

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

REPORTABLE

In the matter between:

Case No: 862/2022

NELSON MANDELA BAY MUNICIPALITY

First Applicant

CITY MANAGER: NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

Second Applicant

EXECUTIVE MAYOR: NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

Third Applicant

AND

ANELE QABA

First Respondent

MUNICIPAL COUNCIL OF NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

Second Respondent

GARY STANTON VAN NIEKERK

Third Respondent

JUDGMENT

GOOSEN J:

[1] At the heart of this matter lies a dispute between political parties represented in a municipal council. The dispute concerns the choice of person to appoint as the municipal manager. The case comes before this court in the form of an application for

interim relief pending a review, in unusual, even extraordinary circumstances. As will be seen the outcome of the case provides no assurance that the underlying malaise will be resolved.

[2] It is a matter of public record that none of the political parties that contested the 2021 local government elections in Nelson Mandela Bay secured an outright majority. The municipal council consists of 120 seats. The African National Congress and Democratic Alliance each secured 48 seats. The Economic Freedom Fighters 8 seats; the Northern Alliance 3 seats; the Patriotic Alliance, Vryheidsfront Plus; Defenders of the People and African Christian Democratic Party each secured 2 seats and Abantu Integrity Movement, African Independent Congress; Good Party; Pan Africanist Congress of Azania and the United Democratic Movement each secured 1 seat.¹ The result is that smaller parties hold sway in the balance of power in the municipal council.

[3] Following the municipal elections, the African National Congress was able to constitute a loose coalition of parties to enable it to form a local government. A council member of the ANC, Mrs Eugene Johnson (the third applicant in this matter), was elected as Executive Mayor. Mr Gary Van Niekerk, a member of the Northern Alliance, was elected as Speaker of the council.

[4] It is also a matter of public record that the coalition government has, from time to time, encountered difficulties because of internal contestation. It is common cause that the post of municipal manager has been vacant. Various officials have, for this reason, acted in that capacity. This continued while a process was undertaken to fill

¹ These figures are published by the Independent Electoral Commission and may be accessed on its website at results.elections.org.za/home/Downloads/ME-Results/.

the post permanently. It is this latter process which culminated in the matter now before this court.

The Facts

[5] On 16 March 2022, a council meeting was convened by the Speaker. The agenda contained an item relating to the appointment of the municipal manager for whom a selection process had been completed. It appears that ANC councillors, together with some representatives of smaller parties favoured the appointment of Dr Nqwazi. Other councillors did not. This included councillors associated with the coalition government. It is common cause that during the debate on the item, the council meeting descended into chaos. A large number of councillors disrupted the proceedings by singing, chanting and dancing. According to the minutes of the meeting, when the item was put to the vote, councillors either had or were in the process of leaving the chamber. The item was nevertheless put to the vote. 57 councillors were recorded as being seated in the chamber and, with 50 votes recorded in favour of appointing Dr Nqwazi, the resolution was declared carried.

[6] The papers filed by the parties do not disclose what occurred immediately after the vote. It is, however, common cause that 57 councillors does not constitute a quorum which would allow for a continuation of the meeting. I shall deal with this more fully later in this judgment.

[7] On 17 March 2022 the executive mayor issued a letter of appointment to Dr Nqwazi. On the same day she signed an employment contract with Dr Nqwazi.

[8] On 23 March 2022 the Speaker, Mr Gary Van Niekerk, convened a further council meeting. There is a dispute about this meeting being a properly convened meeting of council to which I will return. For the present it suffices to say that the

minutes of that council meeting record that it was a continuation of the meeting of 16 March convened to deal with the outstanding business of council. This included important business related to the budget. At the meeting of 23 March 2022 an item was tabled as a matter of exigency. What followed was consideration of the fact that the executive mayor had proceeded to appoint Dr Nqwazi as the municipal manager. A resolution was taken which reads as follows:

- “(a) That the decision of the Executive Mayor to irregularly appoint Dr N Nqwazi as the City Manager of NMBM be revoked as it is against item 2(b) of the Code of Conduct for Councillors.
- (b) . . .
- (c) That Dr N Nqwazi be suspended from the municipality with immediate effect due to allegations contained in the SIU Report and that assigned steps be followed in accordance with the Regulations.
- (d) That the conduct of the Executive Mayor in respect of her involvement in the irregular appointment of Dr N Nqwazi be referred to the Rules and Ethics Committee for its consideration and that the Executive Mayor be held personally liable for any fruitful (*sic*) and wasteful expenditure occasioned by unlawful actions in appointing Dr N Nqwazi as City Manager.
- (e) That the council's decision dated 16 March 2022 pertaining to the appointment of Mr L Magadlela as Acting City Manager be

rescinded and that Mr Anele Qaba be appointed as the Acting City Manager of Nelson Mandela Bay Municipality.

- (f) That the council seek a declaratory order in terms of the process followed for the recruitment of a permanent City Manager to determine if the process followed was legally compliant and that Dr Nqwazi be interdicted pending the outcome of this process.”

[9] The minute records that 68 councillors were present in the chamber and that the resolution was declared carried.² It is necessary to interpose a description of events that occurred between 16 and 23 March since these events are said to clothe what occurred on 23 March with illegality.

[10] On 21 March 2022 one Hayley Gee, ostensibly the Secretary General of the Northern Alliance wrote to the City Manager, Dr Nqwazi. The letter stated that 3 members of the Northern Alliance, who served as the Northern Alliance elected councillors, had been expelled and were no longer members of the Northern Alliance. The 3 included Mr Gary Van Niekerk, the Speaker of the council.

[11] Acting on the strength of this letter, Dr Nqwazi wrote to the Chief Electoral Officer of the Independent Electoral Commission to state that 3 vacancies existed on the council and requested that the vacancies be filled from the proportional representation list of the party concerned. For present it need only be recorded that it appears that Dr Nqwazi, the executive mayor and those councillors who had

² The minute does not record the number of votes for the resolution. It was not suggested, however, that the resolution did not enjoy majority support of the councillors present at the meeting.

remained in the chamber on 16 March formed the view that the meeting of 23 March was unlawfully convened by Mr Van Niekerk at a stage when he was no longer a councillor.³

The Application

[12] The present application was commenced on 28 March 2022 and enrolled for hearing on an urgent basis for Tuesday, 29 March.⁴ On 29 March it transpired that Mr Van Niekerk and the Northern Alliance wished to intervene. The hearing was therefore postponed to Thursday, 31 March 2022.

(a) Joinder of Mr Van Niekerk

[13] The intention of Mr Van Niekerk to intervene was premised upon concerns that aspects of this matter would have a bearing upon pending litigation between Van Niekerk (and the other two Northern Alliance members) and the Independent Electoral Commission relating to the alleged vacancies on the municipal council. However, prior to the launch of the intervention application the applicants applied for the joinder of Mr Van Niekerk. Mr Van Niekerk did not oppose and, at the commencement of the hearing I made an order joining Mr Van Niekerk as the third respondent.

[14] I shall return to questions relating to non-joinder of other parties later in this judgment.

³ It appears from the list of councilors who remained in the chamber on 16 March that only four of them attended the meeting on 23 March 2022 (apart from Mr Van Niekerk, the Speaker).

⁴ The application initially sought a directive on urgency that would have allowed enrolment of the application on Saturday, 26 March 2022. I considered it essential that notice of the application be given to the respondents and accordingly directed that the matter was not so urgent as to warrant the extremely truncated time periods.

(b) Urgency

[15] Mr Albertus (who appeared with Mr Moorehouse) for the applicants, submitted that the matter was urgent by reason, *inter alia*, of the fact that there presently were two persons who claimed authority to exercise the powers of the municipal manager. This was causing significant confusion amongst senior managers and staff members of the municipality. This fact alone required urgent court intervention to prevent ongoing prejudice to the municipality. It was also argued that the purported authority exercised by Mr Qaba may result in administrative actions being taken to the financial and other prejudice of the municipality. Insofar as urgency was concerned both Mr Beyleveld (for the first and second respondents) and Mr Mullins (for the third respondent) accepted that a case for urgent enrolment had been made out. It is therefore unnecessary to address the issue any further.

(c) The parties

[16] It is unusual to deal with who the parties to the litigation are at this stage of a judgment, since it usually facilitates easier understanding of a judgment and the issues to be decided, if the parties are identified. However, for reasons which will become apparent the identity of the parties is a central difficulty posed by this case.

[17] The first applicant is cited as the municipality of Nelson Mandela Bay. The second applicant is the City Manager, cited in that official capacity. The third applicant is the Executive Mayor.

[18] The first respondent is Mr Anele Qaba. He is cited in his personal capacity as the person who was appointed to act as City Manager by the council on 23 March 2022. An interim prohibitory interdict is sought against Mr Qaba to prevent him from exercising any authority as acting City Manager.

[19] The second respondent is the Council of the Metropolitan Municipality. The Speaker of the council was not joined. Mr Van Niekerk was, however, belatedly joined albeit in his personal capacity.

[20] It will immediately be obvious that this is a highly unusual situation. I suggested, during argument, to Mr Albertus that it seemed bizarre that a 'municipality' could sue its council. Mr Albertus conceded that this was indeed '*sui generis*'.

[21] In my view, it is not legally and conceptually possible for a 'municipality' to sue its 'council', and to move a court, ostensibly in the interests of the municipality, for relief against a determination by the council. I come to this view for the following reasons. Chapter 7 of the Constitution provides for a system of local government. Section 151 of the Constitution provides that:

- “(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.

- (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.”

[22] Sections 157, 158 and 159 of the Constitution deal with the establishment, composition, membership and terms of office of municipal councils. Of particular importance in the present matter is section 160 of the Constitution. It states that:

- “(1) A municipal council –
- (a) makes decisions concerning the exercise of all of the powers and the performance of all the functions of the municipality;
 - (b) must elect its chairperson;
 - (c) may elect an executive committee and other committees, subject to national legislation; and
 - (d) may employ personnel that are necessary for the effective performance of its functions;
- (2) . . .
- (3) (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.”

[23] What these Constitutional provisions indicate, is that a municipality holds no power or authority separate from its municipal council. Nor can it have a legal interest which is separate or distinguishable from that of a municipal council.

[24] This is made clear by the provisions of both the **Local Government: Municipal Structures Act** (the **Structures Act**)⁵ and the **Local Government Municipal Systems Act** (the **Systems Act**)⁶. Chapter 2 of the **Systems Act** regulates the legal nature and the rights and duties of municipalities. Section 2 provides as follows:

“A municipality –

(a) is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998;

(b) consists of –

- (i) the political structures and administration of the municipality;
and
- (ii) the community of the municipality;

(c) functions in its area in accordance with the political statutory and other relationships between its political structures, political office bearers and administration and its community; and

(d) has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.”

[25] The term ‘political structure’ is defined by the **Systems Act** to mean,

⁵ Act No. 117 of 1998.

⁶ Act No. 32 of 2000.

“the council of the municipality or any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act.”

[26] Section 2(d), above, has the effect of incorporating a municipality with separate legal personality from its community. It is this statutory provision (read together with Chapter 7 of the Constitution that provides for the essential form of incorporation of a municipality that has been a feature of local government in this (and many other countries) for hundreds of years.⁷ What section 2 of the **Systems Act** does not contemplate is that ‘a municipality’ is a separate incorporated entity to that of its ‘council’. Such a notion would, in any event, be absurd since it is the council in which executive and legislative power and authority is vested.

[27] Section 2(b) plainly conceives of a municipality as an amalgam of the political structures and administration of which it consists. Neither the Constitution nor the legislation enacted to give effect to its provisions clothes a ‘municipal council’ with separate legal personality from the ‘municipality’ of which it is a component. Rather, a municipality acts and performs its functions through the agency of its council. The council consists of democratically elected representatives of the community which forms part of the municipality. In it is vested all of the constitutionally conferred powers and responsibilities of a municipality.

[28] The legal relationship between a ‘council’ and its municipality, albeit now in a wholly different Constitutional framework, is in essence no different to that

⁷ See Steyler v De Visser: Local Government of South Africa, 1-5.

characterized by Watermeyer J in *De Villiers and Others v Beaufort West Municipality*⁸ when he said:

“The council therefore by a statute is made the agent of the body corporate, but the council itself is not a body corporate, it consists of a number of members whose acts are determined by the majority, and when they act collectively by resolution properly taken then they act as agents for the body corporate, the municipality.”

[29] In the light of what I have outlined, a suit (whether action or application) brought by a municipality against its council is not legally cognisable. The same difficulty besets claims of the second and third applicants.

[30] In the case of the second applicant there are several features to consider. Firstly, the second applicant is cited as the office of the City Manager. Dr Nqwazi, who deposed to the founding affidavit does so in her capacity as the appointed City Manager and in the exercise of the authority of that office. She is not involved or cited in her personal capacity. The same applies to the third applicant who is also cited in her official capacity only.

[31] I will deal more fully with an aspect of Dr Nqwazi's own personal interest in the matter under dispute hereunder. For the present it is necessary only to record what is a trite legal proposition, namely that the legal interests of the person who exercises power and authority nomine officio are not the same as the legal interests of the office. They may coincide to a greater or lesser extent but they are not the same interests.

⁸ 1929 CPD 501 at 504.

[32] In this matter Dr Nqwazi asserts the legal interests of the office of the City Manager. She asserts in the founding affidavit that she is authorized to bring the application 'on behalf of' the municipality. Although it is true that she refers also to herself, Mr Albertus accepted that she was not in fact acting personally.

[33] In asserting that she is acting in the capacity of City Manager on behalf of the municipality she can only be exercising delegated authority, i.e. the authority which vests in a municipal council to sue in the name of the municipality but which has been delegated as required by s 59 of the **Systems Act**.

[34] The powers, functions and responsibilities of municipal managers are set out in s 55 of the **Systems Act**. The section stipulates that the municipal manager as head of the administration is responsible and accountable for a range of defined matters. Only a few, of relevance, need be mentioned, namely:

- “(b) the management of the municipality’s administration in accordance with this Act and other legislation applicable to the municipality;
- (i) advising the political structures and political officer bearers of the municipality;
- (k) carrying out the decisions of the political structures and political officer bearers of the municipality;
- (m) the exercise of any powers and performance of any duties delegated by the municipal council or sub-delegated by other delegating authority of the municipality.”

[35] As indicated Dr Nqwazi asserts that as City Manager she is duly authorized to institute the proceedings. It is on the strength of this that the municipality is cited as the first applicant. But, as I have indicated the municipality cannot assert a legal interest or power or authority which is separate from that of the council. Nor can the office of the City Manager or Executive Mayor *qua* Executive Mayor act outside of the powers conferred upon those offices by the council.

[36] It is inconceivable, in my view, that the authority to institute legal proceedings which may be delegated to the City Manager or even to the Executive Mayor can include the authority to institute proceedings against the council since, for reasons already mentioned, that is an absurd notion.

[37] I should point out here, lest this proposition be misunderstood, that there is of course no difficulty with a municipality (if so cited) or municipal council seeking relief from a court to set aside its own conduct or decisions. That would be an instance of self-review in accordance with well-established principles. But that is not what is at issue in the present application. Here a person asserts authority on behalf of a 'party' to suspend certain resolutions of that same 'party', albeit cited differently.

[38] As will be seen from the above discussions there are, in my view, fundamental difficulties in according to the applicants, as cited, standing in relation to the cause of action at issue in these proceedings. Mr Albertus, in acknowledging the *sui generis* nature of these proceedings argued that this court should be slow to non-suit the applicants since there are critical issues of public importance at play. He argued also that the applicants' papers disclose strong prospects of success in

relation to a review in due course. It was, he submitted, essential that some guidance be given by this court order in the light of the ongoing confusion that presently reigns. The difficulty with the reliance on the prospects of success on review is, of course, that the review application will be bedevilled by the same problem of determining who the parties are to the litigation.

[39] I am not at all persuaded that public interest in resolving confusion, however important that may be, would be a sound basis to countenance claims which otherwise cannot be sustained. If it were merely a question whether litigation is authorized different considerations might apply. But this is not such a circumstance. In this instance a party seeks to have the court exercise its jurisdiction against itself in circumstances where the 'conflict' arises from the conduct of individuals, legal subjects, who are not party to the proceedings. Legal subjects who are persons, I dare say, who are the elected representatives of the community serving as a council which is under a constitutional obligation to govern the affairs of the municipality. Based on this finding the application cannot succeed. I shall nevertheless deal with the merits of the application insofar as my view of the fundamental problems with the applicants' case are in error.

(d) **Non-joinder**

[40] Mr Beyleveld, on behalf of the first and second respondents argued that the belated joinder of Mr Van Niekerk by the applicants constituted an implied admission that his participation, and that of the other two Northern Alliance members whose membership had been terminated, was necessary. On this basis, since this matter would potentially affect their status, the failure to join them is fatal.

[41] Mr Albertus submitted that the joinder of Mr Van Niekerk was necessary since his role as Speaker is at issue. The applicants do not, however, seek any finding in relation to Mr Van Niekerk's status in these proceedings. All that they are required to establish is that, *prima facie*, there is a prospect that they will succeed in establishing that, at the time he convened the council meeting of 23 March, he was not as a matter of fact lawfully entitled to do so. In that respect they concede the necessity for his joinder. The same does not apply in relation to the other two Northern Alliance members.

[42] I agree. Mr Van Niekerk, as Speaker and in his personal capacity, clearly has a direct interest in this matter, inasmuch as his actions as Speaker are at issue. But this court is not called upon to determine the question of his status as councillor. That issue is in any event the subject of pending litigation and is to be determined in that litigation. I am accordingly of the view that the failure to join the Northern Alliance and its two other members whose status is contested, is not a bar to hearing this application.

[43] It was also argued on behalf of the respondents that each of the councillors ought to have been joined since they have a legal interest in the subject matter which could prejudicially affect them. In the light of what I have said about the legal status of a municipal council there is some merit in the argument. However, ordinarily, when a municipal council is cited in proceedings its chairperson or speaker is cited *nomine officio* and it is not necessary to cite each individual councillor. If the applicants succeed the order - interim in nature – will be to suspend operation of certain resolutions taken by the municipal council pending a review to set them aside. Such order would be operative against the council as a whole. In this sense it will bind individual councillors. But they will not be adversely affected in the

exercise of their functions as councillors nor required to act under compulsion of any form of *mandamus*. I am, for these reasons, not persuaded that each councillor is, for purposes of the present application, a necessary party.

[44] Mr Beyleveld advanced similar submissions in relation to the Member of the Executive Council (MEC) for Local Government and the Independent Electoral Commission (the IEC). In relation to the latter it was argued that insofar as the applicants rely upon the alleged declaration of vacancies on the council in terms of s 27(c) of the Structures Act, the IEC ought to have been joined. In regard to the MEC it was argued that the provisions of s 54A ascribed to the MEC a range of powers and functions relevant to the appointment of a Municipal Manager.

[45] It must be emphasised that whilst the applicants rely upon the appointment of Dr Nqwazi as City Manager to found, *inter alia*, the claim for an interdict against Mr Qaba, the validity of the appointment process is not a matter for determination at this stage. Nor is the issue of compliance with the provisions of s 54A. Those issues may, in due course, feature in a future review application but for the present purposes it is not necessary to reach them. Accordingly, I do not hold the MEC to be a necessary party at this stage.

[46] I have already addressed the question of the status of Mr Van Niekerk as a councillor and the related aspect of the declaration of a vacancy. Those considerations apply also in respect of the IEC. It follows that I do not find that the application is beset by non-joinder of parties such as would preclude the hearing of the matter. It will be observed, in any event, for the reasons already advanced in respect of the identity of the parties that no purpose would be served by requiring the joinder of further parties since the application falls to be dismissed.

[47] I turn now to certain aspects of the merits.

(e) Requirements for Interim Relief

(i) The prima facie right

[48] It was argued on behalf of the applicants that the right which is asserted is that Dr Nqwazi is the lawfully appointed City Manager and that the purported resolution of 23 March 2022 unlawfully interferes with the exercise of her powers as City Manager. As far as the appointment of Dr Nqwazi is concerned it was asserted that the resolution appointing her was taken at a lawfully constituted meeting of council on 16 March 2022. According to the minutes of that meeting, the meeting was *quorate* at the time that the vote was taken.

[49] Item 19 of the Rules of Order of the Nelson Mandela Bay Council provides in its relevant parts:

“19.1 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.

19.2 Notwithstanding Rule 18.1 above (*sic*), 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 or any matter may be taken.”

[50] Mr Albertus argued that upon a reading of the minutes of 16 March 2022 it appears that some councillors were leaving the council chamber when the vote was taken. The fact that the Speaker proceeded with the vote and recorded that the vote was carried indicates that there was a quorum present. Fifty-seven councillors were seated while others were in the process of leaving. Since item 19 requires that a quorum be present, it must be accepted for purposes of the interim relief sought, that Dr Nqwazi's appointment as Municipal Manager is *prima facie* established.

[51] In addition to this it is common cause that the Executive Mayor signed Dr Nqwazi's contract of employment on 17 March 2022. Mr Albertus accordingly argued that the applicants had established a strong *prima facie* right to warrant the grant of the interdict against Mr Qaba.

[52] In respect of the review relief to be sought it was submitted that a *prima facie* case was established that the resolutions adopted on 23 March 2022 were taken at an unlawfully convened meeting of council. This was so because at the time that the meeting was called Mr Van Niekerk was no longer a councillor. Here reliance was placed on the process which had been initiated to declare a vacancy.

[53] In relation to the resolutions themselves, it was submitted that the 'rescission' of the executive mayor's entry into a contract of employment did not terminate or set aside the contract. The purported suspension of Dr Nqwazi was not conducted in accordance with recognised procedures and was, for this reason, of no force and effect. Finally, it was submitted that the resolution appointing Mr Qaba could not properly be taken because Dr Nqwazi had already been appointed to the position.

[54] The assertion that the meeting of 23 March 2022 was unlawfully convened is, it seems to me, open to significant doubt. This is so for two reasons based on the papers as they are before me. The first is that the minutes assert that the meeting of 23 March is a continuation of the meeting of 16 March. The items recorded in those minutes indicate discussion of business which featured in the agenda papers for the meeting of 16 March which were not dealt with on 16 March. Importantly, there is an item related to the budget which was finalised at the meeting of 23 March about which there appears to be no controversy. Item 20 of the Rules of Order provides for a situation where, during the course of a meeting, the meeting ceases to be quorate. In such circumstances the Speaker can adjourn and schedule another meeting on a future date and time. Although the applicants assert that there was in fact a quorum when the resolution was adopted to appoint Dr Nqwazi, it is plain that following that item no business could be conducted since the meeting was then no longer quorate. None of the parties deal with what then occurred. All that is known is that a further meeting occurred to continue with the business of the first meeting. In the light of this it is doubtful that the meeting of 23 March was one which was unlawfully convened as alleged by the applicants.

[55] The second aspect concerns the authority of the Speaker. This is the subject of pending litigation. I accordingly will refrain from expressing any view on the subject. The applicants' reliance on the declaration of a vacancy was confined to the contention that the council meeting, *prima facie*, was not lawfully convened. I am unable to agree. Upon the applicants' version Dr Nqwazi wrote to the Independent Electoral Commission on 22 March 2022. By that date the council meeting for 23

March had already been convened. This is apparent from communication from Mr Van Niekerk, as Speaker, on 22 March.

[56] Furthermore, if the meeting of 23 March was in fact a continuation of the prior convened meeting of 16 March, as appears from the papers, it is doubtful that the meeting was unlawful merely because Mr Van Niekerk's status as councillor might have changed. I use the term might have changed advisedly. Section 27(c) provides that a councillor vacates office if that councillor ceases to be a member. That is necessarily a factual question. In *Thabazimbi Residents Association v Thabazimbi Municipal Council*⁹ it was held that for a vacancy to be declared the jurisdictional facts required by s 27 must be established. In the present matter Dr Nqwazi relied solely upon the letter received from Hayley Gee dated 21 March 2022. This notwithstanding that she was aware of pending legal processes related thereto and without affording Mr Van Niekerk any notice of her intended communication to the IEC. These facts bear upon the prospects of success of a review in due course. In my view, they do not conduce a finding that there are necessarily strong prospects of success.

[57] Mr Albertus submitted that the resolution adopted on 23 March is open to challenge, since revoking of the Executive Mayor's signing of the contract does not alter the contractual rights which vest in Dr Nqwazi. He further submitted that the purported suspension of Dr Nqwazi was manifestly procedurally flawed. On this basis alone it was likely that the resolution would be set aside.

[58] Insofar as the failure to follow proper procedures for suspension are concerned, it should be stated that Dr Nqwazi is not a party to the application. Rights

⁹ [2019] JOL 41153 (LP).

which vest in her, whether contractual or otherwise, are to be asserted by her. They cannot be asserted by the City Manager against the municipality on her behalf save in the context of a self-review which these proceedings are not.

[59] Although Mr Albertus argued that Dr Nqwazi's status as the City Manager is based on a strong *prima facie* right, I have some reservations that lawfulness of her appointment is established. Again, I do not wish to express firm views since that may be the subject of further proceedings. However, it is open to some doubt that it can be said that a meeting is quorate when a vote is taken whilst councillors are in the process of leaving. Whether there was in fact a sufficient number of councillors present is a factual issue that will need to be established. The minute, as it reads, does not determine the matter one way or the other.

[60] The asserted right need only be established on a *prima facie* basis. The establishment of a right, even if open to doubt, cannot be separated from the part seeking to assert it. The applicants' case is that Dr Nqwazi has been appointed by resolution and her right to act is infringed by the subsequent appointment of Mr Qaba. Yet, the subsequent resolutions exist as a fact and their effect is to deprive Dr Nqwazi of the right to exercise the powers of her office. In these circumstances the office of the City Manager can assert no right in relation to Dr Nqwazi. To the extent that Dr Nqwazi's rights to fair procedure and her contractual rights have been implicated, those rights are to be asserted by her. That is not the case in this matter.

[61] It does not avail the applicants to say that the conduct of the municipal council has brought about a legal conundrum that is likely to result in certain decisions or resolutions being set aside in due course. It must be established *prima facie* at least

that a party properly before the court is vested with a right which it is likely will be vindicated in due course. It is this that allows a court to consider whether the ongoing infringement of that right warrants protection pending the review. In my view, the applicants have not established such a right.

(ii) A reasonable apprehension of irreparable harm should the interim relief not be granted

[62] It was argued that in the event that Mr Qaba not be interdicted from acting as City Manager, and the resolution suspending Dr Nqwazi not be stayed, that the municipality would suffer irreparable harm. In the first instance this would arise from the fact that Mr Qaba's appointment is invalid. Should he be allowed to continue exercising those powers, actions would be taken which themselves would be invalid and potentially liable to be set aside. Furthermore, in the light of alleged impropriety on the part of Mr Qaba apparently evidenced by a forensic investigation, steps might be taken which would prejudice the municipality in its investigation. Finally, it was argued that the fact that there are two persons claiming to be duly appointed as City Manager there is great scope for confusion amongst and even prejudice to staff of the municipality and for members of the public.

[63] For these reasons a failure to grant interim relief would give rise to irreparable harm. In ***Bobani v Nelson Mandela Metropolitan Municipality and Others***¹⁰ Plasket J (as he then was) dealt definitively with an argument on all fours with the present argument. At par [6] the learned judge said:

¹⁰ 2013 JDR 1500 (ECP).

“Bobani’s case is that irreparable harm will be suffered if the interim interdict is not granted and the review succeeds in due course because the municipal manager will, in the period between now and the review, take a significant number of decisions (if she is not interdicted from doing so) that will be liable to be set aside with prejudicial consequences for the municipality and its rate-payers.”

[64] After dealing with a passage from the judgment in ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others***¹¹ the learned judge found:

“In the first place, if the municipal manager’s appointment is set aside, there is no reason to believe that there will be a flood of applications to set aside large numbers of decisions that have been taken by her. Secondly, those decisions that she may have taken that can validly be ratified by the municipality would probably be. Thirdly, it is not a matter of certainty that challenges to her decisions based on the invalidity of her appointment will succeed: their validity may not be dependant on the invalidity of her appointment and, even if decisions she has taken are found to be invalid on this account, the remedy of setting aside, being discretionary, may be withheld in order to prevent dislocation of the municipality’s functioning and to prevent administrative chaos. Finally, the court that reviews and sets aside her appointment may, for reasons of good governance, follow the Constitutional Court’s lead in *Democratic Alliance v President of the Republic of South Africa &*

¹¹ 2004 (6) SA 222 (SCA).

others in which it was ordered that decisions and acts of an invalidly appointed National Director of Public Prosecutions whose appointment was set aside would not be invalid ‘merely because of the invalidity of his appointment.’

[65] On this basis Plasket J found that Mr Bobani, the applicant, had failed to establish a reasonable apprehension of irreparable harm. In my view, the approach set out in the ***Bobani*** matter applies in this instance. Insofar as the appointment of Mr Qaba as acting City Manager may in due course be set aside, it does not follow that his exercise of the powers of the city manager in the interim will give rise to irreparable harm.

[66] There is one distinguishing feature of this case. In this instance, as a result of the conduct of the municipal council on 16 March and thereafter on 23 March there are two persons each of whom purports to act as a duly appointed City Manager. I accept that for as long as this continues it will give rise to confusion amongst municipal staff, and that it may undermine the proper administration of the municipality. I am, however, not persuaded that this confusion and disruption is such as to constitute irreparable harm. For harm to be irreparable, the effects or consequences must be irreversible or permanent.¹² As lamentable as the ongoing confusion and dysfunction of the council may be, there is nothing to suggest that such harm as may ensue will be irreversible or permanent.

¹² Tshwane City v AfriForum and Another [2016] 2 All SA 19; 2016 (6) 279 (CC) par 59.

[67] Thus, just as Plasket J found in the ***Bobani*** matter, I am unable to find that the applicants here have established the requirement of a reasonable apprehension of harm should the interdict not be granted.

(f) The Remedy

[68] In the light of the finding that an apprehension of irreparable harm is not established, it is unnecessary to consider the other requirements for the granting of interim relief. I intend, however, to address the question of the existence of an alternative remedy in the context of what is an appropriate remedy in this matter.

[69] For the reasons I have set out above the applicants' application cannot succeed. The proper order is to dismiss the application. I intend to make such order. Yet, I am compelled to observe that dismissal of the application (i.e. a refusal to grant interim relief) does not and probably will not resolve the immediate conflict which gave rise to this application.

[70] Despite my findings in relation to the parties, the applicants wish to pursue the review relief. Dr Nqwazi, who is not a party to these proceedings, may pursue litigation or may continue to assert her entitlement to act as City Manager. The respondents did not seek by counter-application to restrain her from doing so, notwithstanding the council resolution of 23 March indicating such intention.

[71] It is because of this situation, which arises because of the nature of the underlying dispute to which I referred at the beginning of this judgment, and the

bizarre nature of this application, that I am compelled to briefly address the existence of an alternative remedy to that of an interdict.

[72] I pointed out in the discussion, concerning the impossibility of a party acting against or suing itself, that this does not mean that an administrative or executive body cannot itself initiate court proceedings to review and set aside its actions, where such proceedings are required. That is plainly a course of action available to the municipality. There is also a course which involves the municipal council acting in accordance with its constitutional mandate as set out in s 152 of the Constitution. In doing so, it has available to it s 59(3) of the **Systems Act** which provides that:

“The municipal council –

(a) In accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; . . .” (emphasis added)

[73] If it is accepted, as it must be, that the municipality (and its constituent municipal council) is as a matter of fact and law bringing this application ‘against itself’ then it is vested with an alternative means by which to remedy the impasse that has now arisen. The municipal council, acting in accordance with the Constitutional and statutory powers vested in it, can take the resolutions of 16 March and 23 March in terms of which of City Managers were appointed under review if it

so decides. Alternatively, the municipal council, properly convened can rescind or vary such resolutions. Whilst such a course of conduct may bear upon the rights of either Dr Nqwazi or Mr Qaba, the council is nevertheless capable of resolving the current state of affairs.

[74] During the course of the hearing I requested counsel's comment in relation to potential mediation of the underlying dispute. All felt that that this may be worthy of consideration. The principal dispute which has given rise to the present situation is, however, one that involves persons and parties who are not in fact before this court. Accordingly, mediation of that dispute cannot be directed in terms of Rule 41A.

[75] The present situation in the Nelson Mandela Bay Metropolitan Council evokes grave concern. The impasse which has arisen and the ongoing conflict within council is a matter of public record. The events of 16 March, when a large number of councillors sought to disrupt the council meeting by walking out is undoubtedly a matter of rising public dissatisfaction. The community of Nelson Mandela Bay is, constitutionally a component of this municipality. It is difficult to see how disruption of meetings and refusal to participate in democratic decision-making by elected councillors can be in the public interest. In this instance, those councillors who walked out of the meeting on 16 March attended the meeting on 23 March and took decisions diametrically in conflict with what had occurred prior. The councillors who remained on 16 March did not, apart from a few, participate in the meeting on 23 March.

[76] This type of situation will undoubtedly cause great harm to the interests of residents of the municipality. It may also give rise to the municipal council failing to

execute its constitutional mandate. It is to be hoped that the municipal council will have due and proper regard to the terms of this judgment and that it will act swiftly to resolve the present situation by exercising its powers. It is to be hoped too that all of the political parties represented in the council will act in good faith to achieve that resolution.

[77] Finally, there is the question of costs. Initially the applicants' counsel submitted that in the event that the interim interdict is granted, costs should follow the result. However, following the debate about the unusual nature of the application and in recognition of the fact that even if successful all of the costs would ultimately be borne by the municipality, it was accepted that no order should be made. The concession is correctly made. Distressingly, the costs of this litigation will be borne by the public purse.

[78] In the result I make the following order:

The application is dismissed.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

<i>Obo the Applicants</i>	:	<i>Adv M. A. Albertus SC /</i> <i>Adv A. Moorehouse</i>
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Instructed by : *Kuban Chetty Inc, Mill Park,
Gqeberha*

Obo the 1st and 2nd Respondents : *Adv A. Beyleveld SC*

Instructed by : *Ntlabezo Attorneys, Newton Park,
Gqeberha*

Obo the 3rd Respondent : *Adv N.J. Mullins SC / Adv G. Joubert*

Instructed by : *Meyer Inc, Mill Park, Gqeberha*

Heard : *31 March 2022*

Delivered : *5 April 2022*