

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

CASE NO: CIV APP F B 12 /2016

In the matter between:

**NGAKA MODIRI MOLEMA DISTRICT  
MUNICIPALITY**

**APPELLANT**

and

**MOTO –TECH (PTY) LTD  
R. G. NAIR N.O**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**



## JUDGMENT

### LEEuw JP

- [1] This appeal, with the leave of the *court a quo*, is against the order of Landman J, dismissing an application for review, setting aside and declaring null and void a service level agreement (contract) concluded between the first respondent and the second respondent on behalf of the appellant. At the time of the conclusion of the contract, the appellant was under administration in terms of Section 139(1)(c) of the Constitution of the Republic of South Africa<sup>1</sup>, 1996 (the Constitution). It is common cause that the prescribed procurement procedures were not followed when the first respondent was appointed as a service provider.

### Parties

- [2] The appellant, the Ngaka Modiri Molema District Municipality (the Municipality) is established in terms of Section 2 of the Municipal Systems Act No. 32 of 2000<sup>2</sup> (the Municipal Systems Act) and is represented in these proceedings by Lomax Aphutholotse Gopane (Mr Gopane) who was appointed as an Acting Municipal Manager on **29 May 2015** and has deposed to the founding affidavit.
- [3] The first respondent was erroneously cited as Moto-Tech (Pty) Ltd, instead of Moto-Tech Services (Moto-Tech), which is operated by a sole proprietor Lukesh Ramnarian Maharaj (Mr Maharaj). At the hearing of the matter in the

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<sup>1</sup> See paragraph [26] below.

<sup>2</sup> 2. A municipality— (a) is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998; (b) consists of— (i) the political structures and administration of the municipality; and (ii) the community of the municipality; (c) functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community; and (d) has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.

*court a quo* the Municipality had filed a notice to amend in terms of Rule 28 of the Uniform Rules of Court<sup>3</sup>. Despite an objection raised by the respondents, on the procedure followed in the substitution process, the court held the view that Mr Maharaj was present in Court and that he had deposed to a supporting affidavit wherein he stated amongst others, that he is the sole proprietor of Moto-Tech and also that he confirmed the contents of the first respondent's answering affidavit "in as far as it relates to (him) and/or Moto-Tech."

- [4] Landman J held that the Municipality made a mistake in the citation of the party to the contract. He also held that a substantive application was not necessary and that Moto-Tech did not suffer any prejudice. I agree with this finding. The test applied in cases of misnomer in the citation of a party is whether or not there is prejudice to the other party. Furthermore, this was a formal amendment which did not have the effect of substituting one party for another.
- [5] In **Affordable Medicines Trust v Minister of Health**<sup>4</sup> Ngcobo J (as he then was) remarked as follows with regard to an amendment of the notice of motion:

"8. Here we are not concerned with confirmatory proceedings. In addition, there are no changes to the contents of the provisions. All that has changed are sub-regulation numbers. This is a matter which could have been cured by an appropriate amendment of the Notice of Motion to reflect the correct sub-regulation numbers. It is difficult to see on what conceivable basis it could have been opposed. And I cannot conceive of

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<sup>3</sup> **Rule 28** provides: (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

<sup>4</sup> 2006 (3) SA 247 (CC) at para [8] and [9]

any prejudice that would have been suffered by the respondents if the Notice of Motion were to have been amended. Even if it had been opposed, it is the kind of amendment which would have been granted, had it been sought. It is a formal amendment.

9. The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO.*<sup>10</sup> The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”<sup>11</sup> These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand? (footnotes omitted)

- [6] The second respondent, Ramachunderan Govin Nair (Mr Nair) was appointed an administrator of the Municipality in terms of Section 139 (1)(c) of the Constitution for a period of 6 months commencing on **25 September 2014** up to **31 March 2015**. He was in the interim also inaugurated as a councillor of the Municipality on **4 December 2014**. His term of office was terminated on **27 February 2015**, before the expiry of his contract. He is cited in his official capacity and no specific relief was sought against him.

## **Factual Matrix**

- [7] I have already alluded to the fact that the Municipality was placed under administration in terms of Section 139(1)(c) of the Constitution by the North West Provincial Executive Council (Provincial Executive) from July 2014, and that Mr Nair was appointed as an administrator.
- [8] According to Mr Nair, during his term of office there were protests and strike actions by the ex-councillors and Municipal employees outside the Municipality offices. The strike action was occasioned by the dissolution of the Municipal Council in terms of Section 139 (1) (c). Because of the protracted strike action, the Municipality could not deliver basic services such as water and sanitation to several communities within the area of its jurisdiction. This resulted in service delivery protests within the Lehurutshe, Dinokana, Lichtenburg, Sannieshof, Delareyville and Kraaipan communities during September 2014. The protests and strike actions were violent and several government buildings, roads, as well as water and sanitation service plants were damaged. Motorists passing within the strike area were also attacked and threatened with violence by the protestors.
- [9] He further states that because of the emergency situation he called for the **“then appointed service delivery agents”** of the Municipality “dealing with water and sanitation”. None of those agents **“were willing and/or able to go out to the rural areas (where) those strikes were happening and to attend to installation, reparation and/or construction of water and sanitation services”**, because of the risk to life and limb. The other reason was that **“several of these service providers were not paid up to date and withdrew their services up and until payment of the outstanding fees were made”**. The status of the water and sanitation services in the rural areas was almost non-existent. There was no access to basic services.
- [10] As a result, he and his intervention team conducted site inspections at the affected areas under the protection of the South African Police Services (SAPS) on an urgent basis. He and Suliman Rajah (Mr Rajah) who was part of the “intervention team”, came to a conclusion that a real imminent threat

existed which would impact negatively on the health of the communities because of the water crisis and lack of sanitation services, and further that the strikes would escalate and become more violent and destructive if the basic services were not provided to the communities.

- [11] Consequently, he convened a meeting comprising Mr Rajah, to discuss the way forward. Because of the urgency of the matter, no minutes of the meeting were kept. They decided to approach a private entity to assist with the problem at hand. After several enquiries, they approached Mr Maharaj the sole proprietor of Moto-Tech, who was appraised of the situation and the circumstances under which he would be operating, in view of the violent strike action prevailing at the time. Mr Maharaj indicated that he had the capacity to provide the service required and he accepted the offer.
- [12] On **10 October 2014** Mr Nair concluded a service level agreement (the contract) with Moto-Tech for the **“emergency supply of water material, repairs and maintenance of all water and sanitation facilities for all Local Municipalities in the District”**. The contract was signed by Mr Nair on behalf of the Municipality without any attesting signatures for and on behalf of the Municipality. Mr Maharaj signed on behalf of Moto-Tech in the presence of his two witnesses. The contract was for a period of 3 years. The appointment was later approved by the bid adjudication committee on **4 November 2014**, which committee directed that the contract be reviewed bi-annually.

### **Submissions**

- [13] Mr Gopane submits that, as a Municipal Manager, he is behoved to take effective and appropriate steps to prevent unauthorised, irregular, fruitless and wasteful expenditure and losses that may result in criminal conduct, and to manage available working capital efficiently and economically. He further submits that when Mr Nair procured the services of Moto-Tech, he

disregarded Section 217 of the Constitution<sup>5</sup>, the provisions of the Municipal Supply Chain Management Policy and its Regulations and applicable procurement policies.

- [14] He further asserts that he is an accounting officer of the Municipality, and that he is duty bound to ensure that the Municipality maintains amongst others, effective, efficient and transparent financial and risk management systems and internal controls, as well as a system for properly evaluating all major capital projects before a final decision can be taken in that regard.
- [15] Mr Gopane further states that Mr Nair appointed Moto-Tech to provide services which were already being offered and provided by the following companies and entities namely: Rototec and Lungu Electrical for electrical repairs to the water engines; JPA Hydraulics and High Point 3D 609 to supply and repair the water engines; Rabotapi Construction/Beyond Building JV to drill and equip new bore holes; and Abbo's Fuel Distributors for the supply of fuel for the water engines and generators. He also submits that the employment of Moto-Tech resulted in unnecessary duplication of service providers, impacting on the resources of the Municipality.
- [16] Furthermore, when Mr Nair appointed Moto-Tech, he did not involve any recognised procurement structures of the Municipality and did not apply the following procedural steps relating to procurement of services: (a) the open tender process; (b) there was no written motivation prepared justifying the appointment of Moto-Tech; (c) there was no collation of any tender specifications; (d) there was no evaluation report made; and (e) no adjudication report prepared.
- [17] Mr Nair submits that he decided to appoint Moto-Tech as the service provider and relies on Regulation 36 of the Municipal Chain Management Regulations<sup>6</sup> which he purports permits him to appoint a service provider without having to go through an open tender system. Mr Nair further intimates that the written

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<sup>5</sup> See para [33] below

<sup>6</sup> See para [38] below.

agreement between Moto-Tech and the Municipality was drafted and **“signed by all relevant parties”**.

[18] Mr Nair further states that because of the emergency situation occasioned by the lack of service delivery to the community, **“it was not possible to follow the normal route for procuring service providers, if this route was not followed the loss of life was imminent. The then prevailing situation was almost impossible and quite abnormal; the municipality employees were striking, creditors weren’t paid, communities were striking and he received several personal threats to such extend (*sic*) that he had four body guards for his personal protection”**.

### **Issues**

[19] The issues to be decided are:

- (a) Whether the administrator is part of the top management of the Municipality;
- (b) The role of the accounting officer in a Municipality under administration in terms of Section 139(1)(c) of the Constitution;
- (c) The interpretation of Regulation 36.

### **The Law**

#### **Local Government Structure**

[20] Section 151(1) and (2) of the Constitution provides that:

- “(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.



- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.”

Section 156 of the Constitution provides that:

- (1) A municipality has executive authority in respect of, and has a right to administer:
- a) the local government matter in Part B of Schedule 4 and Part B of Schedule 5<sup>7</sup>; and
  - b) any other matter assigned to it by national or provincial legislation.”

[21] The executive obligation of a Municipality is stipulated in Section 11(3) of the Municipal Systems Act<sup>8</sup>, (Municipal Systems Act) which prescribes the following as the legislative and executive powers of the Municipality:

- “(3) A municipality exercises its legislative or executive authority by-
- (a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
  - (b) promoting and undertaking development;
  - (c) establishing and maintaining an administration;
  - (d) administering and regulating its internal affairs and the local government affairs of the local community;
  - (e) implementing

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<sup>7</sup> Part B of Schedule 4 includes: The following local government matters to the extent set out in Section 155(6)(a) and (7): • Air pollution • Building regulations • Child care facilities • Electricity and gas reticulation • Firefighting services • Local tourism • Municipal airports • Municipal planning • Municipal health services • Municipal public transport • Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law • Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related • Stormwater management systems in built-up areas • Trading regulations • Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems

Part B of Schedule 5: The following local government matters to the extent set out for provinces in Section 155(6)(a) and (7): • Beaches and amusement facilities • Billboards and the display of advertisements in public places • Cemeteries, funeral parlours and crematoria • Cleansing • Control of public nuisances • Control of undertakings that sell liquor to the public • Facilities for the accommodation, care and burial of animals • Fencing and fences • Licensing of dogs • Licensing and control of undertakings that sell food to the public • Local amenities • Local sport facilities • Markets • Municipal abattoirs • Municipal parks and recreation • Municipal roads • Noise pollution • Pounds • Public places • Refuse removal, refuse dumps and solid waste disposal • Street trading • Street lighting • Traffic and parking

<sup>8</sup> Act No. 32 of 2000

applicable national and provincial legislation and its bylaws; (f) providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in Section 78; (g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality; (h) preparing, approving and implementing its budgets”.

Section 59(1) of the Municipal Systems Act provides that:

- “(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may-
- (a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;
  - (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and
  - (c) withdraw any delegation or instruction.”

### **The role of the Municipal Manager**

[22] Section 77 of the Municipal Finance Management Act<sup>9</sup> (Finance Management Act) provides that:

“The top management of a municipality’s administration consists of

- (a) the accounting officer;
- (b) the chief financial officer;
- (c) all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated in terms of Section 79; and
- (d) any other senior officials designated by the accounting officer.”

Furthermore, Section 79 of the Finance Management Act provides that:

“(1) The accounting officer of a municipality-

- (a) must, for proper application of this Act in the municipality’s administration, develop an appropriate system of delegation that will both maximise administrative and operational efficiency and provide adequate checks and balances in the municipality’s financial administration;
- (b) may, in accordance with that system, delegate to a member of the municipality’s top management referred to in Section 77 or any other official of the municipality-
  - (i) any of the powers or duties assigned to an accounting officer in terms of this Act; or
  - (ii) any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of specific provision of this Act; and

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<sup>9</sup> Act No. 56 of 2003

(c) must regularly review delegations issued in terms of paragraph (b) and if necessary, amend or withdraw any of those delegations.

(2) The accounting officer may not delegate to any political structure or political office-bearer of the municipality any of the powers or duties assigned to accounting officers in terms of this Act.”

[23] Section 55(1) of the Municipal Systems Act provides that:

“As head of administration the Municipal Manager of a municipality is, subject to the policy directions of the Municipal Council, responsible and accountable for:-

- a) the formation and development of an economical, effective, efficient and accountable administration
  - (i) equipped to carry out the task of implementing the municipality’s integrated development plan in accordance with Chapter 5;
  - (ii) operating in accordance with the municipality’s performance management system in accordance with Chapter 6; and
  - (iii) responsive to the needs of the local community to participate in the affairs of the municipality;
- b) the management of the municipality ‘s administration in accordance with the Act and other legislation applicable to the municipality;
- c) the implementation of the municipality’s integrated development plan, and the monitoring of progress with implementation of the plan (emphasis added)”

[24] Section 55(2) of Municipal Systems Act provides that:

“As accounting officer of the municipality the municipal manager is responsible and accountable for:

- (a) all income expenditure of the municipality;
- (b) all assets and the discharge of all liabilities of the municipality; and
- (c) proper and diligent compliance with applicable municipal finance management legislation”.

See also Section 62 Finance Management Act, which provides that the Municipal Manager is responsible for the financial administration of the Municipality; and in Section 93 thereof, it provides that: the Chief Executive Officer of a Municipal entity appointed in terms of Section 93J of the Municipal Systems Act<sup>10</sup> is the accounting officer of the entity.

Furthermore, Section 54A of the Municipal Systems Act<sup>11</sup>, which was inserted in this Act by Section 2 of Act 7 of 2011 with effect from **5 July 2011**, provides that the power and authority to appoint a Municipal Manager and Acting Manager vests in the Municipal Council.

[25] The governance structure of the Municipality is succinctly described by Nugent JA in **Manana v King Sabata Dalindyebo Municipality**<sup>12</sup> as follows:

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<sup>10</sup> Section 93J provides that: (1) The board of directors of a municipal entity must appoint a chief executive officer of a Municipal entity. (2) The chief executive officer of a municipal entity is accountable to the board of directors for the management of the municipal entity.

<sup>11</sup> Section 54A provides that’ (1) The municipal council must appoint –(a) a municipal manager as head of the administration of the municipal council; or (b) and acting municipal manager under circumstances and for period as prescribed. (2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed. (2A) (a) A person appointed in terms of subsection (1)(b) may not be appointed to act for a period that exceeds three months. (b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for further period that does exceed three months. (3) A Decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if – (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or (b) the appointment was otherwise made in contravention of this Act.

<sup>12</sup> (2011) 32 ILJ 581 (SCA) at para [13] and [14] and the case referred to at footnote 32 ILJ 581 (SCA)

“[13] The constitutional structure of government is separated into three spheres: the national sphere, the provincial sphere and the local sphere. The local sphere of government consists of municipalities, which must be established for the whole territory of the Republic. The executive authority of a municipality does not vest in its municipal manager (or any other of its employees). Its executive authority is constitutionally vested in its municipal council.

[14] The Act provides the framework within which a municipality must function. As is to be expected, the Act is replete with provisions recognising that executive authority vests in the council and in nobody else. Indeed, ordinary legislation is not constitutionally capable of divesting a municipal council of its executive authority – or any part of it – and the construction of a statute that would produce that result must be avoided if it is possible to do so”.

Furthermore in paragraphs [16] and [17] Nugent JA states that:

“[16] A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself....

[17] In my view s 55 (1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for constructing the Section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority-which includes the authority to appoint staff - in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be constructed to avoid that result.”

See also **MEC for Local Government, Mpumalanga v IMATU and Others**<sup>13</sup>.

### **Provincial intervention in Local Government**

[26] **Section 139(1)(c) of the Constitution provides that:**

“When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

- (a) -
- (b) -
- (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.”

See also Section 34 A of the Municipal Structures Act<sup>14</sup>.

[27] **The Finance Management Act** in Section 136(1)(c) provides, that:

“If the MEC for Local Government in a province becomes aware that there is a serious financial problem in a Municipality, the MEC must promptly

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<sup>13</sup> 2002 (1) SA 76 (SCA) at para [7]

<sup>14</sup> Section 34 A of the Municipal Structure Act: NO 117 of 1998 which provides that: (1) A municipal council may dissolve itself at a meeting called specifically for this purpose, by adopting a resolution dissolving the council with supporting vote of that least two thirds of the councillors. (2) A municipal council may dissolve itself only when two years passed since the council was last elected. (3) The MEC for the local government in a province, by notice in the *Provincial Gazette*, may dissolve a municipal council in the province of the Electoral Commission in terms of Section 23(2)(a) of the Demarcation Act is of the view that a boundary determination affects the representation of voters in that council, and the remaining part of existing term of municipal councils is more than one year; (4) The MEC for local government in a province may dissolve a municipal council in a province accordance with the provisions of Section 139 of the Constitution of the Republic of South Africa, 1996.

- c) determine whether the situation justifies an intervention in terms of Section 139 of the Constitution.”

Section 136(2) of the Finance Management Act further provides that:

“If the financial problem has been caused by or resulted in a failure by the Municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of Section 139(1) of the Constitution are met the provincial executive must promptly decide, whether or not to intervene in the municipality. If the provincial executive decides to intervene, Section 137 applies”. (Emphasis added)

Furthermore Section 136(4) of Finance Management Act provides:

“If the municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as result of which the conditions for an intervention in terms of Section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with Section139.” (Emphasis added)

- [28] Section 137 of the Finance Management Act<sup>15</sup> provides for discretionary provincial intervention whereas Section 139 of this Act<sup>16</sup> deals with mandatory provincial intervention arising from a financial crisis of the Municipality.

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<sup>15</sup> Section 137 provides that : (1) If the conditions for a provincial intervention in a municipality in terms of “Section 139 (1) of the Constitution are met and the provincial executive decides in terms of Section136(2) of this Act to intervene in the municipality, the provincial executive may take any appropriate steps referred to in Section 139(1) of the Constitution, including- (a) assessing the seriousness of the financial problem in the municipality; (b) seeking solutions to resolve the financial problem in way that would be sustainable and would build the municipality’s capacity to manage its own financial affairs; (c) determining whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan and, if so, requesting any suitably qualified person- (i) to prepare an appropriate financial recovery plan for the municipality; (ii) to recommend appropriate changes to the municipality’s budget and revenue-raising measures that will give effect to the recovery plan and; (iii) to submit the recovery and any recommendations referred to in subparagraphs (i) and (ii) to the MEC for local government in the province within a period determined by the MEC; and (d) consulting the mayor of the municipality to obtain the municipality’s co-operation in resolving the financial problem, and is applicable, implementing the financial recovery plan.



Section 141 of the Finance Management Act provides that:

- “(1) Any suitably qualified person may, on request by the provincial executive, prepare a financial recovery plan for a discretionary provincial intervention referred to in Section 137.
- (2) Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in Section 139.”

Furthermore, Section 145(2) of the Finance Management Act provides that:

- “(2) the financial recovery plan binds the municipality in the exercise of its executive authority, but only to the extent to resolve the financial problems of the municipality.
- (3) If the municipality cannot or does not implement the approved recovery plan, the provincial executive may in terms of Section 139 (1) or (4) of the Constitution take further appropriate steps to ensure implementation of the plan.

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(2) The MEC must submit any assessment in terms of subsection (1) (a), any determination in terms of subsection (1)(c) and a copy of any request in terms of subsection (1)(c), to the municipality and the Cabinet member responsible for local government.

(3) This Section does not apply to a provincial intervention which is unrelated to financial problem in a municipality.

<sup>16</sup> Section 139 provides that: (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

- a. issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
- b. assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
  - i. maintain essential national standards or meet established minimum standards for the rendering of a service;
  - ii. prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
  - iii. maintain economic unity; or
- c. dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

- (4) Section 34(3) and (4) and 35 of the Municipal Structures Act apply if the provincial executive dissolves a municipal council in terms of subsection (3)".

[29] It is not clear from the pleadings as to whether the provisions outlined in paragraphs [27] to [28] above, were complied with by the Provincial Executive before the invocation of Section 139 (1) (c) of the constitution. It is however, not necessary to make any findings on this issue since it did not arise as one of the issues to be decided.

[30] Section 35 (1) and (2) of the Municipal Structures Act provides that:

- "(1) If a municipal council is dissolved in terms of Section 34(4) or does not have enough members to form a quorum for a meeting, the MEC for local government in the province must appoint one or more administrators to ensure the continued functioning of the municipality until a new municipal council is elected or until the council has sufficient members for a quorum.
- (2) When appointing one or more administrators the MEC for local government, by notice in the Provincial Gazette, must determine the functions and powers of the administrator or administrators".

### **Analysis**

[31] I have already alluded to the fact that the North West Provincial Executive Council (Provincial Executive) through its Cabinet member responsible for local government, appointed Mr Nair on **26 September 2014** as administrator of the Municipality in terms of Section 139(1)(c) of the Constitution. The terms of reference and scope of his powers and functions are stipulated as follows in the letter of appointment:

- “1. Manage the overall administration of the municipality.
2. Stabilise and improve governance and administration within the Municipality (council and administration).
3. Improve service delivery in Ngaka Modiri Molema District, prioritising water and sanitation services [this should include facilitation of new projects, unblocking of old projects, maintenance of infrastructure, cleansing, etc.].
4. Financial management: improving the financial controls in the municipality, expenditure management, procurement processes, revenue enhancement and debt collection as well as addressing Auditor General’s reports [MFMA compliance].
5. Analysis of past and current investigations, commissions of enquiry, and forensic audits and implementation of recommendations.
6. Attend labour matters in the municipality [outstanding disciplinary cases, labour disputes, functionality of LLF, instil culture of work and discipline of workers].
7. Facilitate the improvement of governance within council [council oversight role, relations between council and administration].
8. Investigate all recently awarded contracts to establish validity and legitimacy thereof and terminate those that are not legitimate.
9. To all times in act in accordance with the Terms of Reference (TOR's) to be agreed to with yourself.

You will be required to develop an action plan to implement the intervention on a short, medium, to long term basis to ensure sustainability post the intervention. The Provincial EXCO will expect monthly reports through the Department of Local Government and Human Settlements regarding progress made on the intervention in general and the above-mentioned priorities. A team of experts in the fields of financial management; technical services; legal services; and corporate services will be appointed to provide you with necessary support.”

[32] In this letter of appointment, the MEC states that “... **the Provincial EXCO has taken over all executive powers of the Council of Ngaka Modiri Molema District**”. In terms of the Municipal Systems Act the executive powers are those listed in Section 11 (3) <sup>17</sup>. I have already alluded to the fact that the executive authority of a municipality does not vest in the municipal manager because it is constitutionally vested in the municipal council. Section 59 (1)(a) of the Municipal Systems Act<sup>18</sup> permits the Municipality amongst others, to delegate its power “ to decide to enter into a service delivery agreement in terms of Section 76(b) <sup>19</sup>....”

**Did the administrator assume the duties of the top management of the Municipality?**

[33] Mr Gopane submits that Mr Nair appointed Moto-Tech without applying the recognized procurement structure and did not involve the officials who were responsible for procurement at the Municipality. In his answering affidavit, Mr Nair denies the allegations and avers that the appointment of Moto-Tech was “made in accordance to the powers vested in (him) as administrator and the provisions of *inter alia* Regulation 36”.

[34] It is important to note that it was expected of Mr Nair to develop an “**action plan to implement the intervention on short, medium to long term basis to ensure sustainability post the intervention**”. Furthermore, the MEC indicated that a team of “**experts in the field of financial management, technical services, legal services and corporate services**” would be appointed to provide him “**with the necessary support**”.

[35] Section 217 of the Constitution provides that:

“(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation,

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<sup>17</sup> See paragraph [19] above.

<sup>18</sup> See paragraph [21] above.

<sup>19</sup> Section 76(b) of the Municipal Systems Act.

contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.”

In order to give effect to Section 217(1) the Municipality, in terms of Section 62(1)(f)(iv)<sup>20</sup> read with Section 111 of the Finance Management Act, established the Supply Chain Management Policy.

[36] The objectives of the Finance Management Act are stated in Section 2 as follows:

“The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

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<sup>20</sup> Section 62(1)(f)(iv) of the Finance Management Act provides that: (1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure:

- (f) that the municipality has and implements-
  - (i) a tariff policy referred to in Section 74 of the Municipal Systems Act;
  - (ii) a rates policy as may be required in terms of any applicable national legislation;
  - (iii) a credit control and debt collection policy referred to in section 96(b) of the Municipal Systems Act; and
  - (iv) a supply chain management policy in accordance with Chapter 11. (Commencement date of subpara. (iv): 1 December 2004)

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
- (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.”

[37] The Finance Management Act, Regulations and the Supply Chain Management Policy and the Municipal Systems Act and all other relevant laws recognize the Municipal Manager as the accounting officer and head of the Municipality administration. The Municipal Manager<sup>21</sup> is appointed by the Municipal Council and it may delegate its power to enter into service delivery agreements to him. As an accounting officer, the Municipal Manager is protected by Section 76 of the Finance Management Act which provides that:

“ Any action taken by a political structure or office-bearer of a municipality against the officer of the Municipality solely because of that accounting officer’s compliance with a provision of this Act, is unfair labour practice for the purpose of the Labour Relations Act, 1995 (Act No. 66 of 1995).”

[38] A dissolution of a municipal council in terms of Section 139(1)(c) does not have the effect of terminating or usurping the duties and functions of the Municipal Manager and Financial Officer, who are accountable to the Municipal Council and are the Accounting Officers of the Municipality responsible for both administration and financial functions thereof. A careful reading of the letter of appointment, suggests that the administrator was

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<sup>21</sup> See footnote 10 above

appointed to exercise a supervisory role *in lieu* of the Municipal Council, which responsibility was now taken over by the Provincial Executive. The administrator's authority was limited to the terms of reference outlined in his letter of appointment, which powers were delegated to him by the Provincial Executive.

- [39] The duty of the administrator was to put systems in place which would enhance the performance of the accounting officers, and the Municipality in general. This, Mr Nair had to do by utilising the services of the Municipal Manager and all other relevant officers. I have alluded to the fact that the Municipal Council has the power to appoint a Municipal or Acting Municipal Manager. It may also be assumed that this power was delegated to Mr Nair as Administrator, as it appears in clause 1 and 2 of his letter of appointment that he was to: "(1) Manage the overall administration of the municipality; (2) Stabilise and improve governance and administration within the Municipality (Council and administration)". I pause here to observe that on **4 June 2015**, when Ms Nono Dince was appointed administrator of the Municipality in terms of Section 139(1)(b), she appointed an acting Municipal Manager and an Acting Chief Financial Officer.

### **Was deviation from procurement processes justified?**

- [40] Regulation 36 (1) (a) and (b) provides that:

"(1) The Municipal Manager may:

- (a) dispense with the official procurement processes established this policy and to procure any required goods and/or services through any convenient process, which may include direct negotiations, but only:
  - (i) in an emergency;
  - (ii) if such goods and/or services are produced or available from a single provider only;

- (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile;
    - (iv) for the acquisition of animals for zoos and nature reserve;
    - (v) for the acquisition of special works of art or historical objects where specifications are difficult to compile; and
    - (vi) in any other exceptional case where it is impractical or impossible to follow the official procurement processes;
  - (b) ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.
- (2) The Municipal Manager must record the reasons for any deviations in terms of sub-paragraph (1)(a) and(1)(b) above, and report them to the next meeting of the Council and must be included as a note to the annual financial statements. This sub-paragraph does not apply to the procurement of goods and services contemplated in paragraph 3(3) of this policy.
- (3) The conditions relating to the procurement of contracts relating to an emergency, as referred to in sub-paragraph (1)(a)(i) above should include the existence of one or more of the following:
- (a) the possibility of human injury or death;
  - (b) the prevalence of human suffering or deprivation of rights;
  - (c) the possibility of damage to property, or suffering and death of livestock and animals;
  - (d) the interruption of essential services, including transportation and communication facilities or support services critical to the effective functioning of the Municipality as a whole;
  - (e) the possibility of serious damage occurring to the natural environment;



- (f) the possibility that failure to take necessary action may result in the Municipality not being able to render an essential community service; and
  - (g) the possibility that the security of the state could be compromised.
- (4) The prevailing situation, or imminent danger, should be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for the formal procurement process.
- (5) Where interim measures to alleviate the immediate situation are appropriate, these should be considered to give time to procure a permanent solution.
- (6) Emergency dispensation will not be granted in respect of circumstances other than those contemplated in sub-paragraph (3) above.
- (7) Where possible, in an emergency situation, 3 (three) quotes in accordance with general acquisition management principles should be obtained and a report submitted to the Municipal Manager for approval. Where, however, time is of the essence, the emergency must be immediately addressed, and the process formalised in a report to the Municipal Manager as soon as possible thereafter.
- (8) The Municipal Manager may, upon recommendation of the bid adjudication committee, and only if good cause exists condone any expenditure incurred in contravention of, or that is not in accordance with, a requirement of this policy, provided that:
  - (a) this power may not be sub-delegated by the Municipal Manager;
  - (b) such condonation will not preclude the taking of disciplinary steps against the responsible official; and

- (c) the Municipal Manager record the reasons for the condonation in writing, and report them to the next meeting of the Council and must be included as a note to the annual financial statements.
- (9) In the event where the Municipal Manager refuses to condone any expenditure referred to in sub-paragraph (7) above, such expenditure will be deemed to be irregular expenditure as defined in terms of the provisions of section 1 of the MFMA, and must be treated as such by the Municipal Manager according to the relevant provisions provided therefore in the MFMA.”
- [41] Regulation 36 specifically provides that the Municipal Manager may invoke this regulation. Furthermore, sub-regulation (8) prohibits the delegation of this power by the Municipal Manager. In **Fedsure Life Assurance v Greater Johannesburg TMC**<sup>22</sup> the court held the view that:
- “[54] There is no provision in the interim Constitution which expressly states that where a local government acts *ultra vires* its empowering statutes it acts unconstitutionally, but it seems that the proposition must be correct for the following reasons.
- [55] There are a series of provisions in chapter 10 itself which make it plain that a local government's powers to act are limited to the powers conferred by the Constitution or laws of a competent authority. For example, s 174(3) provides that:

'A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.'

And s 175(4) provides that:

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<sup>22</sup> 1999 (1) SA 374 (CC) at paras [54], [55] and [56]

'A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.'

[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:

“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”

[42] Landman J held the view that Mr Nair complied with the emergency regulations by noting the reasons for his action in the contract and convening, the Bid Adjudication Committee in November 2014 which considered the contract and adopted it. He however did not deal with the question as to whether Mr Nair did have the power and authority to enter into service level agreements. It is correct that the prevailing circumstances created an

emergency which required prompt, if not immediate attention. The Constitutional Court in **Ngaka Modiri Molema District Municipality v Chairperson of the North West Provincial Executive Committee and Others**<sup>23</sup>, when the Municipal Council prematurely approached the Court seeking an order setting aside the Provincial Council's invocation of Section 139(1)(c), held the view that even if the Municipal Council and Others were non-suited in their main application, the court

“[12] . . . may not ignore the plight of those people who are not parties to the court proceedings and whose interests lie at the heart of the matter, namely the people and communities who reside within the area of jurisdiction of the Municipality. We have a wide just and equitable remedial jurisdiction that is not necessarily dependent on a finding of constitutional impropriety.

[13] The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation. In *Joseph* this Court held that sections 152 and 153 of the Constitution, which set out the objectives of local government, read together with sections 4(2)(f) and 73 of the Local Government: Municipal Systems Act, impose an obligation on every municipality to provide basic municipal services to their inhabitants irrespective of whether they have a contractual relationship with the municipality or not.

[14] In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. At the very minimum, the state must refrain from interfering with existing rights. It is clear that where access to water, sanitation, electricity and fire and emergency services once existed but is then taken away due to a dispute within or relating to the management of a municipality, there may be a violation of fundamental rights of the inhabitants.” (footnotes excluded)

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<sup>23</sup> 2015 (1) BCLR 72 (CC) at paras [12], [13] and [14]

[43] I share the sentiments raised by the Constitutional Court that the dire situation necessitated emergency measures to be applied by the Administrator in order for the Municipality to fulfil its Constitutional mandate. However, the conduct of Mr Nair was vitiated by the lack of transparency and accountability. He assumed the responsibilities of the accounting officers and usurped their powers and unilaterally concluded the service level contract worth millions of rands (R2, 500 000-00) with Moto-Tech. He is the only signatory to the written contract on behalf of the Municipality. An interpretation that suggests that Mr Nair had the sole authority to contract with service providers without any checks and balances would be contrary to the rule of law and the principles of legality and thus *ultra vires* and not in accordance with his terms of reference.

[44] The following conduct by Mr Nair reveals his lack of accountability and transparency in his dealings with Moto-Tech:

44.1 Mr Nair appointed Moto-Tech to provide services which were already engaged by the Municipality. In response, Mr Nair avers that he called the appointed service delivery agents for the Municipality with water and sanitation, and further states:

“10.10 None of the said agents, that I could get hold of, where (*sic*) willing and/or able to go out to the rural areas in which these strikes occurred and to attend to the installation, reparation and/or construction of water and sanitation services ... Furthermore it is necessary to note that several of these providers were not paid up to date and withdrew their services up until payment of outstanding fees were made”.

Mr Nair does not disclose the identity of the existing service providers he contacted. He only mentions one person Mr Rajah, as one of his members of the “intervention team”.

44.2 The reason for not going on tender, according to Mr Nair, was that contracted service providers already contracted by the Municipality “were not paid up to

date and withdrew their services up and until payment of outstanding fees were made". It is ironic that one of the mandates of Mr Nair, clearly stipulated in his letter of appointment, was: **"Financial Management: improving the financial controls in the municipality, expenditure management, procurement processes, revenue enhancement and debt collection as well addressing Auditor General's report [MFMA Compliance]"**.

- 44.3 It is also important to note that one of the reasons for employing Moto-Tech as a service provider is amongst others stated as follows in the contract:

"The service Provider as considered due to the fact that **he is the only local company in the District who rewires and renews electrical motors for water provision without waiting**. The District Municipality has entered into a 3 year contract with Moto-Tech Services to help restore water and sanitation provision services. Most facilities have collapsed and the Municipality is rated as an ICU patient. This has been brought by the probability that underspecifies operating conditions, there is no foreseeable risk of equipment failure that can endanger the safety of personnel, the environment, or adversely affect the business value." (Emphasis added)

- 44.4 Mr Gopane states that the officials responsible for the Water Service Unit at the Municipality namely, Mr Abraham Senwedi and Mr Motlakase Thekiso, were available but were never consulted by Mr Nair when he appointed Moto-Tech. Mr Nair does not explain why he did not consult with officers assigned to deal with the Water Services Provisions and the accounting officer who is the Municipal Manager that is if one was available.
- 44.5 Mr Gopane intimates in his founding affidavit that Mr Nair endorsed, in the Service Level Agreement, that he appointed Moto-Tech as a service provider without any due regard to Section 217 of the Constitution, the provisions of the MFMA and the procurement policies, the reason being that the "employees of the Applicant (Municipality) were outside the institution for about three weeks, (and thus) an emergency situation was created".

- 42.6 In response Mr Nair avers that there were protests outside the offices of the Municipality by ex-councillors and municipality employees. He does not elaborate as to whether the top management of the Municipality's administration was also on strike.

In reply, Mr Gopane avers that: "The mere fact that council was dissolved does not mean that all the other employees who were responsible for procurement, including the established procurement committees of the Applicant, were not in existence or ought to be ignored".

- 44.7 In his letter of appointment, it is stated that a team of experts in the field of financial management, legal services and others, would be appointed to provide him with the necessary support. Mr Nair is silent about whether or not he did solicit their intervention when he appointed Moto-Tech. He does not even say why he did not offer the existing service providers the police security and other security services made available to Moto-Tech.

- 44.8 Mr Nair is the only signatory to the contract concluded on behalf of the Municipality with Moto-Tech. He did not involve any officers especially the accounting officer of the municipality, when he concluded the contract with Mr Maharaj for Moto-tech. Clause 9 of the terms of reference prescribes that he should at all times act in accordance with the terms of reference. He was also expected to submit monthly reports to the Department of Local Government and Human Settlements regarding the progress made in the intervention. Because he was accountable to the Provincial Executive, it is surprising that he did not disclose whether or not he consulted the Provincial Executive in that regard, especially because he was entering into a long- term service level agreement with a duration of a period of 3 years.

- 44.9 Mr Nair avers that he consulted with his intervention team when he decided to appoint Moto-Tech as a service provider. However, he fails to explain who those people are save for Mr Rajah who is not a Municipal Manager and whose status at the Municipality is not defined. It is also strange that Mr Nair

was in a position to table the appointment of Moto-Tech with the Bid Evaluation Committee for ratification but did not approach the same committee when he decided to appoint Moto-Tech. It is further important to note that regulation 36 deals with “ratification of minor breaches of procurement processes”. The contract with Moto-Tech cannot be classified as a minor breach of procurement processes. The conduct of Mr Nair defeated the evil sought to be prevented in Section 2(1) of the objectives referred to in paragraph [36] above

[45] In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others**<sup>24</sup>, Froneman J for the court made the following remarks:

“[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.”

Furthermore

“[27] There is a further consideration. As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process

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<sup>24</sup> 2014 (1) SA 604 (CC) at para [24] and [27]



formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.”

[46] (a) Mr Klopper on behalf of Mr Nair argued that the Municipality bears the onus to prove:

that the decision of Mr Nair and the procedures followed to appoint Moto-Tech as a service provider is unlawful; (2) that the contract concluded is *null and void ab initio* on the basis that no emergency situation referred to in the Supply Chain Management Policy and Regulations existed; and (3) that the procedure followed by Mr Nair in appointing Moto-Tech did not fall within the ambit of the Supply Chain Management Policy.

(b) He further submitted that the correct application of the **Plascon Evans Paints v Van Riebeeck Paints**<sup>25</sup> rule does not include weighing up of the probabilities of competing versions. That unless a court concludes that there exists no genuine or *bona fide* dispute of fact or that the respondent’s allegations or denials are so far-fetched or clearly untenable that they can be rejected merely on the papers, the court has to accept the version of the respondent.

[47] In **Pharmaceutical Manufactures in Association of South Africa v Re Ex Parte President of the Republic of South Africa and others**<sup>26</sup>, the court held the view that:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the

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<sup>25</sup> 1984 (3) SA 623 (AD) at 643C – 635C

<sup>26</sup> 2000 (2) SA 674 (CC) at para.[85]

executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action”.

- [48] I have dealt extensively with the procedure followed by Mr Nair in concluding the contract with Moto-Tech and I hold the view that even though the emergency situation did arise because of non-delivery of basic services by the Municipality, the rationale provided for deviating from the requirements of the procurement procedures prescribed by the law are far-fetched and clearly untenable. The contract can be declared invalid on the basis that it was in breach of the prescribed tender procedures. In **TEB Properties CC v The MEC, Department of Health and Social Development, North West**<sup>27</sup>, where the court held the view that:

“[30] When the head of a department, as the accounting officer, deems it prudent to deviate from the requirements of the bidding system he would nonetheless still be required to provide ‘rational reasons for that decision’ as this is a material requirement. The rationale for this requirement was described as ‘obvious’ in *Chief Executive Officer, SA Social Security Agency NO.*”(Footnote excluded)

- [49] Mr Klopper further submitted that the declaratory order of invalidity of the contract sought by the Municipality is of no consequence because the nature and extent of the appointment of Moto-Tech, remained subject to the Municipality’s entitlement to source parts and use the services of Moto-Tech at fixed rates and prices, and only when the Municipality deemed it necessary to do so. He further argues that (a) Moto-Tech only rendered services at the behest of the Municipality, (b) Municipality was entitled to, without penalty, to refrain from using Moto-Tech at any time subsequent to the prevailing emergency situation; and (c) there was no room for the duplication as other service providers operated on the same basis.

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<sup>27</sup> (792/10)[2010] ZASCA 243 1 December 2011 (unreported).

[50] This argument overlooks the fact that the charges or prices for services agreed upon with Moto-Tech were not subjected to a competitive assessment. It could well be that there was overpricing of services because the process of arriving at the agreed price was not subjected to a fair, equitable, transparent, cost-effective and competitive procurement process as required by the peremptory statutory prescripts.

See **City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd**<sup>28</sup>.

[51] I am of the view that the decision of Mr Nair to appoint Moto-Tech on **10 October 2014** without applying the Supply Chain Management Policy, the Constitution and the relevant prescribed laws was unlawful. Consequently, the said contract was invalid and null and void, *ab initio*, and should be reviewed and set aside.

### **Costs**

[52] Mr. Maharaj was served with the application on the 15 October 2015. A notice of intention to oppose was filed on 2 November 2015 on his behalf by his attorneys of record, Maree & Maree Attorneys. On 23 November 2015, a notice in terms of Rule 35 (14) was filed wherein he requested a copy of the contract between the Municipality and Moto-Tech. It was also indicated in paragraph 1.3 thereof that: "The 1<sup>st</sup> Respondent cannot answer to the allegations made in respect of the said agreement without having a copy thereof". The copy of the contract was provided on 24 November 2015.

[53] There were no opposing papers filed by Mr. Maharaj on behalf of Moto-Tech. However, he filed a supporting affidavit to Mr. Nair's answering affidavit, wherein he stated that he "supports the opposition to the Applicant's application." When a notice in terms of Rule 28(1) for the rectification of the misnomer of the Moto-Tech, a notice to oppose on behalf of Moto-Tech was filed by Mr. Maharaj's attorneys of record. Mr. Maharaj filed a cross-appeal in

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<sup>28</sup> 2008 (3) SA 1 (SCA) at para [23]

relation to the order correcting the misnomer of Moto-Tech (pty) Ltd to Moto-Tech Systems, which cross-appeal was withdrawn before the hearing of this appeal. Mr. Maharaj cannot be exonerated from paying costs of the *court a quo*.

[54] In respect of Mr. Nair, Mr. Gopane stated the following in the founding affidavit (that Mr. Nair) “**cited as a party who might have an interest in these proceedings. No specific relief is sought against the second respondent**”. Nevertheless, Mr Nair opposed the application as well as the present appeal. I am of the view that both respondents, Moto-Tech and Mr. Nair be ordered to pay costs in the *court a quo*. In addition, Mr. Nair should be ordered to pay costs of this appeal.

### **Order**

[55]

1. The appeal succeeds with costs, which costs include costs in the application for leave to appeal.
2. The judgment and order of the Court *a quo* is set aside and altered to read as follows:

“(a) The application is granted;

(b) The decision of Mr R. G. Nair, the erstwhile administrator of the Ngaka Modiri Molema District Municipality, to appoint Moto-Tech Services for the supply of services to the Municipality under contract number NMMDM 14/15/37 is hereby declared unlawful;

(c) The Service Level Agreement referred to in (b) is invalid and null and void ab initio;

- (d) The first respondent (Moto-Tech Systems) and the second respondent, Mr R. G. Nair are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved”.

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**M M LEEUW**  
**JUDGE PRESIDENT OF THE HIGH COURT**  
**NORTH WEST DIVISION, MAHIKENG**

**I agree**

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**R D HENDRICKS**  
**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT**  
**NORTH WEST DIVISION, MAHIKENG**

**I agree**

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**T J DJAJE**  
**JUDGE OF THE HIGH COURT**  
**NORTH WEST DIVISION, MAHIKENG**

Date of Hearing : 19 MAY 2017

Judgment Handed Down on : 17 JULY 2017

Counsel for the Municipality : Adv.P.L Mokoena SC & Adv.  
Mothopa

Instructed by : Motshabi & Modiboa Attorneys

Counsel for the second  
respondent : ADV. J KLOPPER

Instructed by : GJ Maree Attorneys