

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 3023/2018

In the matter between:

DEMOCRATIC ALLIANCE

First Applicant

ROLAND ATHOL PRICE TROLLIP

Second Applicant

CONGRESS OF THE PEOPLE

Third Applicant

**AFRICAN CHRISTIAN DEMOCRATIC
PARTY**

Fourth Applicant

PATRIOTIC ALLIANCE

Fifth Applicant

and

**MEC FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, EASTERN
CAPE**

First Respondent

JENNY ROESTORFF

Second Respondent

**NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Third Respondent

JOHANN METTLER

Fourth Respondent

BUYELWA NANCY MAFAYA

Fifth Respondent

MONGAMELI BOBANI

Sixth Respondent

**TSHONONO CHRISTOPHER SOLOMON
BUYEYE**

Seventh Respondent

VICTOR MANYATI	Eighth Respondent
PUMELELE STANLEY NDONI	Ninth Respondent
AFRICAN NATIONAL CONGRESS	Tenth Respondent
ECONOMIC FREEDOM FIGHTERS	Eleventh Respondent
UNITED DEMOCRATIC MOVEMENT	Twelfth Respondent
AFRICAN INDEPENDENT CONGRESS	Thirteenth Respondent
UNITED FRONT	Fourteenth Respondent

JUDGMENT

HUISAMEN AJ

INTRODUCTION:

[1] This is an urgent application in which the applicants seek the following relief:

- "1. *That the application be heard as one of urgency;***

- 2. *That the decision of the first respondent on 27 August 2018 designating the second respondent to preside over the election of***

a speaker in the council of the third respondent be reviewed and set aside;

3. That the actions and decisions of the second respondent in presiding as chairperson over the election of the speaker of the council be reviewed and set aside;

4. That the election of the fifth respondent as speaker of the council be reviewed and set aside;

5. That it be declared that the meeting of the third respondent's council on 27 August 2018, as presided over by the second respondent, and subsequently by the fifth respondent was not a properly constituted meeting of the council and was unlawful and void;

6. That all the decisions taken by the meeting referred to above and in particular the resolutions:

6.1 that the second applicant be removed from office as the executive mayor;

6.2 that the sixth respondent be elected as executive mayor;

6.3 *that the office of the deputy executive mayor be reinstated and that the seventh respondent be elected as deputy executive mayor;*

6.4 *that the incumbent chief whip be removed from office and that the ninth respondent be elected to that position;*

be reviewed and set aside; alternatively, be declared to be unlawful and void;

7. *That the first respondent, jointly and severally with such of the remaining respondents as may oppose the application, pay the cost thereof."*

[2] The third and fourth respondents are abiding the decision of the court.

[3] The first, second, fifth, sixth, seventh, eighth and ninth respondents are opposing the matter. The tenth to fourteenth respondents filed a joint notice of opposition. They however did not file opposing papers and there was no appearance for them at the hearing of the matter.

- [4] The first respondent (the MEC), the sixth respondent (Bobani) and the eighth respondent (Manyati) have all filed extensive answering affidavits. Bobani's answering affidavit was also deposed to on behalf of the fifth, sixth, seventh and ninth respondents.
- [5] Manyati's answering affidavit contains, at the end thereof, notice of a counter application in the following terms:

"59.1. declaring that the eighth respondent's membership of the DA still subsists and will continue to subsist until compliance with the DA Constitution has been performed;

59.2 declaring that the eighth respondent remains a Councillor of the third respondent;

59.3 declaring the fourth respondent's conduct in purporting to secure the declaration of vacancy as unlawful, unconstitutional and invalid;

alternatively, and in the event of the applicants being successful on any aspect of the main application;

59.4 compelling the Municipal Manager, alternatively the second respondent, acting in terms of Rule 10.3, to continue the relevant

council meeting immediately and/or within 48 hours of the granting of this conditional counterapplication;

59.5 costs in the event of opposition."

- [6] The second applicant (Trollip) deposed to the founding affidavit on behalf of all the applicants, as well as to their replying affidavit and the answering affidavit to Manyati's counter application, to which Manyati has replied.
- [7] At the commencement of the hearing I was informed by Adv Ronaasen SC, who appeared for the applicants, that the fifth applicant withdrew as an applicant in the matter.
- [8] Bobani raised a defence of non-joinder *in limine*, contending that the applicants seek to review and set aside decisions and actions of 61 councillors and that all of these councillors should have been cited as respondents. Bobani also contended that the offices of the executive mayor, the deputy executive mayor, the speaker, the chief whip of council and other MAYCO members should have been joined as well. In addition, the MEC raised the preliminary defences of a lack of urgency, non-joinder, failure to give notice in terms of Uniform Rule 16A(1) and the existence of material disputes of fact.

[9] These defences *in limine* were not pursued during argument before me. Alternatively they were abandoned and I do not find it necessary to deal with them for purposes of this judgment.

THE APPLICABLE LEGISLATIVE FRAMEWORK:

[10] The following is a brief summary of the applicable legislative framework in this matter:

10.1 Section 36 of the Local Government: Municipal Structures Act No 117 of 1998 (the Structures Act) provides in the first instance that a municipal council must have a chairperson who will be called the speaker and further that when necessary to fill a vacancy for the position of speaker, a municipal council must elect a speaker from among the councillors. Section 36(3) then provides that:

"The municipal manager of the municipality or, if the municipal manager is not available, a person designated by the MEC for Local Government in the province, presides over the election of a speaker."

10.2 Section 36(4) of the Structures Act provides as follows:

"The procedure set out in Schedule 3 applies to the election of a speaker."

10.3 Schedule 3 to the Structures Act provides as follows under the heading "***Election of Municipal Office-bearers***":

"(1) Application

The procedures set out in this Schedule applies whenever a municipal council needs to elect a speaker, an executive mayor, a deputy executive mayor, a mayor or a deputy mayor.

(2) Nominations

The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

(3) Formal Requirements

(1) A nomination must be made on the form determined by the municipal manager.

(2) *The form on which a nomination is made must be signed by two members of the municipal council.*

(3) *A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written communication.*

(4) *Announcement of names of candidates*

At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

(5) *Single candidate*

If only one candidate is nominated, the person presiding must declare that candidate elected.

(6) *Election procedure*

If more than one candidate is nominated-

- (a) a vote must be taken at the meeting by secret ballot;**
- (b) each councilor present at the meeting may cast one vote; and**
- (c) the person presiding must declare elected the candidate who receives a majority of the votes.**

(7) Elimination procedure

- (1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. The procedure must be repeated until a candidate receives a majority of the votes.**
- (2) When applying sub-item (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.**

(8) Further meetings

- (1) *If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days of the time determined by the person presiding.*
- (2) *If a further meeting is held in terms of sub-item (1) the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.*
- (3) *If the further meeting held in terms of sub-item (1) only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, the person presiding at such meeting must determine by lot who of the two candidates will hold the office for which the election has taken place."*

10.4 Rule 10 of the council's rules of order provides, *inter alia*, as follows under the heading "***Interruption, Suspension or Adjournment of Proceedings***":

"10.1 If a meeting of Council has commenced, it must continue uninterrupted until it has completed its business unless it is interrupted, suspended or adjourned as provided for in these Rules.

10.2 Only the Speaker may interrupt, suspend or adjourn proceedings of the Council for such period or until such date and time as may be determined by the Speaker. At the discretion of the Speaker, he/she may discuss an adjournment of the meeting with the Whips of Parties.

10.3 The proceedings of an interrupted, suspended or adjourned meeting must immediately recommence on the termination of the period of interruption or suspension or at the date and time to which it was adjourned. No additional business to that submitted to it in terms of these Rules may then be considered."

10.5 Rule 18 provides, *inter alia*, as follows under the heading **"Quorum requirements":**

"18.1 A quorum of the Council or a Committee of the Council will constitute a majority (50% plus one) of all

Councillors or Councillors who are members of that Committee, as the case may be.

18.2 Notwithstanding Rule 18.1 above, and subject to Section 30(1) of the Structures Act, at least a majority of Councillors, or of the members of the Committee in question, must be present before a vote on any matter may be taken."

10.6 Rule 19 provides as follows under the heading "***Absence of quorum***":

"19.1 If there is no quorum at the time appointed for the commencement of the meeting of the Council, the meeting may not commence until a quorum is present, at which stage the Speaker must take the Chair.

19.2 If a quorum is still not present at the expiration of a period of ten minutes of the time appointed for the meeting, the Speaker must take the Chair and adjourn the meeting.

19.3 Such adjournment shall be for a period not exceeding a further 20 minutes, after which if a quorum is still not

present the meeting must be adjourned by the Speaker to a future date and time.

19.4 ***If, during the course of a meeting of the Council, the Speaker becomes aware of the absence of a quorum, the Speaker must act in accordance with Rule 19.3 above [and] must adjourn the meeting.***

19.5 ***Whenever a meeting of the Council is adjourned owing to the absence of a quorum, the time of such adjournment, as well as the names of those Councillors present, must be recorded in the minutes of the proceedings of the Council."***

10.7 Rule 20 provides as follows under the heading "***Acting Speaker***":

"If the Speaker of a Municipal Council is absent or not available to perform the functions of Speaker, or during a vacancy, the Council under the chairpersonship of the Municipal Manager or designated official, must elect another Councillor to act as Speaker."

THE FACTS AND DISCUSSION OF SUBMISSIONS:

[11] The following is a summary of the factual matrix within which the issues in this matter have to be determined:

- 11.1 On 3 August 2016 the council elected Trollip as executive mayor and Lawack as the speaker of the third respondent (the Municipality). They held these positions until the events of 27 August 2018;
- 11.2 None of the political parties represented in the council on its own commands an absolute majority. The first applicant (the DA) was however able to establish a functioning majority by entering into a coalition with a number of political parties. This coalition, bar a few interim changes, has remained in place until 27 August 2018 and consisted of the DA and the third to fifth applicants;
- 11.3 The council consist of 120 councillors;
- 11.4 On 27 August 2018, at approximately 10:00, a meeting of the council, which had been adjourned from 16 August

2018, came to order and commenced under the chairmanship of councillor Lawack in his capacity as speaker. There is no dispute between the parties that the council meeting was duly constituted with proper prior notice to all councillors.

- 11.5 All 120 councillors were present;
- 11.6 The voting alliance consisting of the DA and the third to fifth applicants was represented by 60 councillors and that consisting of the tenth to thirteenth respondents was represented by 60 councillors. In the event of an equality of votes on any item, the speaker was entitled to give a casting vote;
- 11.7 Under item 6 of the agenda the following motions were received from various councillors, *inter alia*:
 - (a) The removal of the speaker of council from office and the election of a new speaker;

- (b) The removal of the executive mayor and the election of a new executive mayor;
- (c) The rescinding of the council's decision to resolve the office of deputy executive mayor and the reinstatement of the office of deputy executive mayor;
- (d) The election of a deputy executive mayor;
- (e) The removal of the council chief whip from office and the appointment of a new council chief whip;

11.8 Under rule 18 of the council's rules of order, a quorum of the council is constituted by a majority (50% plus 1) of all councillors;

11.9 Accordingly, a majority of councillors must be present before a vote on any matter may be taken;

11.10 In terms of section 30(4) of the Structures Act, if on any question there is an equality of votes, the councillor

presiding must exercise a casting vote in addition to that councillor's vote as councillor;

11.11 The first motion which came before the council for consideration on 27 August 2018 was that submitted by Bobani seeking the removal of the speaker from office and the election of a new speaker. After a short adjournment and some debate, a counting and thereafter a recounting of the votes, it was recorded that there were 60 votes for the motion and 59 votes against it, with Manyati, a councillor representing the DA in the council, having abstained from voting in the face of a specific resolution of the DA's caucus in the council to oppose the motion;

11.12 Lawack accordingly announced that the motion had been carried and he left the chair, whereafter the fourth respondent (Mettler), the municipal manager, took Lawack's place as chairperson of the council and commenced to explain the process that would thereafter unfold;

11.13 Before the commencement of the process to select a new speaker, councillors Banga and Senekal requested Mettler to

grant an opportunity to caucus. However, Mettler ruled that by virtue of the provisions of rule 10 of the rules of order only the speaker may interrupt, suspend or adjourn the proceedings of the council or grant a caucus. The request was therefore refused;

11.14 Trollip then requested that Mettler obtain legal opinion on that question and after due consideration Mettler agreed. As it was close to the lunch hour, Mettler adjourned the meeting until 14:00 for purposes of enabling him to obtain an opinion;

11.15 Prior to the adjournment, councillors Senekal and Jordan, duly authorised by a decision of the DA's voting coalition, submitted a nomination form to the council secretariat for the position of speaker. They again nominated Lawack for the position. This nomination form was duly signed by each of the said councillors as well as by Lawack in acceptance thereof;

11.16 During the adjournment, a number of statements and social media clips were handed to Trollip, providing evidence that

Manyati had publicly declared his intention to resign his membership of the DA. Trollip immediately made this information available to the chairperson of the DA's federal executive who convened a meeting of the federal executive by telephone conference at 13:30;

- 11.17 The federal executive resolved that Manyati's membership of the DA had ceased with immediate effect;
- 11.18 The chairperson of the federal executive of the DA shortly thereafter forwarded letters to the fourth and eighth respondents recording the decision of the federal executive. Copies of these letters were also hand delivered to Mettler and Manyati;
- 11.19 The said letter addressed to Mettler on 27 August 2018 reads as follows:

"The Federal Constitution of the Democratic Alliance provides, in section 3.5.1.2 that any member who 'publicly declares his or her intention to resign and/or publicly declare his or her resignation from the party ceases to be a member with immediate effect. The Democratic Alliance has in its possession of video and audio

recording in which Councillor Victor Manyati very clearly states his intention to resign from the Democratic Alliance.

The Federal Executive of the Democratic Alliance met by way of a telephone conference at 13:30 today and resolved that Councillor Manyati's membership of the DA ceased. I would be grateful if you would take the necessary steps to declare a vacancy with immediate effect."

11.20 The letter addressed to Manyati reads as follows:

"I have in my possession two affidavits and a recording indicating that you intend to leave the Democratic Alliance. As you know, section 3.5.1.2 of the Party's constitution states that any member who 'publicly declares his or her intention to resign and/or publicly declares his or her resignation from the Party', ceases to be a member immediately.

In the face of incontrovertible evidence that you did so publicly declare your intention to resign, the Federal Executive met by means of a telephone conference at 13:30 today and resolved that your membership had ceased with immediate effect.

We will be informing the City Manager accordingly."

- 11.21 The council meeting reconvened at approximately 14:00, whereupon Mettler advised the meeting that he had received an oral opinion from senior counsel to the effect that his ruling had been correct and that he was not entitled to grant a caucus or otherwise to adjourn the meeting;
- 11.22 Mettler then proceeded to read the letter from the chairperson of the Federal Executive of the DA to the meeting;
- 11.23 There was then some debate on the question of whether or not the DA was entitled to declare Manyati's membership as having been terminated. Mettler advised the council that he would seek legal opinion on the matter of the cessation of Manyati's membership of the DA;
- 11.24 Mettler then again "*stood the meeting down*" (in his own words) and requested the attorney and senior counsel advising them to attend at the council chamber. Most of the members of the council remained in the chamber whilst Mettler was consulting. Mettler later returned to the council chamber, took his place as chairperson and advised that on

the basis of legal advice received by him he was obliged to declare a vacancy and in fact did so declare a vacancy as a result of the termination of Manyati's membership of the DA;

11.25 Mettler at this stage also read a letter which he had received from an attorney acting on behalf of Manyati indicating that Manyati intended to contest the termination of his membership. It was further contended in the letter that Manyati remained a councillor until such time as his expulsion was lawfully confirmed after a disciplinary process and/or the DA had taken administrative steps for his removal as a councillor;

11.26 At that point all of the councillors representing the DA and the members of its voting alliance left the council chamber, save for Manyati, who remained behind. The reason for leaving the chamber was obviously to frustrate the further conduct of the meeting on the assumption that Manyati's position had been declared vacant and the meeting would therefore be without a quorum after the DA alliance had left (even if Manyati stayed behind). According to Trollip the councillors retired to a caucus meeting. Nobody from the

DA's voting alliance thereafter returned to the council chamber. According to the respondents the DA coalition left the chamber with full knowledge that 61 councillors remained behind and the DA alliance members left at their own risk;

11.27 Mettler then declared that the council meeting lacked a quorum and could not continue. Various councillors contested this decision, whereafter he reiterated that his decision remained that a vacancy had occurred and that, consequently, the meeting was not quorate. Mettler then "*left the chamber*" (in Trollip's words) at approximately 15:20;

11.28 Shortly thereafter, Trollip received a message from Mettler that the latter wished to see him. Trollip met Mettler at the City Hall. Mettler advised that he had received further advice which possibly cast doubt upon his decision to declare a vacancy and that it was his intention to convene a further council meeting the following day. This decision to reconvene the following day was taken after Mettler had been advised, and also realized, that he had incorrectly

declared a vacancy. Trollip expressed the view that before reconvening the meeting Mettler was obliged to consult with him. Trollip also pointed out that, in any event, in terms of the rules of order, five working days' notice of a further meeting was required;

- 11.29 Mettler then sent an electronic message to councillor Riordan, a councillor of the tenth respondent (the ANC) in the following terms:

"Just had further legal advice. Will be calling council meeting for tomorrow and will retract declaration of vacancy. Please don't continue with meeting. At liberty to read this sms to cllrs."

- 11.30 Shortly thereafter Mettler supplemented this message as follows:

"Was advised to give adequate notice, for Monday three September."

- 11.31 After Mettler had left the chamber, councillor Lungisa (a representative of the ANC) urged all present to remain in the

chamber, obviously persisting that there had in fact been a quorum. A period of discussion ensued as to whether or not to continue with the agenda items;

11.32 Councillor Riordan received the electronic message referred to above from Mettler and read it out to those present;

11.33 At approximately 17:00, an official in the speaker's office, upon instructions of Mettler, circulated a notice to all relevant officials notifying them of the re-scheduled council meeting on 3 September 2018;

11.34 Importantly, the said notice was circulated:

- (a) after Mettler had been advised that his earlier declaration of the vacancy was incorrect;
- (b) after Mettler had realized that he had to retract his declaration of a vacancy;
- (c) after Mettler had refused to return to the meeting, despite the aforesaid; and

(d) after the MEC had already commenced with the implementation of the fallback procedure provided for in section 36(3) of the Structures Act, to which I will revert in more detail later herein;

11.35 Shortly after 17:00, the second respondent (Roestorff) arrived at the council chamber and after a meeting in the street with councillors Lungisa, Bobani and other members of the leadership of the ANC, entered the chamber at approximately 17:30, took the chair and introduced herself;

11.36 According to Trollip he had made enquiries from Mettler and was informed that after Mettler had left the chamber, subsequent to declaring that the council meeting lacked a quorum, he was at all times in his office in City Hall, which is directly across from the street of the chamber. His cellphone was on and he was also accessible by landline (and e-mail). His secretary was also available;

11.37 According to Trollip Mettler informed him that he was at no stage contacted by the MEC or anybody on the MEC's behalf,

nor did he receive any electronic or other form of message enquiring as to his availability. According to Trollip Mettler ***"was plainly available to return to the meeting in the Council chamber to the extent that this was necessary (if for example the meeting had become quorate)"***;

11.38 Annexed to Trollip's affidavit is an unsigned confirmatory affidavit of Mettler;

11.39 On 3 September 2018 Mettler deposed to an affidavit in which he stated, *inter alia*, as follows:

"3. I read the Founding Affidavit attested to by the Second Applicant.

4. The Third Respondent and I abide any decision of the above Honourable Court regarding the above Application.

5. On Index – Pages 113 to 114 of the Application Papers, there appears an unsigned Affidavit which bears my name.

6. I decline to attest to such Affidavit through the Third Respondents and my attorney of record on the basis that

I am an official of the Third Respondent and I did not consider it appropriate that I align myself with any of the political parties who are in dispute in respect of the issues raised in the Affidavits.

7. *Insofar as the allegations in Paragraph 68 are concerned (which allegations dealt with the further sms in relation to adequate notice forwarded by Mettler to councillor Riordan), the impression may be created that the sms which I forwarded to councilor Riordan was as a result of discussions with the deponent and advice from the deponent.*

8. *For the reasons stated above, I do not align myself with any political party and the sms which is quoted in Paragraph 68 and appears as the second sms on annexure "FA11" was sent on the advice of Senior Counsel."*

11.40 On 6 September 2018 Mettler deposed to a supplementary affidavit in which he stated, *inter alia*, as follows:

"3. *This Affidavit is supplementary to the Affidavit deposed to by me on 3 September 2018.*

- 4. Save as is otherwise dealt with in my Affidavit of 3 September 2018 and save to point out that the reference in the second and third lines of Paragraph 60 erroneously refer to the Third, Fourth and Fifth Respondents as opposed to Third, Fourth and Fifth Applicants, I confirm the correctness of the contents of the Founding Affidavit to the extent that these refer to me and my actions."**

11.41 On 12 September 2018 Mettler deposed to a further supplementary affidavit in which he stated, *inter alia*, as follows:

- "3. This Affidavit is supplementary to the Affidavits deposed to by me on 3 September 2018 and 6 September 2018.**
- 4. The Third and Fourth Respondents continue to abide the decision of the above Honourable Court in the above matter.**
- 5. I have read the First Respondent's Answering Affidavit, the Confirmatory Affidavit deposed to by S.V. Maqungo, the Confirmatory Affidavit deposed to by N.D. Jamjam and the Supporting Affidavit deposed to by the Second Respondent which were received on 11 September 2018.**

6. ***I confirm having been contacted on 27 August 2018 by N.D. Jamjam who wanted me to take delivery of a letter at the Council Chamber to which I responded that I was in my office and the letter could be delivered to me at my office.***

7. ***I confirm further that I have no record of any attempt by the Second Respondent to contact me on 27 August 2018 and that during the afternoon of 27 August 2018 after leaving the Council Chamber, I was available at my office."***

11.42 In his latest supplementary affidavit Mettler therefore confirmed that he was contacted with a request to return to the council chamber, albeit to take delivery of a letter. This is in plain contrast to Trollip's allegation in paragraph 75 of the founding affidavit which was that Trollip was informed by Mettler, and I repeat: ***"that at no stage was he contacted by the First Respondent or by anybody on his behalf, nor did he receive any electronic or other form of message enquiry as to his availability"***;

11.43 The respondents' version as to the availability of Mettler to chair the meeting differs markedly from that of the

applicants. According to Bobani, councillors from the remaining majority tried to contact Mettler to proceed with the meeting. Councillor Ndoni (the ninth respondent) phoned Mettler in Bobani's presence at 15:42. Councillor Lungisa was also present when Ndoni phoned Mettler. Ndoni told Mettler that the meeting was quorate and specifically requested him to return to the council chamber to preside over the election of a speaker. Mettler however declined, insisting that he would reschedule the council meeting to the following day;

11.44 According to Bobani, Roestorff also tried to contact Mettler from Bobani's cellphone in his presence and in the presence of councillors Lungisa and Ndoni. Mettler did not answer. His voicemail indicated that he was "*not available*";

11.45 Ndoni deposed to an affidavit, as part of the opposing papers, in which he stated, *inter alia*, as follows:

"5. At 15:42 on 27 September 2018, I phoned the Municipal Manager from my cell phone. When I made the call, and

for its entire duration, I was in the presence of Mayor Bonani (sic) and Councillor Andile Lungisa.

6. *I spoke with the Municipal Manager for 59 seconds. To the best of my recollection, the conversation went like this:*

Councillor Ndoni: *Hi Johan, it's Councillor Ndoni (Bicks) here can we talk?*

Municipal Manager: *Yes Councillor*

Councillor Ndoni: *Johan I would like to persuade you to come back to the meeting, I personally do not think that walking away and leaving councilors behind was a right thing to do.*

Municipal Manager: *Yes Councillor you know after receiving a second legal opinion on the standing of Councillor Manyati, I had the same thinking you have and I wanted to come back, but given the fact that other councilors [the DA Coalition] have left already on the basis of the first legal advice I feel that I must re-schedule the meeting for tomorrow.*

Councillor Ndoni: Well if you say so there is nothing I can do, I hope you will consider what I have advised. Thank you.

7. I expressly asked the Municipal Manager to return to the chamber to preside over the election of a new Speaker. The Municipal Manager declined to do so. He insisted that he would be re-scheduling the meeting. With that, I returned to the meeting."

11.46 In Roestorff's affidavit, which was filed together with the answering affidavit of the MEC, she stated, *inter alia*, as follows:

"I further confirm that I called the Fourth Respondent on my way to the Council Chambers two times without any success."

11.47 It needs to be stated that Roestorff read out to the meeting a letter from the MEC in the following terms:

"Kindly be advised that I have designated you, in terms of section 36(3) of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) to preside over the election of a speaker at Nelson Mandela Bay Metropolitan Municipality. You are

expected to ensure that the procedure that is set out in Schedule 3 of the Structures Act is observed when elections are conducted."

- 11.48 After taking the chair, Roestorff requested the attendance register to be completed to establish if there was a quorum. She was advised by councillors that the attendance register would be circulated before she left. She then stated that she would proceed with the process of the election of a speaker in compliance with the requirements of Schedule 3 of Structures Act;
- 11.49 Councillor Vena suggested that a hand count be conducted to establish whether or not there was a quorum. Roestorff agreed to this and those present, including Manyati, were counted to be 61 councillors present;
- 11.50 Roestorff then called for nominations for the position of speaker. According to the applicants this occurred orally. However, according to the respondents there was only one nomination on a signed nomination form and that was the nomination of councillor Mafaya. According to the

respondents no nomination for councillor Lawack was presented to council as the applicants had voluntarily absented themselves from the council meeting. The respondents contend that, in doing so, the DA coalition partners were exercising their constitutional rights to protest and to dissociate. Their actions however had no external legal effect;

11.51 Roestorff then announced councillor Mafaya (the fifth respondent) to have been duly elected as speaker. Mafaya then took the chair as speaker and announced that she would proceed with the further items on the agenda;

11.52 According to the respondents Roestorff lawfully discharged her mandate to preside over the election of a speaker. There was only one nomination on a signed nomination form for the speaker and that was that of councillor Mafaya. The motions which are the subject matter of these proceedings were then all validly passed with a quorum of 61 councillors and with the majority of votes in favour;

11.53 The respondents contend that the provisions of Schedule 3 of the Structures Act were complied with, alternatively they contend that any non-compliance was formal of nature and did not render the process invalid. The DA coalition had left the meeting and it did not nominate an alternative candidate. Section 5 of Schedule 3 then obliged Roestorff to declare councillor Mafaya duly elected as speaker, which Roestorff duly did.

THE APPLICANTS' "NEW" CAUSE OF ACTION:

[12] In the applicants' replying affidavit and their heads of argument the applicants purported to amend their cause of action by the introduction of the following new arguments based on the trite Oudekraal¹ principles:

"12. From these facts it is clear that the fourth respondent, who was fulfilling his statutory obligation to preside over the election of a new speaker in terms of section 36 of the Local Government: Municipal Structures Act, 117 of 1998 ("the Structures Act") took the following actions, which are administrative actions as

¹ See Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

contemplated in the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"):

12.1. he declared a vacancy in the Council pursuant to the termination of the eighth respondent's membership of the first applicant;

12.2. he declared the meeting to be inquorate; and

12.3 he adjourned the meeting;

12.4 he re-scheduled the meeting of the council for 3 September 2018;

12.5 he advised the Independent Electoral Commission of the vacancy in the Council.

13. The abovementioned administrative actions/decisions of the fourth respondent:

13.1 as a fact do exist;

13.2 continue to exist until, in terms of due process, they are properly considered and set aside by a court;

13.3 had consequences."

[13] It is a trite principle that the court will not permit an applicant to make out a case in reply when it failed to make out a case in the founding papers.²

[14] I accept that this is not an absolute rule and that courts should not be overly technical in this regard.³

[15] In the circumstances I intend to apply this general rule with a fair measure of common sense.

[16] Applicants' counsel, Adv Ronaasen SC, contended that the applicants' case has always remained the same and that the facts for the administrative action on which they now rely, were apparent from the founding papers. I disagree with this contention, with particular reference to the contention that Mettler "*adjourned the meeting*". It is common cause that Mettler did not adjourn the meeting in terms of rule 19, but that he simply "*left the chamber at approximately 15:20*". His intention was specifically not to adjourn

² See Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Company (Durban) (Pty) Ltd and Another 1980 (1) SA 313 D at 316 A

³ See Passenger Rail Agency of SA v Swifambo Rail Agency (Pty) Ltd 2017 (6) SA 223 at 227 at paragraph [11]

the meeting and I again refer to paragraphs 74 and 75 of the applicants' founding papers, which reads as follows:

"74. In this regard I have made enquiries from the Fourth Respondent who has informed me that after he left the Council chamber subsequent to declaring that the Council meeting lacked a quorum, he was at all times in his office in City Hall which is directly across the street from the chamber. His cell phone was on and he was also accessible by landline (or for that matter by email). His secretary was also available.

75. He informed me that at no stage was he contacted by the First Respondent or by anybody on his behalf, nor did he receive any electronic or other form of message enquiring as to his availability. He plainly was available to return to the meeting in the Council chamber to the extent that this was necessary (if for example the meeting had become quorate)."

[17] These allegations pertaining to Mettler's availability were obviously necessary for purposes of the applicants' cause of action to review and set aside the intervention of the MEC in the meeting. It was not the applicants' case in its founding papers that Mettler had formally adjourned the meeting. He subsequently decided, after his discussion with Trollip and after he had received the further advice

that he incorrectly declared a vacancy, not to return to the chamber and to resume the meeting the next day. In doing so, he did not comply with rule 19 of the rules of order in terms of which he was obliged to adjourn the meeting for a period not exceeding 20 minutes, after which, if a quorum was still not present, the meeting had to be adjourned to a future date and time.

[18] In the circumstances I find, as a fact, that the meeting was not formally adjourned by Mettler and that his belated attempt to do so, after the provisions of section 36(3) had already been invoked, had no legal effect.

[19] A further difficulty for the applicants in relation to the decisions or rulings by Mettler, is the question whether or not such rulings constituted administrative action as contemplated in PAJA. It was convincingly argued by Adv Ngcukaitobi, who appeared on behalf of fifth, sixth, seventh and ninth respondents, that the decisions of Mettler, in his capacity as acting speaker, were merely preliminary and procedural rulings as part of fluid proceedings, which cannot ever be regarded as administrative action. It would be untenable, so it was contended, to suggest that every ruling of the speaker is cast in stone until it is reviewed and set aside in a court of law. I agree

with this contention. City councils would never get their business done if every ruling of the speaker stood until it was overturned on review. This would however, in my view, depend on the nature of the ruling and the specific facts and circumstances which prevail at the time of the ruling.⁴

[20] In my view the interim nature of Mettler's procedural rulings in this matter disqualify them from being administrative action for purposes of PAJA.

[21] It was also argued by Adv Mpofu SC, who appeared for Manyati, that the rulings of Mettler in this matter plainly fell within the legislative functions of the municipal council and are, for that reason, excluded by the provisions of section 1 (b) (dd) of PAJA. In light of my finding set out above, I do not deem it necessary to decide this particular issue for purposes hereof.

[22] I therefore find that the creative approach of the applicants to introduce the aforesaid administrative action argument in relation to the rulings of Mettler is without merit, and was in any event introduced too late, in the circumstances of this particular matter. I

⁴ See Botha v Matjhabeng Municipality [2015] JOL 34026 (FB), for an interesting discussion on the nature of

want to make it clear that this finding is pertinent to the facts of this matter only. It is not inconceivable that certain rulings of a speaker might indeed, depending on the prevailing facts and the consequences thereof, constitute administrative action for purposes of PAJA. This is, however, in my view, not one of those cases.

THE MAIN ISSUES ON THE MERITS:

[23] This then brings me back to the main issues on the merits of the main application, namely the issue of a quorum; the issue of the availability of Mettler, and the issue of compliance with the provisions of Schedule 3 to the Structures Act. I will deal with these issues below *a seriatim*.

Was the council meeting of 27 August 2018 quorate?

[24] There is no dispute between the parties that there was a quorum at the beginning of the council meeting on 27 August 2018 (in fact all 120 councillors were present). There also seems to be no dispute that, when the DA coalition councillors left the chamber, 60 councillors plus Manyati remained behind. This was a sufficient

number of councillors to constitute a quorum, provided that Manyati was still a councillor.

[25] The applicants suggest in their founding papers that Manyati was no longer a member of the DA at that time, and that there was therefore a vacancy, which would have meant, if this were correct, that only 60 councillors stayed behind, which was insufficient for a quorum. The DA subsequently seems to have realized that their impromptu termination of Manyati's membership during the lunch adjournment was premature.

[26] In this regard the DA's internal disciplinary documents clearly indicated that, as far as the DA was concerned, 28 August 2018 was Manyati's last day as a member of the DA. The following are the pertinent extracts from the relevant documentation of the DA:

26.1 On 29 August 2018 the DA addressed a letter to Manyati in the following terms:

"Attached hereto please find a determination by the Federal Legal Commission of the Democratic Alliance in which they find that your membership of the Party has ceased by virtue of the

fact that you publicly declared your intention to resign from the DA.

You will note from paragraph 19.1 of this determination that you should be afforded a further opportunity to make representations as to why your membership has not ceased. Accordingly, and on behalf of the Federal Executive, I am giving you 24 hours from the time of service of this letter for you to provide me with reasons why your membership has not ceased..."

26.2 The ultimate determination of the Federal Legal Commission of the DA reads, *inter alia*, as follows:

"9. The original of the attached copy of the Letter of Cessation of Membership (Annexure "G"), dated 28 August 2018, was served on Manyati's daughter at 13:32pm on the same day by the Sheriff of the Court, Mr Morne De Lange, in the presence of Ms Vicky Knoetze and others. The panel was provided with a return of service and service affidavit which is attached hereto as Annexures "H" and "J".

10. The letter advises Manyati, inter alia, that, in terms of ss 3.5.1.2, 3.5.1.3 and 3.5.1.13 his membership of the Party ceased on 28 August 2018...

19. Having perused and considered all relevant and available documentary evidence at hand, the panel finds that Manyati's membership ceased on 28 August 2018 by virtue of the provisions of s 3.5.1.2, 3.5.1.3 and 3.5.1.13 of the DA Constitution. It is accordingly recommended to the Federal Executive that:

19.1 Manyati should be afforded a further opportunity, by the submission of documentary evidence, within a reasonable time to be set by the Federal Executive, to persuade the Federal Executive to the belief that his membership did not cease on 28 August 2018; and

19.2 Should Manyati fail to persuade the Federal Executive that his membership did not cease on 28 August 2018 in terms of s 3.5.1.13 of the DA Constitution; then cessation of his membership be confirmed and all consequences thereof implemented" (emphasis added);

26.3 On 28 August 2018 the aforesaid date of termination was confirmed in a letter from the DA's attorneys addressed to Manyati's attorneys, which letter read, *inter alia*, as follows:

"In the circumstances, your client's membership of the DA ceased with effect from 28 August 2018."

[27] Mr Ronaasen argued that the reference in paragraph 2 of the determination of the Federal Legal Commission to a letter of cessation of membership, dated 28 August 2018, was a mistake and obviously should have been a reference to the letter of Selfe, the chairperson of the Federal Executive of the DA, dated 27 August 2018 in terms of which Manyati was informed that ***"In the face of incontrovertible evidence that you did so publicly declare your intention to resign, the Federal Executive met by means of a telephone conference at 13:30 today and resolved that your membership had ceased with immediate effect."***

[28] I disagree with Mr Ronaasen's submission. The Federal Legal Commission made it clear that the panel was presented with a copy of a *"Letter of Cessation of Membership"*, dated 28 August 2018. This is obviously a correct reference to the letter of cessation of membership, which was in fact dated 28 August 2018 and which letter was served by the sheriff on Manyati's daughter on 28 August 2018. This letter came to the attention of Manyati for the first time

when he entered his study at approximately 07:00 on 29 August 2018.

[29] The DA should furthermore, and in any event, have been fully aware of the provisions of its own constitution, which would have made a termination of Manyati's membership on 27 August 2018, without any prior notification to him, and without affording him an opportunity to present his case, impossible. Mr Mpofo referred me in this regard to clause 10.5.1 of the constitution of the DA which provides, *inter alia*, as follows:

"10.5.1 The Rules of Procedure prescribed by the Federal Legal Commission must apply to all proceedings of a panel: Provided that the rules of natural justice must at all times be adhered to. In particular a panel must not make any adverse finding against any person unless:

10.5.1.1 The person has been sufficiently informed of every allegation against him or her and has been given the opportunity to rebut the allegations; and

10.5.1.2 He or she has been given the opportunity to submit evidence of mitigating factors..."

[30] In terms of the provisions of its own constitution, the DA has, in the circumstances, guaranteed the right of its members not only to the principles of natural justice but also to the principles of a fair process.

[31] Insofar as the DA persisted with their contention that Manyati's membership ceased during the course of the adjournment of the council meeting on 27 August 2018, it seems to me that the principles of natural justice were barely, if at all, observed by the DA. In this regard Mr Mpofu submits as follows in the heads of argument filed on behalf of Manyati:

"19.1 Manyati was not given a reasonable opportunity to respond to any adverse statements or evidence held against him – the decision to remove his membership was taken minutes after he had abstained his vote;

19.2 Manyati was summarily dismissed without a proper process being followed or any charges being put to him;

19.3 As opposed to being heard, he was simply informed of a decision, rather than being heard prior to the decision being made;

19.4 *He was subjected to numerous subsequent cessations of his membership that purported to sanitize a process that was marred with irregularity.*

[32] Mr Mpofu also referred me in argument to the recent decision of the full bench of the Western Cape Division of the High Court in the matter of *Patricia De Lille v The Democratic Alliance and Others*, case number 7882/18, handed down on 27 June 2018, where the court held, *inter alia*, as follows:

“[48] *... In the circumstances counsel for the DA was constrained to concede that until such confirmation by FedEx, as a matter of law, cessation of membership does not occur. In the absence of such a finding the membership of an affected member remains extant and does not cease to exist in law.*

[49] *Our finding that in terms of the party’s constitution and its rules, membership does not cease automatically, by operation of law, and is dependent upon a determination which has to be made to that effect, which must in turn be confirmed in order to become operative...*

[67] *Chp 10 of the DA’s constitution in turn provides that the FLC must determine the rules of procedure which may be applicable to it, which may not be in conflict with the Federal constitution.*

The procedures that are applicable to proceedings of panels are dealt with in Clause 10.5 of the Federal constitution. (The court then quoted clause 10.5.1 of the DA constitution referred to above.)

[68] It is apparent from these peremptory provisions that before making an adverse finding against De Lille, the parties was required to give her an opportunity to submit evidence in mitigation, which is common cause, it did not do. Although ordinarily mitigation only comes into play when penal or disciplinary sanctions can be imposed, cl 10.5.1 extends this to all proceedings of an FLC panel ie not only proceedings in panels conducting disciplinary proceedings, but also those constituted to determine whether a member's membership has ceased, and it further provides that no panel may make an adverse finding against any member, unless he or she has been given an opportunity to put forward mitigating factors."

[33] Manyati disputes in his opposing papers that his membership of the DA has been terminated at all.

[34] I am constrained, in these circumstances, to find that Manyati was still a member of the DA and a duly elected councillor on 27 August 2018.

[35] There was therefore factually no vacancy at any point on 27 August 2018 and because there was no vacancy there was, at all material times, a quorum of 61 councillors.

[36] This brings me to Mettler's purported declaration of a vacancy in the council during the meeting of 27 August 2018. Mr Mpofu submitted that Mettler's incorrect declaration of a vacancy had no effect on the quorum of the meeting and the meeting could therefore proceed to deal with the further items on the agenda. However, the DA then opportunistically ceased upon the declaration of a vacancy as an opportunity to render the meeting inquorate by leaving the chamber together with its alliance members.

[37] It is important to note that the meeting had not been formally adjourned immediately after the declaration of a vacancy. After the DA coalition left the chamber, Mettler declared that the meeting was inquorate and also left the chamber. He however did not adjourn the meeting at that stage to the next day or to a later date. Apart from probably acting unlawfully by leaving the chamber at that time, Mettler was compelled to comply with the provisions of rule 19 in

terms of which he had to again establish that the meeting was not quorate twenty minutes later.

[38] Back in his office, Mettler then received further legal advice in terms of which he realized that he was wrong in declaring the vacancy. Mettler duly conveyed this information to Trollip. However, instead of returning to the chamber immediately and continue with the meeting, which was factually quorate, Mettler did not do so, neither did the DA coalition members, who were by then fully aware that the declaration of the vacancy was wrong, return to the chamber. The DA coalition is, unfortunately for them, bound by the consequences of their political gamesmanship in this regard.

[39] In accordance with the council rules, the meeting should, after the departure of the DA coalition, have continued until it had completed its business.

Was the municipal manager "not available" to chair the meeting for purposes of section 36 of the Structures Act?

[40] Rule 20 of the rules of order provides that if the speaker is absent or not available to perform the functions of speaker, or during a

vacancy, the council under the chairmanship of the municipal manager or designated official must elect another councillor to act as speaker.

[41] Although rule 10.2 provides that “***Only the Speaker may interrupt, suspend or adjourn proceedings...***”, the municipal manager would, in given circumstances, have these same rights in his capacity as acting speaker. I do not think there is merit in the respondents’ contention that Mettler could not adjourn the meeting on the basis that only the speaker could do so. It would, for instance, be untenable to suggest that Mettler was obliged to continue with the meeting, and not have the right to adjourn the proceedings, even in the absence of a quorum.

[42] Section 36(3) of the Structures Act then provides that where the municipal manager of the municipality is not available, a person designated by the MEC for Local Government in the province shall preside over the election of a speaker.

[43] The provisions of section 36(3) are plainly intended to prevent a municipal manager from disabling the workings of the council by simply refusing to preside over the election of a speaker.

[44] In this matter Mettler knew that 61 councillors were left in the chamber. He was informed that his ruling that the meeting was not quorate was incorrect. He realized that his ruling had to be retracted. He also knew that the rules of order required the meeting to continue uninterrupted. He was asked to return to the meeting, but declined. Ndoni phoned Mettler at 15:42 on 27 August 2018 from his cell phone. Mettler however refused to return.

[45] Despite the minor factual dispute of what exactly happened, Mettler, in his further supplementary affidavit, concedes that he was phoned by a councillor with a request to return to the chamber. He, however, did not do so.

[46] Roestorff, the designated substitute chairperson of the MEC, also tried to get hold of Mettler on two occasions. Mettler, however, did not answer his phone. In doing so, Mettler plainly made himself unavailable, triggering the section 36(3) fallback position which entitled the MEC to designate an alternative person to preside over the election of a speaker.

[47] It is important to note again that Mettler did not formally adjourn the council meeting. He merely declared the meeting inquorate and thereafter left the chamber. On the DA's version he was available to return to the meeting to the extent that this was necessary (if for example the meeting had become quorate). At the time when Mettler decided not to return to the chamber, he was fully aware of his earlier incorrect ruling and that the meeting was in fact quorate.

[48] Rule 10.1 of the rules of order makes it plain that a meeting of the council must continue uninterrupted until it has completed its business.

[49] The meeting had a quorum of 61 councillors. It should therefore have continued uninterrupted. The meeting, however, needed a speaker to continue. Mettler's role was to preside over the election of a speaker. His absence necessitated the procedure set out in section 36(3) of the Structures Act.

[50] The position might have been different if Mettler had returned to the meeting and formally adjourned it to a future date in terms of the provisions of rule 19. It is quite conceivable that, should this have

occurred, the meeting could not have been reconvened without prior notice to all councillors.

[51] However, for the reasons advanced above I find that the council meeting was not adjourned before section 36(3) of the Structures Act was invoked by the MEC; that Mettler had to return to the meeting in terms of rule 19; that his refusal to do so, rendered him “*not available*” to chair the meeting and that the MEC then validly proceeded in terms of the provisions of section 36(3).

Were the provisions of Schedule 3 to the Structures Act complied with?

[52] The main issue in this regard relates to items (5) and (6) of Schedule 3 which provides as follows:

“(5) *Single candidate*

If only one candidate is nominated, the person presiding must declare that candidate elected.

(6) *Election procedure*

If more than one candidate is nominated-

- (a) a vote must be taken at the meeting by secret ballot;***
- (b) each councilor present at the meeting may cast one vote;
and***
- (c) the person presiding must declare elected the candidate
who receives a majority of the votes."***

[53] The DA contends that, as they have earlier submitted a proposal to the secretariat of the council, there were two candidates and the voting should therefore have taken place by way of a secret ballot.

[54] The respondents contend that the DA Alliance did not submit a nomination in terms of item (2) of the Schedule and, for that reason, there was only a single nomination.

[55] Item (2) of the Schedule reads as follows:

"(2) Nominations

***The person presiding at a meeting to which this Schedule applies
must call for the nomination of candidates at the meeting."***

[56] In my view the trigger for the submission of nominations was indeed the calling for nominations by the person presiding in terms of item 2. Roestorff was the person presiding. She called for nominations and only one nomination was submitted. The DA Alliance was absent and therefore did not submit a nomination to the person presiding. I do not think that the earlier submission of their nomination to the secretariat was in compliance with item 2 of Schedule 3.

[57] I therefore find, on all the facts already comprehensively set out and dealt with above, that there was compliance, alternatively substantial compliance, with the provisions of Schedule 3, by the respondents.

MANYATI'S COUNTER APPLICATION:

[58] In Manyati's counter application he seeks the relief which is set out in paragraph [5] above.

[59] The counter application flows from the same facts and circumstances set out above.

[60] The Applicants have essentially raised two defences to the counter application. Firstly they raised a defence of non-joinder on the basis that the Independent Electoral Commission ("the IEC") and councillor Lutho Sokudela, who was appointed in the place of Manyati, should also have been joined as respondents. The submission was that the IEC and Sokudela had direct and substantial interests in the relief sought in the counter application and that such relief would operate adversely to their interests.

[61] As far as the defence of a lack of jurisdiction is concerned the applicants contend that the DA's national head office is in Cape Town and because the primary relief sought in the counter application, in particular the relief which is set out in paragraphs 59.1, 59.2 and 59.3 of Manyati's affidavit, relates exclusively to the DA. This court, so it was contended in the opposing papers in the counter application, therefore lacked the necessary jurisdiction to hear the matter.

[62] On the point of non-joinder Manyati contends that the letter from the IEC purporting to declare a vacancy and which was not addressed to him, and which letter forms the basis of the applicants' contention that the IEC should have been joined as a party, was attached for

the first time to Trollip's answering affidavit to the counter application. Manyati only became aware of the letter on 12 September 2018 when Trollip's answering affidavit was served on him. It could therefore not have been expected of him to have joined the IEC as a party to the counter application.

[63] The test to be applied in this regard is whether or not a party has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.⁵ The mere fact that a party may have an interest in the outcome of the litigation does however not always necessarily warrant a plea of non-joinder.⁶ The general rule is that any party is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that the particular party has waived his or her right to be joined.⁷

⁵ See Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) at 168 to 170

⁶ See Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at 176 (I) to 177 (A)

⁷ See Kethel v Kethel's Estate 1949 (3) SA 598 (A) at 610

[64] I am not convinced that this is a matter where the court's order cannot be sustained or carried into effect without prejudicing the aforesaid two parties. The IEC is an independent organization established under chapter 9 of the Constitution. It is responsible for the management of elections of national, provincial and municipal legislative bodies in accordance with national legislation. In the exercise of these functions the IEC is responsible for voter's roles and for keeping record of duly elected officials. It is inconceivable that the IEC would have entered into the fray of these proceedings. The IEC would, in any event, only have been joined as a nominal respondent. When the outcome of these proceedings is conveyed to the IEC, they will, needless to say, simply amend their records accordingly.

[65] As far as councillor Sokudela is concerned, his involvement is also merely of a formal nature. His appointment flows from the purported termination of Manyati's membership. Should the termination of Manyati's membership be unlawful, the *status quo ante* will simply be restored which will in effect mean that Sokudela's appointment will be reversed. Furthermore having regard to the very late introduction of the letter of the IEC, which is dated 6 September 2018, Manyati cannot be blamed for his failure to join

these parties. I also see no reason why the counter application should be postponed to some future date for the purposes of effecting the joinder of these parties. It is also plainly in the interest of justice that the matter be brought to finality as soon as possible.

[66] I therefore find that the defence of non-joinder is without merit.

[67] As far as the defence of a lack of jurisdiction is concerned, the basic principle of our law in respect of jurisdiction is effectiveness.⁸

[68] In terms of section 21 of the Superior Courts Act a high court has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction.

[69] There is no dispute between the parties that the various causes of action in this matter arose within this court's jurisdiction. The DA coalition partners furthermore chose to launch their proceedings in this court. It is, untenable to now expect a counter application, arising from the same facts, to be launched by Manyati in the Western Cape High Court. To hold differently will defeat the principle of effectiveness.

⁸ See White v Stattafor and Company 1929 EDL 10 at 42

[70] I therefore also find that this defence is without merit.

[71] As far as the merits of the counter application is concerned I have already found that the DA's purported termination of Manyati's membership on 27 August 2018 was unlawful, in breach of the DA's own constitution and in conflict with the De Lille-judgment. Insofar as the DA's own documentation seems to suggest that the termination of Manyati's membership possibly only took place at a later date, following some belated notification to Manyati, the DA alliance partners are, in my view, bound to their defence raised in their papers, and persisted in before me, which is that Manyati's membership was lawfully terminated on 27 August 2018. This defence therefore has no merit.

[72] It follows, in the circumstances, that Manyati's counterclaim must succeed.

[73] I will direct the registrar to forward a copy of my orders to the IEC. Sokudela is a member of the DA and my orders will therefore, needless to say, come to his attention in due course.

CONCLUSION:

[74] As a result of the serious political consequences of my decision in this matter I have deemed it necessary to give a brief summary of the salient points culminating in my decision:

74.1 *The flaws in the political decision-making of the DA coalition on 27 August 2018 were as follows:*

- (a) The decision to terminate Manyati's membership during the lunch adjournment, in circumstances where the DA coalition ought to have known that this was not legally competent;
- (b) The decision to leave the council chamber after Mettler's incorrect declaration of a vacancy;
- (c) The decision not to return to the council chamber after the DA had been informed by Mettler that his decision in relation to the vacancy was incorrect, which meant that there was at all material times a quorum in the meeting;

- (d) The insistence of the DA coalition partners that they be given sufficient notice of a continuance of the meeting in circumstances where, on their own version, Mettler was waiting and available in his office for purposes of resuming the meeting should it become quorate (which, of course, it always was);

74.2 Mettler's errors in handling the situation can be summarized as follows:

- (a) His decision to stand the meeting down twice in circumstances where the meeting had to continue uninterrupted in terms of the rules of order.;
- (b) His failure to return to the meeting after having been requested to do so by certain councillors;
- (c) His failure to return to the meeting after he had been advised that the meeting was at all material times quorate;

- (d) His failure, in any event, to properly adjourn the meeting in terms of the provisions of rule 19(3). In terms of this rule Mettler was obliged to adjourn the meeting for a period "***not exceeding a further twenty minutes***", after which, if a quorum was still not present, the meeting had to be adjourned by Mettler to a future date and time. As stated above, Mettler's belated attempt to postpone the matter, after the section 36(3) procedure had already commenced, had no legal effect.

[75] It is my wish that all political parties in the Metro will endeavour to work together in a less confrontational manner in the future, in the best interests of all concerned.

[76] However, for purposes of the present matter, and based on the facts placed before me, I fail to find any reviewable error in the process adopted by the respondents on 27 August 2018.

[77] As far as costs are concerned, the fifth applicant had withdrawn its participation as an applicant in the matter at the commencement of the hearing. This withdrawal was not accompanied by a tender for

costs. The fifth applicant therefore remains liable in respect of the cost orders which are contained in my orders set out below.

[78] It is not in dispute between the parties that the costs of two counsel would be justified in this matter.

[79] I therefore make the following orders:

(1) The main application:

- (a) The application is dismissed;
- (b) The applicants are jointly and severally liable to pay the respondents' costs, including the costs of two counsel;

(2) The counter application:

- (a) It is declared that the eighth respondent's membership of the DA still subsists and will continue to subsist until his resignation, or until the conclusion

of disciplinary proceedings against him, properly brought in compliance with the DA's constitution;

(b) In the interim it is declared that Manyati remains a councillor of the third respondent;

(c) The applicants are jointly and severally liable to pay the eighth respondent's costs, including the costs of two counsel;

(3) The registrar of this court is directed to forward a copy of this order by e-mail to the IEC at *info@elections.org.za*.

J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

Matter heard on : 13th September 2018

Judgment delivered on : 20th September 2018

Counsel for the Applicants	:	Adv O Ronaasen SC together with Adv Richards
Instructed by	:	Roelofse Meyer Inc Attorneys PORT ELIZABETH
Counsel for the 1 st and 2 nd Respondents	:	Adv P Beningfiled SC together with Adv Mqobi
Instructed by	:	The State Attorney PORT ELIZABETH
Counsel for 3 rd and 4 th Respondents	:	No appearance
Instructed by	:	McWilliams & Elliot Inc. PORT ELIZABETH
Counsel for the 5 th , 6 th , 7 th and 9 th Respondents	:	Adv T Ngcukaitobi together with Adv C. Tabata and Adv T. Romogale
Instructed by	:	N.E Mbewana Attorneys Inc PORT ELIZABETH
Counsel for the 8 th Respondent	:	Adv D Mpofu SC together with Adv J Mitchell and Adv Mkhize
Instructed by	:	Mabuza Attorneys c/o Bester Attorneys PORT ELIZABETH
Counsel for the 10 th to 14 th Respondents	:	No appearance
Instructed by	:	Wikus van Rensburg Attorneys PORT ELIZABETH