

SOUTH AFRICA / JUDGMENT

**Enoch Mgijima Local Municipality and Another v
Dingani and Another; In re: Enoch Mgijima Local
Municipality and Another v Dayi; In re: Enoch
Mgijima Local Municipality and Another v Siqhaza
(583/2019; 686/2019; 634/2019) [2020] ZAECGHC
42; [2020] 3 All SA 135 (ECG) (12 May 2020)**

[2020] ZAECGHC 42**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

583/2019; 686/2019; 634/2019

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****[EASTERN****CAPE DIVISION: GRAHAMSTOWN]****CASE Nos:**

583/2019; 686/2019; 634/2019

In

the matter between:

ENOCH MGIJIMA LOCAL

MUNICIPALITY

1st Applicant

VUYO

MLOKOTHI

N.O. 2nd

Applicant

And

MZIWOXOLO

DINGANI

1st Respondent

ZANDISILE

NXANO

2nd

Respondent

In

Re: ENOCH MGIJIMA LOCAL
MUNICIPALITY 1st
Applicant
VUYO
MLOKOTHI
N.O. 2nd
Applicant
SIMILO
DAYI Respondent
MOUNTAIN
SIQHAZA Respondent

JUDGMENT

JOLWANA J:

Introduction

- [1] The applicants seek in the main, to have declared null and void and therefore the setting aside of the appointment of the respondents as its general managers in terms of sections 56(2) and 66(4) of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act).
- [2] The first applicant came out of the disestablishment of Inkwanca, Tsolwana and Lukhanji Local Municipalities and the amalgamation of those municipal areas into Enoch Mgijima Local Municipality. This was done through Provincial Notice No.182 of 2016 published in Provincial Gazette No. 3717 dated 8 August 2016. The disestablishment of those former local municipalities and the establishment of the first applicant was done by the Member of the Executive Council responsible for local government in the Eastern Cape acting in terms of sections 12, 14 and 17 of the Local Government: Municipal Structures Act 117 of 1998.
- [3] The second applicant is the administrator of the first applicant having been appointed as such in terms of sections 139(1)(b) and 139(5) of the Constitution.[1] It appears that the second applicant's appointment was a necessary intervention by the Provincial Government to ameliorate the effects of the service delivery failures by the first applicant, the sale in execution of some of its assets due to its inability to meet its financial commitments and other administrative lapses. The terms of reference were broadly, the financial management and administration of the first applicant with particular focus on credit control, debt collection, supply chain management and the development of the financial recovery plan.
- [4] The applicants launched three separate applications against the respondents. The first application is against Mr Mziwoxolo Dingani and Mr Zandisile Nxano, the second application is against Mr Mauntain Siqhaza and the third application is against Mr Similo

Dayi. It is not clear why it was deemed necessary to launch three separate applications as against one composite application especially considering the largely similar causes of actions. Furthermore, the facts against all of them were gleaned from the same report following investigations that were spearheaded by the second applicant shortly after his appointment. These applications were not consolidated, but it was agreed by counsel that all of them would be heard at the same time as they were largely similar. Purely for brevity and to avoid confusion, I shall henceforth refer to Mr Dingani and Mr Nxano as the first and second respondents and Mr Dayi and Mr Siqhaza as the third and fourth respondents respectively.

- [5] The first, second and third respondents are still the employees of the first applicant and still occupy the positions of general managers to which they are alleged to have been unlawfully appointed to in June 2018. The fourth respondent's counsel, Mr Mthombeni placed on record at the commencement of the proceedings that the fourth respondent was withdrawing his opposition to the application as he had since been employed elsewhere. It is not clear if he had resigned from the first applicant's employ. The applicants' counsel, Mr Rorke indicated that the applicants persist with the relief they seek also against the fourth respondent including an order for costs.

The facts

- [6] Under the leadership of its erstwhile municipal manager (Mr Magwangqana) the first applicant held a strategic planning meeting in February 2018. It was in that strategic planning meeting that an operation plan that introduced a new organogram which created the positions to which the respondents were ultimately appointed was adopted. On 29 March 2018 the first applicant's council held a meeting in which a resolution was taken approving the said staff

establishment. The resolution also authorised Mr Magwangqana to ensure that the staff establishment envisaged in the said organogram

was implemented and satellite offices in the former municipalities were established. The first and second respondents were subsequently

appointed by Mr Magwangqana to the positions of general manager for Molteno and Sterkstroom and general manager for Tarkastad and Hofmeyr respectively. The third and fourth respondents were appointed as general managers for integrated planning and economic development and general manager for public safety respectively.

- [7] The applicants contend that that organogram in which the respondents' positions were created did not comply with regulation 4(7)[2] in a number of respects. Not only were these regulatory provisions ignored and disregarded in the compilation of the said report but also the report incorrectly reflected that the changes in the staff establishment would have no financial implications. However, the appointment of the first and second respondents had financial implications of about R2 million for the 2018/2019 financial year. Due to the

incorrectness of the report on the financial implications these positions were created - and the first applicant employed the respondents in those positions in circumstances where it had no budget for them. This resulted in the first applicant incurring a budget over expenditure of about R2.7 million on its employee related costs as at the end of December 2018. The decision of the first applicant's council to approve the staff establishment under these circumstances was unlawful and therefore the employment of the respondents is null and void as envisaged in section 66(3) and 66(4) of the Municipal Systems Act. What follows below is the first applicant's account of the history of the respondents until they were appointed to the impugned

positions.

- [8] The first respondent was, prior to the current position, employed by the Inkwanca Local Municipality in September 2013 as a manager: community services, a position that was not a section 56 manager position. That contract was scheduled to terminate on the 30 August 2018. However, when Inkwanca, Lukhanji and Tsolwana Local Municipalities were disestablished, their former employees, including the respondents became employees of the new municipality - the first applicant with effect from the 11 August 2016.
- [9] The second respondent was employed by Tsolwana Local Municipality as its manager: community services from the 1 October 2012, on a five-year contract that was scheduled to terminate on 30 September 2017. He also became an employee of the first applicant on 11 August 2016 on the disestablishment of the three municipalities and the establishment of the first applicant. He was appointed as first applicant's acting director: technical services when his five-year contract had expired. The first applicant's council passed the resolutions extending the second respondent's acting appointments until the position in which he had been acting was filled. The applicants contend that these acting appointments fell foul of section 56(1)(c) of the Municipal Systems Act which provides that an acting appointment shall not exceed a period of three months.
- [10] Following the adoption of the organogram the posts were advertised and both the first and second respondents applied for those positions, were shortlisted, interviewed and subsequently appointed. The first applicant refers to a number of reasons why it contends that the whole recruitment process was flawed for want of compliance with section 56 and the applicable regulations. I deal with some of the alleged non-compliances hereunder.
- [11] First, the advertisement contained no minimum competency requirements for the section 56 manager positions as prescribed by regulation 7 of the Municipal Regulations on Minimum Competency Levels (the 2007 Regulations). In fact, the first and second respondents did not have those qualifications. These were the relevant higher education qualification, work related experience, core managerial and occupational competencies and competency in the unit standards prescribed for financial and supply chain management.

- [12] Second, the interview panel consisted of Mr Magwangqana, Mr Van Wyk and Mr Nkonki. Both Mr Van Wyk and Mr Nkonki were section 56 managers of the first applicant. This interview panel did not comply with regulation 12(4)[3] of the Regulations: Appointment and Conditions of Employment of Senior Managers (the 2014 Regulations) as there was no member of the mayoral committee or a councillor who was a relevant portfolio head and there was no external expert.
- [13] Third, the appointments of the first and second respondents were not approved by the council of the first applicant. On the contrary, Mr Magwangqana, in his capacity as the chairperson of the interview panel, made a recommendation to himself for their appointment and proceeded to appoint them. It appears from annexure “AA11”, the interview report, that Mr Magwangqana was indeed the chairperson of the interview panel and in that capacity he signed a recommendation for the appointments of the first and second respondents. He also signed in approval of the said recommendation.
- [14] Fourth, the first and second respondents did not undergo the competency assessment required in terms of regulation 16(1) of the 2014 Regulations. It is common cause that the first applicant’s council did not satisfy itself that they met the relevant competency requirements required by regulation 17 of the 2014 Regulations as it never participated in their appointment. The first applicant contends that in any event both the first and second respondents simply did not meet those competency requirements and therefore they did not have the prescribed competencies required in terms of section 56(1)(b) of the Municipality Systems Act.
- [15] Fifth, the remuneration packages of the respondents appear to have been unilaterally determined by Mr Magwangqana without a job evaluation process that ought to have informed them. There were no job descriptions, duties, functions and responsibilities. The positions were not evaluated in order to determine their grading. Therefore, the staff establishment incorporating the respondents’ positions was unlawfully adopted. The positions under these circumstances, were not properly created.
- [16] In the final analysis and for the reasons foreshadowed, these appointments were done in contravention of sections 56(1)(a) and (b) of the Municipal Systems Act and the regulations. Furthermore, the development of the organogram which preceded these appointments was done in contravention of section 66(1)(a) and (b). These breaches of the statutes, so contends the first applicant, make the appointments null and void in terms of the provisions of sections 56(2)(a) and (b) and 66(3) and (4). This is largely the basis for the declaratory relief that the applicants seek against the first and second respondents.

- [17] The applicants also seek, in the alternative, that the decisions to appoint the first and second respondents be reviewed and set aside on the basis that they were taken in breach of the principle of legality. The basis for that contention is the various alleged contraventions of the Municipal Systems Act and the Regulations as indicated above. Furthermore, the non-compliance with the procedures prescribed for the appointment of the section 56 managers was in breach of section 217(1) of the Constitution which reads:

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

legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent,

competitive and cost-effective.”

- [18] The first applicant contends that the manner in which the respondents were appointed on 22 June 2018 did not comply with this constitutional imperative. Furthermore, in employing all the respondents in the non-compliant manner, such employment also fell foul of section 195(1) of the Constitution — where the basic principles that govern public administration are founded upon.
- [19] The third and fourth respondents’ appointments are challenged firstly on the basis that their appointment as general managers of the first applicant did not comply with section 66(3) of the Municipal Systems Act and therefore in terms of section 66(4) their appointment is null and void. The first applicant also seeks to have their appointment reviewed and set aside on the basis that they are not qualified for their positions. As indicated above, the fourth respondent no longer opposes the application against him. Therefore, due to the substantial similarities in the factual and legal contentions against them I will determine his case on the basis of the third respondent’s contentions.
- [20] There are a number of factual and legal contentions against the third respondent, I deal with some of them hereunder. First, section 66(1)(a) and (b) requires that a municipal manager must develop a staff establishment that accords with the municipal council policy framework and subject to any applicable legislation. The staff establishment so developed must be submitted to the municipal council for approval and provide a job description for each position on the staff establishment.
- [21] Second, section 66(3) provides that no person may be employed in a municipality unless the post to which he is so appointed is provided for in the staff establishment of that municipality. Section 66(4) provides that the employment of any person and any employment contract concluded with that person contrary to the provisions of section 66(3) is null and void. Where a position is created in an approved staff establishment that does not comply with regulation 4(7) of the 2014 Regulations, the employment of any person to such a post is null and void. Third respondent’s appointment was done in contravention of the above legal provisions and therefore it is null and void in terms of section 66(4).

- [22] The process leading up to the third respondent's appointment is the same as that which preceded the appointment of the first and second respondents. For the sake of completeness and context, I again refer to certain aspects of it. In February 2018 the first applicant held a strategic planning meeting facilitated by Mr Magwangqana. It is in this strategic planning meeting that an operational plan encompassing a new organogram which created a general manager position for integrated planning and economic development was adopted, the post to which the third respondent was subsequently appointed.
- [23] That operational plan was approved in a council meeting held on 29 March 2018. Relevant for the purposes of this matter, the said council meeting passed the following resolutions:
- “(a) That the Draft Organisational Structure/organogram for 2018/2019 financial year, be approved.*
- (b) That the Municipal Manager ensures that the Draft Organisational Structure is implemented and satellite offices are established in the erstwhile municipalities.”
- [24] The third respondent's history with the first applicant is that he was a municipal manager of Tsolwana Local Municipality since 2001 until his last employment contract expired on the 30 June 2016. Tsolwana Local Municipality was disestablished and it became part of the first applicant's establishment in August 2016. The third respondent, like all employees of the former municipalities would have become an employee of the first applicant on its establishment with effect from the 11 August 2016. However, he could not become an employee of the first applicant because his contract expired on the 30 June 2016.
- [25] Inexplicably, on 24 August 2016 the council of the first applicant adopted a resolution purportedly appointing him as acting director of integrated planning and economic development. The first applicant submits that he could not validly be appointed to that position as he could not legally be an employee of the first applicant for the simple reason that his contract of employment with Tsolwana Local Municipality had expired before the first applicant was established. He remained in that position since the resolution of 24 August 2016 until the 13 October 2017 when the council resolved to extend his acting appointment for a further period of three months after which the council further extended his contract indefinitely until that position was filled. This resulted in him occupying the position of acting director for integrated planning and economic development for a period of about two years contrary to section 56(1)(c) of the Municipal Systems Act. This was done for the sole purpose of keeping him in the first applicant's employ until a suitable position could be found for him.
- [26] The appointment of the third respondent to an unlawfully created position resulted in the first applicant incurring an irregular and unbudgeted expenditure of approximately R1 087 065.00 in respect of his annual remuneration. The impugned appointment to the position of general manager for integrated planning and economic development followed an unlawful recruitment process. There are a number of reasons on the basis of which the first applicant submits that the recruitment process was unlawful and I deal with some of them hereunder.

[27] The advertisement required a candidate to have a Bachelor's Degree in Economics and/or Development Studies or their equivalent. It also required him or her to have a minimum of ten years related work experience, seven years of which had to be at management level. These two requirements were part of the minimum requirements for that position.

[28] The applicants submit that his previous position of municipal manager of Tsolwana Local Municipality is not work related experience — because he did not perform the functions of general manager for integrated planning and economic development when he was a municipal

manager. His appointment as acting director of integrated planning and economic development was for a period of two years and as such did not satisfy the requirement of ten years related work experience seven years of which was required to have been in a management position. He also did not have the qualification of a Bachelor's Degree in Economics and/or Development Studies or their equivalent, this being also a requirement in terms of the advertisement.

[29] For these reasons the applicants seek, in the alternative the review and setting aside of the decision to appoint him on the basis of the principle of legality for want of compliance with the requirements of the first applicant's Recruitment and Selection Policy adopted in terms of Section 67 of the Municipal Systems Act. In the final analysis the applicants contend that his appointment was in violation of section 195 of the Constitution.

[30] I turn now to deal with the case put up by the respondents in opposition to the relief sought by the applicants.

The first and second respondents

[31] I consider it necessary to restate the history of the respondents with the first applicant as stated by the respondents themselves in order to contextualise their submissions.

The first respondent was appointed on 01 September 1998 to the position of manager for community services by Inkwanca Local Municipality as a section 56 manager until August 2013. In July 2013 that contract was further extended for another five-year period. That municipality was affected by the disestablishment process that gave birth to the first applicant.

On 24 August 2016 he was appointed as acting director of community services for a two-year period terminating on 31 August 2018.

[32] In February 2018 the first applicant held a strategic planning meeting which reviewed its organogram by creating new positions of general managers reporting directly to the municipal manager. On 28 February 2018 the proposal for the revised organogram with a satellite model and a second tier of management in the form of the general managers was approved for implementation. On 30 August 2018 another resolution adopting the reviewed organogram creating the offices of the general managers for Whittlesea Unit, Tarkastad and Hofmeyr as well as Molteno and Sterkstroom was approved. He applied and was appointed to the position of general manager of Molteno and Sterkstroom following an advertisement

of this position. I think that reference to the 30 August 2018 is a typographical error. It is common cause that the date on which council adopted the new organogram is the 29 March 2018. Furthermore, in August 2018 the first respondent had already been employed in the current position.

- [33] His principal contention is that his position is not a section 56 manager position and the fact, which he admits, that he reports to the municipal manager does not make it a section 56 position. He also places reliance, incorrectly in my view, on the approval of the proposal by the strategic planning meeting on the 28 February 2018. The resolution taken thereat reads:

“That the proposal on the reviewed organogram and Satellite Model and the creation of the second tier of management in the form of General Managers be approved and implemented.”

- [34] The first respondent’s reliance on a strategic planning meeting which has no powers to approve or adopt an organogram is difficult to understand. That resolution of council which approved the organogram is dated 29 March 2018. That resolution makes no reference to a second tier of management. Whatever resolution was adopted on the 28 February 2018 was adopted for approval by council and it did on 29 March 2018.
- [35] He contends that the first tier of managers are the directors who are the section 56 managers who report to the municipal manager and these are the managers that are appointed by the council. There was no resolution that the general managers were to be section 56 managers or that they would be appointed by council. He therefore rejects the first applicant’s contention that because the general managers report to the municipal manager therefore, and by virtue thereof, they are section 56 managers. For this reason, when the positions of the director for technical services and that of the chief financial officer were appointed it was done in terms of a council resolution which was not the case for him. He instead, became an employee of the first applicant, not through the council but was employed by the municipal manager.
- [36] His appointment was therefore in terms of section 55(1)(e) of the Municipal Systems Act as no council approval was sought for their appointments as general managers. Section 55(1)(e) empowers the municipal manager to make certain appointments and does not require council approval.
- [37] He and the second respondent further contend that appointments in terms of sections 56 and 57 are top management posts as they are the decision makers. They also have to have annual performance agreements and have to have fixed term contracts. Section 56 managers also earned performance bonuses which are, not earned by general managers. There is no salary scale for sections 56 and 57 managers. His position and that of the second respondent are Task Grade 18 and they are permanent employees with no performance agreements required for the very reasons that contrary to what applicants say, they are not section 56 but are section 55(1)(e) appointees. Therefore, their positions as general managers directly reporting to the municipal manager is just like that of the municipal manager’s secretary

who also reports to the municipal manager. This does not make the secretary a section 56 employee. The requirements set out in section 56(2) and the regulations do not apply to their appointments as general managers.

- [38] In essence he challenges the applicants' case against him and the second respondent as being ill-conceived and ill advised to the extent that it is based on the general managers being section 56 employees as against section 55(1)(e) employees. That is why his and the second respondent's appointments did not have to comply with regulations 16(1) and 17 which call for competency assessments and meeting competency requirements as section 55(1)(e) does not provide for competency requirements.
- [39] The first and second respondents further contend that the organogram which created the positions to which they were appointed was approved by council. Therefore the submissions relating to the invalidity or otherwise of that organisational structure or staff establishment cannot be a basis for the invalidation of their appointments and are in fact an impermissible collateral defence. Furthermore, they were appointed by the erstwhile municipal manager, Mr Magwangqana who took the decision to employ them but has not been called to explain his decisions in these proceedings. Rule 53 of the Uniform Rules of Court has not been complied with nor have reasons for their appointment been sought from Mr Magwangqana (the decision maker). The above is, in a nutshell, the first and second respondents case. The second respondent also raised certain points in limine namely, jurisdiction, non-joinder of Mr Magwangqana, incompetency of the declaratory relief, the misjoinder of the second applicant and the Turquand rule. I will deal with the points in limine later in this judgment.

The third respondent

- [40] The third respondent's principal contentions are that the post to which he applied had been advertised and he applied, he was shortlisted and following an interview, he was appointed. The municipal manager was within his powers in appointing him as he is not a section 56 manager and therefore his appointment did not need to be approved by council. Section 66(4) is of no relevance because section 66(3) was not contravened. The organisational structure which created his post was approved by council as contemplated in section 66(3).
- [41] He also contends that there was nothing wrong with the recruitment process that led to his appointment. To the extent that the applicants rely on non-compliance with the municipality's internal processes, their ineptitude cannot be used to deprive him of the benefits of a transparent and competitive recruitment process. The regulations referred to by the applicants are of no moment because the decision of the council of 29 March 2018 which approved the organogram has not been set aside. The applicants do not seek the setting aside of his acting appointments prior to his employment in the current position and therefore once again the applicants' submissions in relation to such acting appointments are similarly of no moment.

[42] He denies that his appointment led to an irregular expenditure on the basis that it is the council that approved his post which was thereafter subjected to a lawful recruitment process. He denies that he does not have the necessary competencies. Furthermore, such competencies are irrelevant because the applicants rely on section 66 of the Municipal Systems Act. He also says that

the Recruitment and Selection Policy is irrelevant because his appointment was never challenged, presumably by another candidate.

In any event he was a municipal manager of Tsolwana Local Municipality before its disestablishment. Therefore, he finds it baffling that he was qualified to hold that position but is not qualified to hold a far lower position of a general manager. He therefore disputes the allegations that he does not have the necessary qualifications for the post of general manager for integrated planning and economic development as the applicants allege.

The issues

[43] The issues for determination in this application are, principally, as regards the first and second respondents whether or not they are section 56 managers. As regards the third respondent the issue is whether he does hold the necessary qualifications for the position he currently holds. As against all the respondents, the validity of the organisational structure adopted on the 29 March 2018 also falls to be determined. The final issues relate to the points in limine raised by the second and third respondents and lastly the applicants' condonation application.

The legal framework

[44] Before I deal with sections 56 and 66 of the Municipal Systems Act I do need to highlight the rather peculiar history of the amendment to the Municipal Systems Act which is very important in the context of this matter. On the 5 July 2011 Government Gazette No. 34433 introduced certain amendments to the Municipal Systems Act through the gazetting of the Local Government: Municipal Systems Amendment Act No.7 of 2011 (the Amendment Act). Among other amendments, this Amendment Act amended sections 56, 66 and 67 of the Municipal Systems Act.

[45] Section 56 of the Municipal Systems Act as amended reads as follows:

“56

- (1) (a) A municipal council, after consultation with the municipal manager, must appoint –
 - (i) a manager directly accountable to the municipal manager; or
 - (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.

- (b) A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed.
- (c) A person appointed in terms of paragraph (a)(ii) may not be appointed to act for a period that exceeds three months: Provided that 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 a further period that does not exceed three months.
- (2) A decision to appoint a person referred to in subsection (1)(a)(ii), 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, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).
- (3) If a post referred to in subsection (1)(a)(i) becomes vacant, the municipal council must –
 - (a) advertise the post nationally to attract a pool of candidates nationwide; and
 - (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.
- (4) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.
- (4A) (a) The municipal council must, within 14 days of the date of appointment, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
- (b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.
- (5) If a person is appointed to a post referred to in subsection (1)(a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.
- (6) A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (1)(b) if it is unable to attract suitable candidates.
- (7) A person appointed in a permanent capacity as a manager directly accountable to the municipal manager when this section takes effect, must be regarded as having been appointed in accordance with this section.

- (8) A person appointed as an acting manager directly accountable to the municipal manager when this section takes effect, must be regarded as having been appointed in accordance with this section only for the period of the acting appointment.
- (9) Any pending legal or disciplinary action in connection with an appointment made before this section took effect, will not be affected by this section after it took effect.”

[46] Section 66 as amended reads:

“(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must –

- (a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;
 - (b) provide a job description for each post on the staff establishment;
 - (c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
 - (d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.
- (2) Subsection (1)(c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.
- (3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.
- (4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).
- (5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision.”

[47] The constitutional validity of the Amendment Act containing, among others, sections 56, 66 and 67 was challenged in the High Court of South Africa, Gauteng Division, Pretoria, which found the Amendment Act to be invalid. It also granted an order referring its declaration of constitutional

invalidity to the Constitutional Court. The Constitutional Court in *South African Municipal Workers’ Union*[4] upheld the declaration of constitutional invalidity and said:

“Having had regard to the Premier’s submissions, I am of the view that the declaration of invalidity should be suspended for a period of 24 months to allow the Legislature to cure the procedural defect. The Amendment Act brought about reforms that inform the proper functioning of the municipalities. I am of the view that the reforms provided for in the Amendment Act are not provided for in any other legislation. Accordingly, suspension is justified to minimise disturbance in the running of the municipal administration.”

[48] It thereupon granted, inter alia, the following orders:

“1. The declaration of invalidity of the Local Government: Municipal Systems Amendment Act 7 of 2011, made by the High Court of South

Africa, Gauteng Division, Pretoria, is confirmed.

2. The declaration of invalidity is suspended for a period of 24 months to allow the Legislature an opportunity to correct the defect.

...”[5]

[49] These orders were granted by the Constitutional Court on 9 March 2017 and the 24 months’ period of suspension ended on the 8 March 2019 without the defects having been corrected by the Legislature. It is very important to note that the events relating to this matter took place during the period of the suspension of invalidity. Therefore, it is the Amendment Act that is applicable for the purpose of determining this matter and not the unamended Municipal Systems Act.

Most significantly for this matter and as alluded to by the Constitutional Court in *South African Municipal Workers Union* some of the most stringent provisions are not in the now applicable unamended Municipal Systems Act but are provided for in the Amendment Act. Therefore, the interplay between the two pieces of legislation needs to be contextually appreciated and the legislation which is applicable needs to be understood relative to the time when the issues before court arose. In this matter all reference to sections 56, 66 and 67 of the Municipal Systems Act is the Municipal Systems Act as amended.

[50] However, section 55 of the Systems Act remains the same in that it was not affected by the amendments brought about by the Amendment Act. This is also important because all the respondents say they were employed in terms of section 55, a point that is challenged by the applicants whose case is that both the first and second respondents are section 56 managers. However, it is common cause that the third and fourth respondents are not section 56 managers. Relevant for the purposes of this matter is section 55 (1)(e) which reads:

“55 Municipal Managers

- (1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for –

...

- (e) The appointment of staff other than those referred to in section 56(a), subject to the Employment Equity Act, 1998 (Act 55 of 1998);

...”

- [51] Fundamental to the above pieces of legislation and the whole legal and regulatory framework is the Constitution. Because the first applicant forms part and parcel of public administration, section 195 of the Constitution is pivotal to its administration and human resource management. Section 195 provides:

“195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development-oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad presentation.
- (2) The above principles apply to—
- (a) administration in every sphere of government;
 - (b) organs of state; and
 - (c) public enterprises.
- (3) National legislation must ensure the promotion of the values and principles listed in subsection (1).
- (4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

- (5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
- (6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.”

[52] These are the overarching principles governing public administration at all levels of governance including municipalities. It follows that anything done contrary to these principles is prima facie illegal. For this reason, the interpretation of the legal framework has to be undertaken informed by these constitutional principles. That this is so is itself provided for in the Constitution. Section 2 of the Constitution specifically provides for this in the following terms:

“2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

[53] There is one last issue that I need to deal with which is also relevant to the legal framework. That issue relates to the interplay between paragraphs (i) and (ii) of Section 56(1)(a) read with section 56(2). Section 56(1) and (2) reads as follows:

“56(1)(a) A municipal council, after consultation with the municipal manager, must appoint –

- (i) a manager directly accountable to the municipal manager; or
- (ii) an acting manager directly accountable to the municipal manager

under circumstances and for a period prescribed.

- (2) A decision to appoint a person referred to in subsection (1)(a)(ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –
- (b) the appointment was otherwise made in contravention of this Act, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).”

[54] It is clear that there was a legislative slip of the tongue, for lack of a better expression, when these provisions were drafted in that section 56(2) proscribes the appointment of a person referred to in section 56(1)

- (a) (ii) if he does not have the prescribed skills set. That person is an acting manager directly accountable to the municipal manager. However, the appointment of a person referred to in section 56(1)(a)(i) is not so proscribed if he does not have the prescribed skills set. The person referred to in section 56(1)(a)(i) is not an acting manager but is employed on a fixed term contract in terms of section 57.

[55] Clearly that is insensible in light of the very purpose of the whole of section 56 and the entire legislative and regulatory framework. That obvious error must be corrected so that the purpose of the Legislature is not frustrated or thwarted by a literal interpretation of these provisions. In *Endumeni Municipality*[6] the legal position relating to the process of interpretation was spelt out as follows:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration

must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

[56] One of the ways of correcting this obvious error is to read into section 56(2) the words “(i) and” just before the word “(ii)” so that subsection (2) reads “A decision to appoint a person referred to in subsection (1)(a)(i) and (ii), and any contract concluded between the municipality and that person in consequence of the decision, is null and void if-”. I do not think that the Legislature intended that the same competencies and qualifications required for a person employed on a fixed term contract of five years should be less stringently regulated than that of a person employed on a three months’ contract. The reason for this is not far to seek. If the Legislature required a person employed on a three months’ contract to be stringently regulated, that should be the case equally, if not more, for a person employed on a five-year contract.

[57] Doing so will align subsection 56(2) with the purpose of the entire legal and regulatory framework and give the intended meaning to section 56(1) and (2). It defies logic to read section 56(2) as requiring more stringent measures for the appointment of an acting person than for the appointment of a person employed on a long term contract. Reading in is a well-known principle of our law and is in line with our constitutional value system. In *National Coalition for Gay and Lesbian Equality*[7] Ackermann J expressed this principle as follows:

“The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible.”

The analysis

[58] One of the main pillars of all the respondents' opposition to this application is that the decision of the council of the 29 March 2018 in which the staff establishment or organogram that created their positions was approved has not been

set aside. They, however, have not made any real effort to show that the organogram was in any event validly adopted in that it is a proper organogram that complies with the legal prescripts. Their case is simply that regardless, as long as the organogram or the decision that adopted it has not been set aside — the applicants' case is ill-advised.

[59] For this proposition, they rely on the Oudekraal principle. The Oudekraal principle in its simplest formulation is that administrative decisions remain valid until set aside and have legal consequences.

In *Gijima Holdings*[8] the dichotomy between a PAJA review and a legality review was explained at length by the Constitutional Court as follows:

"Section 6(1) of PAJA provides that '(a)ny person may institute proceedings in a court or tribunal for judicial review of an administrative action.' Section 6(2) then itemises the grounds on which a court or tribunal may undertake this review. When decreeing – in section 33(3) – that national legislation must be enacted to, inter alia, 'provide for the review of administrative action', the reference to 'administrative action' in this section must surely be a reference to the earlier 'administrative action' referred to in section 33(1) and (2). The Constitution thus envisages that – in making provision for the review of

administrative action – the national legislation must direct itself to the administrative action referred to in section 33(1) and (2). We have already concluded that the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1) and the right of everyone whose rights have been adversely affected to be given written reasons (section 33(2)) are enjoyed by private persons, not organs of state. Therefore, when section 33(3)(a) stipulates that national legislation which provides for the 'review of administrative action' must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under section 33(1) and (2).

The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA. In *Fedsure* this [C]ourt said that '[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. It also said 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 [supremacy]. ...’

Pharmaceutical Manufacturers tells us that the principle of legality is ‘an incident of the rule of law’, a founding value of our Constitution. In Affordable Medicines Trust the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.’

What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review.

The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.” (My added emphasis.)

[60] The question that arises is whether the legal prescripts and therefore the Constitution were followed in creating the staff establishment and therefore whether it is a valid staff establishment or not. It was never contended by the respondents that the staff establishment was properly created. All that the respondents are saying is that it has not been set aside and that even in these proceedings there is no application for it to be set aside. The first applicant’s submissions that the legal prescripts were not followed in creating the staff establishment is not being gainsaid by the respondents at least not meaningfully or cogently nor are the respondents engaging with that issue.

[61] The submission that the staff establishment has not been set aside has unfortunately been raised in a vacuum. The respondents have not alleged that the council decision of the 29 March 2018 was an administrative decision. The applicability of the Oudekraal principle to the facts of this case has similarly not been explained. The doctrine of the rule of law on which legality review is founded is that law or conduct, that is inconsistent with the Constitution is invalid. The constitutional principle of legality, properly understood also dictates that whatever is done on the basis of that which the Constitution says is invalid is also invalid.

[62] I understand the Constitutional Court to be also expressing this principle in Corruption Watch[9] when, writing for the majority, Madlanga J said:

“The appointment of Advocate Abrahams as NDPP was an act consequential upon the constitutionally invalid vacation of office by Mr Nxasana. Consequential acts which follow on constitutionally invalid conduct are commonplace. An interesting question raised by the oft-cited statement of law in Oudekraal is the effect of the constitutional invalidity of Mr Nxasana’s vacation of office on the consequential act of the appointment of Advocate Abrahams. In that statement Howie P and Nugent JA said that until administrative action is set aside by a court in review proceedings, it continues to exist in fact and has legal consequences that cannot simply be overlooked. This pronouncement has been relied upon by this Court on a number of occasions. Does this mean that – because Mr Nxasana’s

vacation of office had not yet been set aside when Advocate Abrahams was appointed NDPP – Advocate Abrahams was validly appointed?

What may lead some readers of what I have paraphrased from Oudekraal astray is reading it in isolation. Later Oudekraal makes it clear that where a consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act the consequential act would be valid only for so long as the earlier act had not been set aside. In Seale Cloete JA for a unanimous court put this beyond question. He held:

“Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in Oudekraal Estates (Pty) Ltd v City of Cape Town which adopted the analysis by Christopher Forsyth of why an act which is invalid may nevertheless have valid consequences and concluded:

‘Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

...”

[63] If my understanding of Corruption Watch is correct then the respondents face an insurmountable problem. In my view, a staff establishment should not just have “factual existence”, it must have legal validity for the simple reason that it is not a staff establishment unless it is the one envisaged in section 66(1). The staff establishment envisaged in section 66(1) is not whatever the municipal manager develops and council adopts, it is only clothed with legal validity if it has been developed in the manner prescribed. It must be a product of the process described in section 66(1) in that it was developed and approved in the manner prescribed by the policy, legal and regulatory framework. If that were not so, it would make no sense for the legal framework to require such stringent provisions for its development and adoption.

[64] Non-compliance with section 66 in the development and adoption of the staff establishment is not the only problem for the first and second respondents. Even if a valid staff establishment had been developed by the municipal manager and adopted by council their employment still needed to comply with section 56(2) in that they had to have the necessary

prescribed skills and qualifications and be appointed by council. Once again they do not make any cogent factual averments that seek to establish that they, in any event, have the necessary skills and concede that they were not appointed by council.

- [65] The first applicant contends that the relevant advertisement in respect of the posts to which the first and second respondents were appointed did not require candidates to have the minimum requirements prescribed in the regulations as it should have nor did the first and second respondents meet the minimum prescribed requirements for the jobs. These are the prescribed higher education qualification, work related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency areas. These are the requirements prescribed for senior managers in terms of regulation 7 of the 2007 Regulations.
- [66] The first and second respondents make no attempt to show that they do have the necessary qualifications and competencies and state clearly what these qualifications and competencies that they have which meet these requirements are. They appear to be content in denying that they are section 56 managers and they make no real attempt whatsoever to plead that in any event, they met the prescribed requirements for the positions that they occupy. Clearly, when your employer says you were wrongly employed in that you lack the prescribed qualifications and competencies, it surely is incumbent upon you to debunk those allegations with clear evidence of your qualifications and experience for your job. This would include whatever else you believe qualifies you for the job in light of its requirements as prescribed.

Are the first and second respondents section 56 managers?

- [67] The applicants' case is that the first and second respondents are section 56 managers and therefore their employment should have complied with section 56. They contend that it did not in that they do not have the prescribed skills and were otherwise appointed in contravention of section 56 for many other reasons. I do need to emphasise that the first and second respondents' case is not that their employment complied with section 56. Their case is simply that section 56 does not apply to them because they are not section 56 managers.
- [68] The second point is that the whole recruitment process was fundamentally flawed. Again this is based on the requirements for a process that must be followed in the recruitment of section 56 managers. The applicants' case is that proper recruitment processes were not followed in that the necessary skills set were basically ignored in the advertisement for the positions. The interview panel was also not the panel prescribed by regulations for section 56 managers. This is with reference to regulation 12(4) of the 2014 Regulations which requires a panel to consist of a mayoral committee member or councillor who is a portfolio head of the relevant portfolio and an external expert with expertise or experience in the area of the advertised post. That that did not happen in this case is common cause, and the first and second respondents again argue that it did not have to be constituted in that fashion because they are not section 56 managers.

- [69] The panel in this case consisted of the former municipal manager, Mr Magwangqana, a section 56 manager Mr Van Wyk and another section 56 manager Mr Nkonki. If they are section 56 managers, regulation 16(1) required the first and second respondents to undergo a competency assessment and the municipal council ought to have satisfied itself that they had the relevant competencies.
- [70] The case against the two respondents therefore largely boils down to the issue of whether or not they are section 56 managers. They say they are not -and did not have to meet the requirements prescribed for section 56 managers. In its simplest formulation the applicants' case is that the first and second respondents are section 56 managers because they are accountable to the municipal manager. In its founding affidavit, the first applicant has attached an extract of a copy of the organogram approved by council on 29 March 2018 and argues that it reflects that these respondents are section 56 managers.
- [71] The first and second respondents dispute that they are section 56 managers on the contention that the fact that a person reports to the municipal manager does not make him or her a section 56 manager. The respondents used the words "report to" in their answering affidavits. It is not clear if they intended to make any linguistic distinction between "report to" and "accountable to". There is no discernible difference between the two phrases. In my view, any suggestion of a difference would be nothing more than semantics. It is also not clear what the source of the phrase "report to" is as the Municipal Systems Act uses the phrase "accountable to" in section 56 and section 60(1)(b) the phrase "responsible to" is used.
- [72] They also contend that they are second tier managers, the first tier managers being the directors who are appointed by council. Furthermore, there was no resolution that they would be appointed by council. Some of the reasons cited by the first and second respondents for their submission that they are not section 56 managers are incidentally the very reasons why the applicants argue that their appointment was unlawful. For instance, the fact that their appointment was not done by council or their appointment was not brought before council for approval.
- [73] They also say that the fact that their appointments were coupled to a post level or Task grade 18 clearly indicates that they are not section 56 managers. They do not have performance agreements with the first applicant and do not earn performance bonuses. They further argue that they are no different to a municipal manager's secretary who reports or accounts to the municipal manager but is not a section 56 employee. On these bases, it was argued on behalf of the first and second respondents that they are not section 56 managers and that the applicants' case is predicated on the misconception that they are in fact section 56 managers.

[74] In making some of their averments in their answering affidavits the first and second respondents appear to have taken submissions that were made by counsel for the respondents in another matter almost verbatim. In Dihlabeng Local Municipality[10] counsel for the respondents made the following submissions:

“Appointments under sections 56 and 57 of the Structures Act (sic) are top management posts. They are the decision-takers. There has to be a performance agreement signed by them annually. Such person’s job is permanently uncertain. It is a fixed term contract. When dealing with such type of appointment it must be clear from the outset that one is dealing with a section 56 appointment. It cannot be inferred afterwards. The advertisement makes it clear that the Unit Managers will work under the direction of the directors. The Unit Managers were appointed to a post level 4. Once an appointment is coupled to a post level it is automatically no longer a section 56 or 57 appointment. Appointments under a section 56 and 57 are not coupled to a post level or a salary scale. Persons holding such posts could earn double or even more than the highest post level.”

[75] Dihlabeng Local Municipality predates the Amendment Act which came into effect in 2011, the basis on which it is relied on after the Amendment Act is not explained. Section 56 of the Municipal Systems Act in its unamended version and Section 56 of the Amendment Act are completely different. This is not dealt with in the first and second respondents’ answering affidavits nor was it dealt with during argument in court. For this reason alone, that case is clearly distinguishable from the facts of this matter.

[76] There are some disturbing aspects of the report developed by Mr Magwangqana on which the organogram was based. For instance, not only is that report creating their new positions, but very strangely it misleadingly says that their employment or the creation

of their posts would have no financial implications. The applicants say these posts resulted in the first applicant incurring

an irregular expenditure for the relevant financial year in respect of employment related expenditure. It is simply beyond

comprehension that the creation of any post would have no financial implications.

[77] Most significantly the first and second respondents completely ignore annexure “AA4” in the founding affidavit. That document is the organogram itself and it places them immediately below the municipal manager. There are no directors or any other managers placed above these managers other than the municipal manager. This must mean that the first and second respondents are placed together with other section 56 managers who, are accountable to the municipal manager. This is consistent with them being directly accountable to the municipal manager. Their attempt to explain why they are not section 56 managers and yet report to or are accountable to no one else but the municipal manager is difficult to understand. It also distinguishes their situation from that of Dihlabeng Local Municipality. These respondents do not explain in their answering affidavits, where the first tier managers are in annexure “AA4”.

[78] The first and second respondents acknowledge that they report to the municipal manager in no uncertain terms. Their dissonant analogising of their employment situation to that of a secretary is not only a misplaced reliance on Dihlabeng Local Municipality which in any event, is at best, of persuasive value to this court, but also clearly a red herring. Their concession that they are accountable to or report to the municipal manager is in line not only with the applicants' case but also a confirmation of the organogram placing them directly below the municipal manager, something that they do not address in their papers as stated before.

[79] In Lulama Ntamo–Mtukushe[11] Matebese AJ said:

“On this issue counsel sought to argue that though the applicant is a Manager accountable to the Municipal Manager, she is not a section 56 manager, referring to section 56 of the Systems Act.

This argument by counsel suggests that section 56 of the Systems Act creates a certain category of managers who are directly accountable to the Municipal managers whilst there are also other managers directly accountable to the Municipal Manager but who are not created by section 56 of the Systems Act.

This argument is fallacious in my view. Firstly, because section 56 does not create positions of managers directly accountable to the Municipal Manager but only determines how managers directly accountable to the Municipal Manager are to be appointed. In my view, it is not the manner of appointment of an incumbent that determines the position he holds but it is the position that

determines how an incumbent must be appointed. Secondly, section 56 and the Systems Act in general provides no room for this

contention. The Act only provides for managers directly accountable to the Municipal Manager without providing for different

categories thereof.

Consequently, there is not merit to counsel's argument in this regard.

If the position of General Manager in the Municipal Manager's Office to which [the] applicant was appointed to act is a manager directly accountable to the Municipal Manager, her appointment to act in such [a] position is only valid if it is done in terms of section 56(1)(a)(ii) which provides:

“(1)

(a) A municipal council, after consultation with the municipal manager, must appoint –

(i)...; or

(ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.”

Section 56(2) provides that any decision to appoint a person referred to in subsection (1)(a)(ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if the appointment was otherwise made in contravention [of section 56] of the Act.

In my view the applicant's appointment to act in the position of General Manager to the office of the Municipal Manager, which is admittedly a position of a manager directly accountable to the Municipal Manager, is null and void for having been done in contravention of section 56(1) of the Systems Act." (My added emphasis.)

[80] No submissions were made by counsel for the first and second respondents at all on this case even after it was brought to their attention. This is a decision of this Division which is binding on me unless I find it to be clearly wrong. I expected counsel for the first and second respondents to make submissions on why I should find that it is clearly wrong or distinguishable to the matter at hand. I find that it is on all fours with this matter and I agree fully with the conclusions reached by Matebese AJ in *Lulama Ntamo-Mtukushe* as well as his reasoning on the interpretation of section 56. The first and second respondents are clearly managers directly

accountable to the municipal manager. Their contention to the contrary is not only illogical but also a deliberate resort to contrivance. It follows that their recruitment and employment should have complied with section 56 of the Municipal Systems Act.

[81] The council of the first applicant should have ensured that the report that was tabled before them - recommending the approval of the new organogram complied with regulation 4 of the 2014 Regulations before they approved it. The council failed to read the report because if they did, they would have seen the glaring irregularities in the report. It appears that they were made to understand that the new positions that were being created for the general manager of Molteno and Sterkstroom and Tarkastad and Hofmeyr were for managers who would be directly accountable to the municipal manager. Once the municipal manager got the approval of the organogram, he went on to fill the positions outside of the council process and thus contrary to section 56. He even unilaterally fixed their remuneration package without any process or budget.

[82] This was clearly contrary to the provisions of section 60(1) of the Municipal Systems Act which reads:

"60(1) The following powers may, within a policy framework determined by the municipal council, be delegated to an executive committee or executive mayor only:

- (a) ...
- (b) the determination or alteration of the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager."

- [83] The power to determine the remuneration, benefits or other conditions of service of the first and second respondents were not delegated to the municipal manager and most importantly – could not be delegated to him. The stratagem of creating of the first applicant’ council, the impression that they were approving positions for section 56 managers and then appointing them contrary to section 56 was clearly an unlawful manipulation of processes to achieve illicit purposes on the part of Mr Magwangqana.
- [84] Even if I am wrong on the consequential effect of the organogram created in total disregard of section 66(1) of the Amendment Act, that has nothing to do with section 56. Put differently, the requirements for the creation of an organogram and section 56 stand independently of each other and non-compliance with section 56 is not dependant on section 66(1). Therefore, even if Mr Magwangqana had correctly followed the legal prescripts in creating the organogram, which he clearly did not, that would not solve the first and second respondents’ appointment in contravention of section 56. It is, in my view, possible for an organogram having been properly developed and adopted and therefore constitutional, that the employment is done in contravention of section 56 in which case such employment would be null and void.
- [85] Therefore the submission that the decision of council approving the organogram has not been set aside is not an answer to the non-compliance with section 56. After all, the council of the first applicant would be entitled to pass a resolution that creates a new compliant organogram whose adoption is fully in line with the whole legal framework in the ordinary course of exercising its executive mandate. That this is so flows from the fact that when the first applicant’s council embarked on the adoption of the new organogram, it was acting in an executive capacity and not in an administrative capacity. This as well makes reliance on Oudekraal also misplaced, in my view.

Do the 2014 Regulations apply to the third and fourth respondents?

- [86] As indicated before, the fourth respondent whose case is similar to the third respondent, is not opposed to the prayers sought by applicants. However, because of the similarities of the employment and factual situations between the third and the fourth respondents, the case of the applicants against him will follow the results of the case against the third respondent. For these reasons, it is only the case against the third respondent that I deal with hereunder.
- [87] The 2014 Regulations are captioned: Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers. This caption might lead some astray into believing that these regulations are not applicable to employees other than senior managers. This, in my view, is incorrect. A closer reading of these regulations makes it clear that the staff establishment referred to therein is not just in relation to senior managers. As it will become clear below it is in this context that the applicants’ case against the third and fourth respondents as it relates to the staff establishment must be understood.

- [88] The applicants seek, in their notice of motion, an order declaring the appointment of the third respondent as the first applicant's general manager for integrated planning and economic development null and void as contemplated in section 66(4) of the Municipal Systems Act. The applicants rely on alleged non-compliance with section 66(1)(a) and (b) in the development and approval of the staff establishment. I have already dealt with the irregularities committed when the staff establishment was developed and subsequently approved by council contrary to the applicable legislative framework.
- [89] It is not the applicants' case that the third respondent is a section 56 manager. This is the main distinguishing feature between the applicants' case against the first and second respondents on the one hand and the third and fourth respondents on the other hand. I must point out that the creation of a staff establishment is in my view, not only about senior managers of a municipality. It is about the entire workforce of a municipality. In this regard the definition of a staff establishment in the 2014 Regulations is "staff establishment means the approved posts created for the normal and regular requirements of a municipality". The "posts created for the normal and regular requirements of a municipality" cannot conceivably be the posts for senior managers only.
- [90] Some of the irregularities pertaining to the creation of the staff establishment and its subsequent adoption relate to regulation 4(7). The reading of this regulation leads to an inescapable conclusion that it was designed to ensure that the competitive and transparent recruitment process required by the Constitution is achieved. This would result in municipalities having the best qualified team of employees from the lowest rung all the way to the top from a financially prudent process. Regulation 4(6), (7) and (8) of the 2014 Regulations deals with this specific constitutional requirement as follows:

"Regulation 4

4

- (6) The municipal manager must, within 14 days of finalising the staff establishment, submit the staff establishment, a detailed report and recommendations on the staff establishment to the municipal council for approval.
- (7) The report contemplated in sub-regulation (6) must outline the process followed in developing the staff establishment, which must include—
- (a) a summary of the mandate and service delivery priorities of the municipality and how the proposed staff establishment addresses these;
- (b) ...
- (c) a motivation of the proposed changes, including an analysis of the strengths, weaknesses and limitations of the current staff

establishment;

- (d) job descriptions, duties, functions, competency requirements and responsibilities according to which one or more posts of the same grade are established, including the grading or relative size and value of a job;
 - (e) details of the financial implications of the changes including, but not limited to, the outcomes of job evaluation processes, remuneration costs for senior managers, costs for relocation, new facilities and equipment, if any;
 - (f) ...
 - (g) ...
 - (h) ...
- (8) The municipal council must at its next meeting following receipt of the staff establishment, approve the staff establishment, with or without amendments, as proposed by the municipal manager.”

[91] It is clear that the erstwhile municipal manager’s report was woefully inadequate or fell woefully short in complying with regulations. It is in fact common cause that the report did not comply as the respondents themselves did not argue or present facts to show that it complied. Their argument was simply that the staff establishment was approved by council of the first applicant on 29 March 2018 and it remains valid until set aside. I have already indicated above, that the staff establishment envisaged in section 66(1)(a) and (b) is the one that complies with regulation 4. When section 66(3) provides that “no person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality,” it is, in my view, not referring only to senior managers but to all the employees of a municipality. In my view, section 66 has to be read together with regulation 4 as a whole if it is to be interpreted correctly and contextually.

[92] Section 72(1) of the Municipal Systems Act not only empowers the Minister to pass these regulations but also provides for the matters that they may deal with including the staff establishment. It is simply not possible for staff establishment to be developed and approved in total disregard of the regulations. A proper and purposeful reading of section 66(1)(3) and (4) and the regulations results in anything done contrary thereto being invalid and unconstitutional. This is buttressed by the fact that the Municipal Systems Act defines “this Act” to include “any regulations made in terms of section 120”.

Did the employment of the third respondent breach the legality principle?

[93] All the respondents did very little to nothing to show that despite the glaring problems with the staff establishment, they nevertheless qualified and possessed the required qualifications and experience for their positions. The third respondent as did the first and second respondents spent a lot of time in his answering affidavit making bare denials and in his and the second respondent’s case even raising points in limine. He did not make any

cogent submissions, that in the event that the court finds that the legal framework was not complied with in the creation of the staff establishment the recruitment process was in any event proper and that he had the required qualifications and work experience. He basically ignored this aspect of the applicants' case save for fleeting and dismissive submissions. During the hearing I raised this issue and the lack of attention given to this issue and indicated that it may be addressed in the supplementary heads of argument that I directed, should be filed. Very little, to nothing has been done about it in the supplementary heads of argument.

[94] In this regard, the applicants' case is simply that the advertisement called for candidates who had a Bachelor's Degree in Economics and/or Development studies or their equivalent as well as a minimum of 10 years related work experience, seven years of which had to be at management level. The applicants contend that the third respondent did not meet these requirements. This is so because his previous position, as the former municipal manager of Tsolwana Local Municipality was not the required work experience as he did not perform functions of a general manager of integrated planning and economic development. He only acted in the latter position for two years which fell far short of the 10 years related work experience, seven years of which needed to have been in a management position. That two year acting period of acting appointments also fell far short of meeting this requirement.

[95] The third respondent basically brushes these allegations aside in his answering affidavit, and maintains that he was successful in an interview and baldly and dismissively submits that the recruitment policy is irrelevant. He makes no attempt at all to show that he met the advertised requirements for the post. Instead he relies on his previous position as the former municipal manager of Tsolwana Local Municipality without detailing some of the work he did in that position and how that work should be considered as the relevant experience relative to the requirements for the job. Without explaining how, he avers that it is absurd that having held that previous senior position, he did not qualify for the current position.

[96] Whatever one's views may be about the staff establishment, the reality is that when the post of general manager for integrated planning and economic

development was advertised, there were minimum requirements prescribed. The third respondent, on the papers before me, did

not present a case to show that he met those minimum requirements. There may very well have been other people who did not apply because they did not qualify as the advertisement set out. This, among other things, makes his appointment unlawful. His appointment in the circumstances was neither transparent nor fair. Even a cursory reading of section 67(1) of the Municipal Systems Act as amended makes this plain.

[97] Section 67(1) reads:

"67 Human resource development

(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72(1)(c) to ensure fair, efficient, effective and transparent personnel administration, including –

- (a) the recruitment, selection and appointment of persons as staff members,
- (b) service conditions of staff;
- (c) the supervision and management of staff;
- (d) the monitoring, measuring and evaluating of performance of staff;
- (e) the promotion and demotion of staff;
- (f) the transfer of staff;
- (g) grievance procedures;
- (h) disciplinary procedures;
- (i) the investigation of allegations of misconduct and complaints against staff;
- (j) the dismissal and retrenchment of staff; and
- (k) any other matter prescribed by regulation in terms of section 72.”

[98] In making out a case against the third respondent, the first applicant referred to and attached the relevant advertisement as well as its Recruitment and Selection Policy. Both of these documents have been ignored by the third respondent and he went on to describe the Recruitment and Selection Policy as irrelevant. How this is so, but no explanation provided thereof. It is important to emphasise that the lawfulness of the manner in which the third respondent was employed depended on a compliant and transparent process of his employment. The Recruitment and Selection Policy was designed to comply with section 67(1) of the Municipal Systems Act and compliance therewith would have meant that the third respondent’s employment was constitutional barring the challenges relating to staff establishment. The employment of the third respondent was clearly constitutionally invalid. There was no real effort or facts presented by him justifying a different conclusion.

[99] Instead of engaging meaningfully with the facts averred by the applicants he made bare denials and was even dismissive of the first applicant’s Recruitment and Selection Policy. That policy was obviously adopted to enable the first applicant to have uniform standards that “ensure fair, efficient, effective and transparent personnel administration including the recruitment, selection and appointment of persons as staff members;”[12]

[100] Bare denials are simply not enough nor do they, on their own, raise a dispute of fact and this goes for all the respondents. In Wightman[13] Heher JA articulated this legal position as follows:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[101] Whilst some might think that Mr Magwangqana was mistaken in relation to the provisions of sections 56 and 66 of the Municipal Systems Act, that is inconceivable to a person as senior as a municipal manager who has got all the access to legal advice. The violations of the principle of legality are so glaring as they relate to his decision to lower the bar after the advertisement which was clearly done to favour the third and fourth respondents. For this reason, it is necessary in my view to also review and set aside that crafty manipulation of the first applicant’s employment processes over and above any other relief that is granted.

The points in limine

[102] Some points in limine were raised by the second and third respondents, all of which were clearly without merit. The first point in limine they raised in the papers was jurisdiction which was later abandoned at the commencement of the hearing. Very strangely the point about the incompetency of the declaratory relief which was equally devoid of merit was not abandoned and yet it was raised based on the jurisdictional challenge. They also raised the non-joinder of Mr Magwangqana, the former municipal manager of the first applicant. This was dealt with in a few sentences without any attempt to explain the interest that Mr Magwangqana had in the relief sought by the applicants. Similarly, with the misjoinder of the second applicant, the second and third respondents did not deal with his terms of reference as the administrator of the first applicant to contextualise the issue of the alleged misjoinder. The second applicant’s affidavit which explains why he deemed it necessary to be a co-applicant in these proceedings is simply ignored. I fail to understand how he could be said to have been misjoined without engaging meaningfully with his

explanation for being part of these proceedings.

[103] The other point in limine is the fact that the applicants seek no relief setting aside the council's decision of the 29 March 2018 in which the staff establishment was approved. I have already dealt with this issue in the merits of the case.

[104] The other point in limine is non-compliance with rule

53. The applicants annexed to the papers a lot of documents that they deemed relevant for their case against the respondents.

They clearly had all the documents they needed for their case. No documents were called for by the respondents in terms of rule 35(12) and (14) of the Uniform Rules of Court or in any other way they deemed appropriate to assist them in getting whatever documents they needed. The respondents do not indicate the desired results for them from a rule 53 process that they insist the applicants should have followed. This is important because the case of the applicants is about their own failures to comply with the law in the manner in which the respondents were employed. How rule 53 is relevant in the circumstances remains unexplained.

[105] I am fortified in this view by the sentiments expressed by Madlanga J in Helen Suzman Foundation[14] in which he said the following:

“The purpose of rule 53 is to ‘facilitate and regulate applications for review’. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds of review.”

[106] This brings me to the last point raised, the Turquand rule. Our jurisprudence, as I understand it on the Turquand rule is that it relates to company law. The point being simply that a company is not allowed to rely on its failures to comply with its own internal processes. The Labour Court cases referred to on behalf of the respondents related to company employees. It might very well be that the Turquand rule was correctly raised in those cases simply because the employers were companies. In this case the employment issues relate to an organ of state and the applicable legislation. The legal framework of the first applicant simply has no room for internal process in its recruitment and selection processes. The legislative framework requires transparency; and the principle of legality requires that anything done without observing the rule of law cannot be allowed to stand.

[107] In Afrisec Strategic Solutions[15] Froneman J had occasion to deal with a similar situation of a self-review albeit relating to an unlawful award of a tender by the applicant. He expressed the following sentiments with which I am in respectful

agreement:

“The procurement of goods and services by organs of state and the rendering of those goods and services by third parties is a public, not private, matter under our constitutional

system of government. The mischief that this public gaze seeks to avoid is nepotism, patronage, “or worse”. What it seeks is to provide members of the public with opportunities to tender to fulfil public needs and to ensure the fair, impartial, and independent exercise of the power to award these public contracts (Eastern Cape Government and Others v Contractprops 25 (Pty) Ltd 2001(4) SA 142 (SCA) paragraph [8]; City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd

[2007] SCA 28 (RSA) ... paragraph [15]). The potential ills of nepotism, patronage, “or worse”, however, do not only lie with those who may award contracts, but also with those who receive them.”

Condonation

[108] The applicants have applied for condonation of any delay which may be said to be unwarranted in launching these proceedings. They explain that the council of the first applicant acted on the advice of its former municipal manager, Mr Magwangqana. It is common cause that he was central to the employment of the respondents in that he spearheaded the invalid changes in the organogram and recommended its adoption. Council adopted the said staff establishment which created the positions in which the respondents were employed. They were employed in June 2018. He was suspended in October 2018 after the second applicant uncovered some irregularities, including in the employment of staff.

[109] The second applicant was appointed as administrator of the first applicant with effect from the 14 September 2018. After he identified irregularities relating to staff appointments, he advised the first applicant’s council to investigate the said irregularities. The council of the first applicant resolved that an investigation be conducted. That investigation was concluded in November 2018. Thereafter attorneys were instructed to provide an opinion on those investigations. The preliminary opinion from the first applicant’s attorneys was received on 7 December 2018 and a final opinion was received on 23 January 2019. The delay from the preliminary opinion on 7 December 2018 and the 23 January 2019 is attributed to the closure of the first applicant’s attorneys’ offices in December 2018 until the new year. The council considered the final opinion on 24 January 2019 and took a resolution authorising the second applicant to take the necessary legal steps to

address the irregularities relating to staff appointments. Consultations relating to these proceedings took place, papers

were drafted and settled by counsel. On 01 March 2019 applicants’ papers in respect of the first application launching these proceedings were issued.

[110] Other than registering their opposition to the application for condonation and alleging that that no case is made out for condonation, the respondents have glaringly ignored the averments made by the applicants in the application for condonation. The respondents expect the court to exercise its discretion and non-suite the applicants without showing why the court should exercise its discretion and refuse the application for condonation. A court

cannot be expected to exercise its discretion in a vacuum. If the allegation is that the applicants have not made out the case for condonation or that the delay has not been adequately explained, it cannot be left to the court to figure out how the explanation is inadequate or why the court should exercise its discretion and not grant the application for condonation.

[111] The legal position on delay has been explained a number of times by our courts. Relevantly for this matter in light of its peculiar facts, the Constitutional Court had this to say in *Gijima Holdings*[16]:

“Khumalo also says that courts have a ‘discretion to overlook a delay’. Here is what we said:

‘(A) court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook a delay.’ ...

Tasima explained that this discretion should not be exercised lightly:

‘While a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore

exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.’ ...

From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter.” (My added emphasis.)

[112] Besides the fact that no attempt has been made by the respondents to gainsay what the applicants allege to be the causes of the delay; the respondents have made no attempt to demonstrate that the delay was unwarranted. I can see no reason for not accepting the applicants’ explanation that the delay was not unwarranted on the facts alleged by the applicants. Furthermore, the respondents have not even alleged how, if they were prejudiced by the delay. The applicants have made out a case for condonation which was, in any event not unwarranted in the circumstances. Even if the delay was unwarranted, it would not follow that the applicants would be non-suited. As pointed out in *Khumalo*, courts have a discretion to overlook a delay.[17]

Conclusion

- [113] It seems to me that Mr Magwangqana was determined to create positions for the respondents which he did in total disregard of the legal and regulatory framework. The reason for this is not far to seek. The respondents' acting appointment had after all been extended a number of times way beyond the three months' period provided for in section 56(1)(c) unlawfully in some cases clearly just to keep them in the payroll of the municipality. It is difficult to escape the conclusion that if he had followed the correct recruitment process he might not have been able to ensure that they were employed in those positions simply because they did not qualify for them.
- [114] The council of the first applicant clearly paid no attention to its responsibilities in approving the organogram. At best it turned a blind eye to all these irregularities or wittingly or unwittingly acquiesced in the violation of the legal framework and therefore the Constitution. It is, after all, the council that had been extending the respondents' acting appointments way beyond the legally prescribed periods. This was a serious betrayal of their constitutional obligations by aiding and abetting the violation of the law by Mr Magwangqana through its failure to perform its legally prescribed functions of ensuring that the legal framework was complied with. Mr Magwangqana presented an invalid report on the organogram to council which then approved it any way. He then employed the respondents without ensuring that the positions were necessary and they had the necessary qualifications and experience for their positions to achieve the service delivery objectives of the municipality which is at the very heart of the legal framework and the very existence of any municipality. Even worse, he did not ensure that there was a budget for the new positions resulting in over expenditure on employee related costs. Had the Provincial Government not intervened by appointing a person of the calibre of the second applicant as the administrator of the first applicant, all these irregularities and constitutional violations would have carried on unnoticed.

The costs

- [115] It was submitted that even if I find against the respondents, I should not order them to pay costs. This was based on the submission that if they lose the case, the inevitable result is that they would have lost their jobs. It was also indicated that the legal representatives of the respondents acted on a pro bono basis. I find it difficult to divorce their actions in applying and getting the jobs unlawfully from the egregious conduct of Mr Magwangqana and the consistence of the first applicant's council in allowing the regularities to continue unabated. It is very unlikely that they were innocent by-standers in the commission of those irregularities. They were in fact the intended beneficiaries in the violation of the law and the ignominious disregard of the Constitution. Furthermore, on the papers before me, the opposition to the applicants' application was not only as unprincipled as the respondents' employment, but it was without merit and ill-advised. Costs are in their very nature a matter for the discretion of the court. However, that discretion must be exercised judicially in light of the facts and the circumstances of each case. In my view, not to order the

respondents to pay costs, including the fourth respondent who withdrew his opposition on the day of the hearing, would be unjustified.

[116] Therefore the applicants must succeed. In the result the following order shall issue:

1. The applicants' applications for the condonation of any late filing of the applications against the respondents is hereby granted.
2. The appointment of the respondents to their various positions consequent upon the unlawful creation of the staff establishment is hereby declared to be in contravention of section 66(3) and (4) of the Local Government: Municipal Systems Act 32 of 2000, and are accordingly null and void.
3. The appointment of the first and second respondents as the first applicant's general manager for Molteno and Sterkstroom and general manager for Tarkastad and Hofmeyr respectively are hereby declared to be in contravention of section 56(2) of the Local Government: Municipal Systems Act 32 of 2000, and are accordingly null and void.
4. The appointment of the third and fourth respondents as the first applicant's general manager for integrated planning and economic development and general manager for public safety respectively is hereby reviewed and set aside.
5. The respondents are ordered to pay costs of this application.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: ADV S. RORKE SC

Instructed by: NETTLETONS ATTORNEYS

Grahamstown

Counsel for the 1st Respondent: ADV Z. FENI

Counsel for the 2nd, 3rd and 4th Respondents: ADV MTHOMBENI

Instructed by: YOKWANA ATTORNEYS

Heard on: 06 February 2020

Delivered on: 12 May 2020

[1] Constitution of the Republic of South Africa, 1996.

[2] Regulations: Appointment and Conditions of Employment of Senior Managers published in Government Gazette No. 37245 dated 17 January 2014.

- [3] Regulation 12(4) reads— “The selection panel for the appointment of a manager directly accountable to a municipal manager must consist of at least three and not more than five members, constituted as follows: (a) the municipal manager, who will be the chairperson; (b) a member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and (c) at least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.”
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- [4] South African Municipal Workers’ Union v Minister of Co-operative Governance & Traditional Affairs and Others 2017
- (5) BCLR 641(CC) at para 91.
- [5] Ibid at para 104.
- [6] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) at para 18.
- [7] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para 74.
- [8] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC) at paras 31 and 38-40.
- [9] Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (10) BCLR 1179 (CC) at paras 31-2.
- [10] Dihlabeng Local Municipality v Nthute and Others (O) unreported case no 4107/2005 of 15 February 2007 at para 101.
- [11] Lulama Ntamo-Mtukushe v Director Corporate Services, Mnquma Local Municipality and Others (ECM) unreported case no 5733/2017 of 26 June 2018) at paras 27-33.
- [12] Section 67(1)(a) of the Municipal Systems Act.
- [13] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another

[2008] ZASCA 6; 2008

(3) SA 371(SCA) at para 13.

[14] Helen Suzman Foundation v Judicial Service Commission 2018(4) SA1 (CC) at para 13.

[15] Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd and Others [2007] JOL 20448 (SE) at para 29.

[16] Gijima Holdings (note 8 above) at paras 47-9.

[17] Ibid.

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