mr Ndlovu in that position. As already stated, the decisions and resolutions taken in the council meeting of 22 September 2020 are not challenged by the applicants in these proceedings. I may hold a certain view on whether the reference to the phrase 'shall be convened as the continuation in terms of rule 5 of these by laws' is to be interpreted as meaning the starting of the entire process afresh, but I have already issued a disclaimer under paragraph 29 above. To the extent that the invitation would have this court consider the decisions and resolutions not properly before it, in this case, it is politely but firmly declined.

The 10th respondent could not, as a matter of fact, present a report to the special meeting of Council of 22 September 2020 concerning the appointment of the acting municipal manager, and did Council appoint the 28th respondent as the acting municipal manager?

[37] On 17 September 2020 Balton J granted the municipal respondents leave to supplement their answering affidavit in order to deal with certain matters which the municipal respondents contended that they omitted from their answering affidavit because they had to respond to the applicants' papers on an urgent basis. Pursuant to Balton J's order, the 9th respondent delivered his supplementary affidavit. Of importance to the applicants in relation to their contention under this head is what I have recorded in paragraph 30. The applicants contend that the facts set out by the 9th respondent in his supplementary affidavit do not support the municipal respondents' contentions that the appointment of the 28th respondent was made by Council in accordance with the provisions of s 82 of the Structures Act. On the respondents' own version and as it is evidenced on annexure 'SA5'[18] to the 9th respondents' supplementary affidavit, the meeting of 18 September and later the meeting of 22 September dealt with the rectification of the appointment of the Acting Chief Financial Officer and Acting Director Planning, Housing and Land administration. They assert that there was no report to be discussed on 18 September 2020 and later on 22 September 2020 concerning the appointment of the acting municipal manager.

[18] Annexure 'SA5' at 429 of the indexed papers is headed 'Implementation of the Constitutional Court order and Rectification of the appointment of the Acting CFO and Director Planning'.

[38] It is common cause that the applicants seek to review and set aside the decision taken by the Council on 2 September 2020 appointing the 28th to 30th respondents in the first impugned decision and have not challenged the decisions and resolutions taken at the meeting of 22 September 2020. In the circumstances, I am hamstrung to express a view on the unlawfulness or otherwise of the decisions and resolutions taken in the meeting of 22 September 2020. Again, the invitation to deal with this issue is politely but firmly declined.

Relief and Remedy

[39] I have already set out in some detail in paragraph 30 above how the first impugned decision came about. As said by the Supreme Court of Appeal in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others*:[19]

'The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates* is that they often have been acted upon by the time they are brought under review…To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.' (Footnote omitted.)

[40] In *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*[20] the Constitutional Court pointed out that the circumstances of each case need to be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. It is undeniable that the consequences of declaring the first impugned decision invalid and setting it aside with retrospective effect would be to taint all decisions taken by the incumbents, all contracts concluded by or appointments made by them with invalidity with potentially devastating consequences for the Municipality and its residents as well as for those

[19] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) para 23.
[20] *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC) para 85.

parties who may have contracted with the Municipality represented by the 28th to 30th respondents.

[41] The evidence reveals that the 28th to 30th respondents have taken decisions daily relating to the continuous operation of the Municipality, which in part would have dealt with the award of contracts for tenders and conclusion of contracts with Municipality service providers. Ultimately, the applicants' salvation rests on a technical contravention of rule 13.2 of the standing rules precluding the transaction on new business at an adjourned meeting.

The second impugned decision

[42] As stated, in his counter-application, the MEC contends that the special council meeting convened on 26 March 2020 was irregular and illegal. Therefore, the decision taken to appoint the 10th respondent to the Exco of the Council and his subsequent appointment as the Mayor should be declared illegal and ultra vires and set aside. The foundation of his contention is the directives published by the Minister on 25 March 2020 in response to the COVID 19 pandemic. The MEC's deponent, Mr Tubane deposed that on 26 March 2020 the department was advised that the Council of the Municipality intended to hold a meeting. Upon hearing that Mr Mdadane telephonically contacted the 9th respondent and advised him that the Council meeting scheduled for 26 March 2020 should not proceed as it would be unlawful given the directives of 25 March 2020 in response to the COVID 19 pandemic, specifically regulation s 6.7.2(e) which directed the Municipalities to suspend all 'ordinary council meetings'.

[43] The MEC's deponent did not give any cogent reason(s) why he came to the conclusion that regulation 6.7.2(e) found application to the special council meeting in light of the directive unequivocally stating that it applies to ordinary Council meetings. I have already referred to Circular No 8 of 2020 (annexure 'TMJ5') issued by the MEC on 25 March 2020. At para 8 of annexure 'TMJ5', the MEC suspended the Council meetings and meetings of the Municipality, all plenary sittings of municipal Council and their structures during the lockdown. Importantly, annexure 'TMJ5' did not suspend the special council meetings. I can, therefore, find no evidence suspending the convening of the special council meetings. In the circumstances, the

MEC's contention is anchored on an unsound foundation and falls to be rejected as devoid of any merit.

[44] The MEC also raised certain procedural challenges based on alleged contraventions of s 4.1 and rule 8.1 of the standing rules. Section 4.1 provides that the Speaker convenes the meetings of the Council through a duly signed notice of Council meeting stating the date, place and time of the meeting and accompanied by or containing the agenda of the proposed meeting. Rule 8.1 provides that no meeting shall take place, if no quorum has assembled at the expiry of ten minutes after the time at which a meeting is due to commence, unless it is unanimously agreed by the Councilors present to allow further time not exceeding ten minutes for a quorum to assemble. The MEC's deponent states that on 26 March 2020 the Department was advised that the Council intended to hold a meeting. On receipt of that information, Mr Mdadane contacted the 9th respondent telephonically and advised him that the Council meeting would be unlawful given the Minister's directives of 25 March 2020. The 9th respondent had advised Mr Mdadane that he was under pressure to proceed with the meeting. He undertook to consult with the Council and revert to him but did not do so.

[45] After some delay Mr Mdadane contacted the Municipality and was advised that approximately 150 members of the community had occupied the Council chamber which was the venue of the meeting and that the meeting had not yet commenced. Mr Mdadane was advised that the 9th respondent appeared intent on moving the venue for the Council meeting to a different place. The MEC's contention is that it was not possible to change the venue of the meeting given the requirements of s 4.1 and that the meeting could no longer take place given the provisions of rule 8.1. The MEC contends further that any meeting would have contravened paragraph 6.7.2 of the Minister's directives and the prohibition on gatherings of more than 100 people provided for in regulation 3 of the COVID 19 regulations of 18 March 2020. Mr Mdadane also sent a letter to the 9th respondent advising him of this. Despite that the meeting proceeded and the 10th respondent was elected to the Exco and to the Mayorship position.

[46] By contrast the municipal respondents contend that the purpose of s 4.1 is to give notice of the venue of the meeting. They contend that all the councilors who attended the meeting were present when the decision was taken to move to another venue and all of them moved there. As for rule 8.1, the municipal respondents' evidence is that the meeting commenced at 08h45 and thereafter had to be moved to a new venue as a result of unrest engineered by the applicants. They contend that the

MEC's assertion that the meeting commenced at 09h40 is not within his personal knowledge. They point out, correctly in my view, that in terms of the standing rules, a Council meeting only commences once a quorum is met and that once the meeting has commenced, rule 8.1 cannot apply.

[47] Interestingly, the MEC does not disclose the source from which Mr Mdadane might have obtained this information. Oddly enough, the MEC's deponent's founding affidavit only states in this regard that Mr Mdadane 'contacted the Municipality and was advised' and nothing more. Importantly, his informant is not identified.

[48] It is common cause that later that same day the department received a letter from the 1st applicant (annexure 'T11') in his capacity as the chief whip of the ANC in which he raised, inter alia, the following concerns that, (a) the meeting had commenced at 09h46 as opposed to the time given in the notice for the meeting being 09h00, (b) there were violations of the rules resulting in the meeting ultimately only starting at 12h00, (c) more than 100 people had illegally attended the meeting (apparently 160 people) in breach of the lockdown regulations and directives and (d) the meeting was chaotic and took place 'in a complete pandemonium'.

[49] It is not within the MEC's knowledge that this meeting commenced at 09h40. I am mindful that the 1st applicant has also advanced a similar assertion in this regard. On the other hand, the municipal respondents' assertion is that the meeting commenced at 08h45. On accepted rules of motion court proceedings, the municipal respondents' version must therefore stand. In the circumstances, I am not persuaded that the process of the election of the 10th respondent was not in accordance with sections 43 and 48 read with schedule 3, particularly item 5 of the Structures Act which provides that 'if only one candidate is nominated, the person presiding must declare that candidate elected'.

[50] Lastly, the MEC contends that the election of the 10th respondent to the Exco was irregular and illegal in that it contravened section 43 read with schedule 3 and ss 48(1), (2) and (3) of the Structures Act. I have already recorded in paragraphs 36 and 37 above, the basis on which the MEC is contending that the 26 March 2020 meeting was irregular and illegal. The basis of his attack on the manner of election of the 10th respondent is based on the same facts.

[51] The objective evidence from the minutes of the meeting of 26 March 2020 reveals that the 9th respondent received two letters from the 15th respondent, one relating to his resignation as an Exco member and the other his resignation as a Mayor. He explained to the meeting that the election of the Mayor would be conducted in terms of schedule 3 of the Structures Act, as amended and thereafter outlined the procedures. He thereafter requested nominations from the floor for candidates for an Exco member. Subsequently, the 20th respondent seconded by the 19th respondent nominated the 10th respondent. The 10th respondent signed and accepted the nomination. Thereafter, the Council resolved that the 10th respondent was duly elected during the special council meeting held on 26 March 2020 as an Exco Member.

[52] Thereafter the 9th respondent requested nominations from the floor for the candidate of Mayor. Councilor S P Khumalo proposed the name of the 10th respondent. The 21st respondent seconded the nomination of the 10th respondent. Since there were no further nominations from the floor for the candidate of the Mayor, the 9th respondent, in terms of schedule 3 of the Structures Act declared the 10th respondent as the Mayor of the Municipality. The objective evidence also reveals that the meeting adjourned at 13h33 due to chaotic members of the community. After giving this aspect a careful thought I am not persuaded that the MEC has been able to demonstrate that the meeting of 26 March 2020 was tainted with the irregularities that the MEC has sought to advance in these proceedings.

[53] According to the minutes of this meeting only 27 councilors out of 33 attended this meeting. No apologies or requests for leave of absence are recorded in the meetings in respect of the councilors who did not attend. The MEC sought to

contend that in the context of the prohibition against the meeting by the Minister's directives, the councilors who did not attend might have felt that they were obliged to stay away in compliance with the directives. They contend that not only did this affect the legitimacy of the meeting but it also affected the legitimacy and democratic nature of the election of the 10th respondent as the Mayor. They assert that those six councilors had the right to vote and to stand for election. Attractive though this argument may be, it remains a speculation because no evidence has been produced showing that their failure to attend was attributed to what has been asserted to by the MEC and Mr Tubane.

[54] In the circumstances, I conclude that the evidence before this court does not sustain MEC's contentions herein. The counter-application falls to be dismissed.

Order

[55] In the result the following order shall issue,

As to the main application

(a) The first impugned decision be and is hereby declared invalid.

(b) The declaration of invalidity shall take effect from the date of this order.

(c) The first, sixth to twenty second respondents and twenty eighth respondent are directed to pay the costs, jointly and severally, the one paying the other to be absolved.

As to the counter-application

(a) The counter application be and is hereby dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

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Mnguni J

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