

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

**Case No: 2417/21**

In the matter between:

|                                                  |                  |
|--------------------------------------------------|------------------|
| <b>THE SPEAKER: O R TAMBO DISTRICT MUNICIPAL</b> | First Applicant  |
| <b>O R TAMBO DISTRICT MUNICIPALITY</b>           | Second Applicant |

And

|                             |                   |
|-----------------------------|-------------------|
| <b>LUYANDA MADZIDZELA</b>   | First Respondent  |
| <b>THOKOZILE SOKHANYILE</b> | Second Respondent |
| <b>FEZEKILE MPHAKE</b>      | Third Respondent  |

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**JUDGMENT**

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**TOKOTA J:**

[1] The relief sought by the applicants is twofold: In part A, they seek an order in terms whereof:

- (a) the first respondent is restrained and interdicted from performing any duties and functions of an Acting Municipal Manager at the O R Tambo District Municipality;

- (b) a declaratory order is made declaring the decision taken by the second applicant on 22 May 2021 suspending the first respondent to be of full force and effect;
- (c) ordering the second respondent to pay costs of the application in her personal capacity.

Only the relief sought in (a) and (c) was pursued during argument. The relief sought in part B is to be heard in due course and therefore is not relevant for purposes of this judgment.

[2] The second respondent (the Mayor) is resisting the application and has brought a counter-application seeking an order that:

- (a) the decision to convene meetings, and consequent resolutions taken thereat by the municipal council of O R Tambo District Municipality (O R Tambo Municipality), held on 22 and 26 May 2021, be reviewed and set aside as unlawful;
- (b) the Speaker of O R Tambo (the Speaker) be ordered to issue a notice, within five days of this order, convening a special council meeting of the second applicant at which the removal of the Speaker and Deputy Executive Mayor of the second respondent and the appointment of the Acting Municipal Manager shall be debated;
- (c) in the event the Speaker fails to convene such meeting referred to above within the specified period then in that event the first respondent shall convene such meeting;

- (d) the first applicant be ordered to pay costs of the counter application on attorney and client scale *de bonis propriis* together with the second applicant jointly and severally the one paying the other to be absolved.

**Factual background:**

[3] On 2 May 2018 a former Municipal Manager one Mr Owen Hlazo was dismissed by O R Tambo Municipality. Mr Hlazo unsuccessfully challenged his dismissal in the Labour Court. He then turned to this court and on 4 May 2021, this court upheld his challenge and ordered that he be reinstated to his former position. On 5 May 2021, O R Tambo Municipality filed an application for leave to appeal the order and when Mr Hlazo reported for duty to render his services on that day he was informed that the O R Tambo Municipality has applied for leave to appeal. He then left the offices and did not come back on 6 May 2021.

[4] On 26 February 2021 the Municipal Council appointed Ms Dunywa as Acting Municipal Manager for a period of three months commencing from 1 March 2021 to 31 May 2021.

[5] On 21 May 2021 the Mayor issued a circular informing the senior managers that she had appointed Mr Madzidzela, the first respondent, as an Acting Municipal Manager with effect from 21 May 2021. On the same day the Mayor 'terminated' the appointment of Ms Dunywa as Acting Municipal Manager with immediate effect.

[6] On 22 May 2021 the Municipal Council convened a special meeting whereat the conduct of the Mayor in 'terminating' the appointment of Ms Dunywa and the appointment of Mr Madzidzela was deliberated. The Council reaffirmed its appointment of Ms Dunywa as Acting Municipal Manager and resolved that Ms Dunywa should write a letter to the Mayor warning her to refrain from interfering with Council's decisions and in particular to inform the Mayor that the power to appoint an Acting Municipal Manager vested in the Council in terms section 54A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Further to inform the Mayor that in terms of clause 43.2 of the Political Delegations Framework of the O R Tambo Municipality the Executive Mayor has only *"the power to recommend to Council the appointment of a Municipal Manager and, when necessary, the Acting Municipal Manager when the position of the Municipal Manager becomes vacant."*

[7] On 28 May 2021 the Mayor attended a budget Steering Committee meeting where, in defiance of the Council's decision, she introduced Mr Madzidzela as the Acting Municipal Manager. Mr Madzidzela made representations under items relevant to the Acting Municipal Manager's portfolio in that capacity.

#### **Lawfulness of the meeting of 22 May 2021:**

[8] The Mayor contends that the following Local Municipalities had replaced their councillors at O R Tambo District Municipality; Ingquza Hill, Nyandeni, King Sabata Dalindyebo and Port St John's. There is a serious dispute as to whether the elected councillors who were deployed by these municipalities were properly replaced. The Mayor contends that at the meeting of the Council on 22 May 2021 and 26 May 2021

convened by the Speaker the new councillors were not invited. She submits therefore that for this reason those meetings were not lawfully convened and therefore resolutions taken thereat are invalid.

[9] The Mayor has listed 13 “councillors” who she claims were not invited and should have been invited to the meetings of 22 May 2021 and 26 May 2021. The Speaker contends that he invited all the officially recognised councillors to the meetings. He contends that the people mentioned by the Mayor are not councillors of the Municipality and do not appear in the register thereof and therefore he was not obliged to invite them.

[10] The status of these so-called councillors is the subject matter of a pending case under case number 1995/21 where the Independent Electoral Commission (IEC) is challenged for placing these people as councillors where no vacancies existed.

[11] The first respondent, Mr Madzidzela, sent names under cover of a letter to the IEC on 4 March 2021 purporting to act as an Acting Municipal Manager where he informed the IEC that vacancies existed and that the names were for the newly elected councillors. When this was brought to the notice of the Speaker, he immediately convened a special meeting on 5 March 2021. It was at this meeting that the Council once again reaffirmed the appointment of Ms Dunywa as the Acting Municipal Manager in line with the decision of 26 February 2021.

[12] After the expiry of three months i.e. 31 May 2021 the Council appointed the third respondent to act as a Municipal Manager with effect from 1 June 2021. As a result of the conduct of the Mayor and Mr Madzidzela, the Council resolved to suspend Mr Madzidzela and that the conduct of the Mayor be investigated. Notwithstanding his suspension, Mr Madzidzela is still masquerading as an Acting Municipal Manager.

[13] In the letter dated 4 March 2021 addressed to the IEC Mr Madzidzela represented himself as the Acting Municipal Manager. He informed the IEC, *inter alia*, that "O R Tambo District Municipality notes and approves the replacement of local representatives to the district council. In line with the contents of the correspondences and resolutions of O R Tambo District Municipality declares the vacancies and requests the IEC to process the referred replacements."

Signed L Madzidzela  
*Acting Municipal Manager*

[14] Although no letter of appointment could be traced in this regard, it is common cause that the Mayor appointed Mr Madzidzela as an Acting Municipal Manager for two days from 4 March 2021 to 5 March 2021 hence he described himself as such to the IEC. The challenge of this appointment by the second applicant is contained in prayer 2 of the notice of motion in case number 1995/21. It is also common cause that the Council never appointed Mr Madzidzela as an Acting Municipal Manager. The second appointment of Mr Madzidzela by the Mayor was that of 21 May 2021. At all times material, the appointment of Ms Dunywa was still in place. Mr *Bodlani*

who together with Mr *Ntikinca* appeared for the Mayor, contended that when Mr Hlazo came back on 5 May 2021 he effectively nullified the acting appointment of Ms Dunywa.

[15] On 22 May 2021 the Council resolved to appoint the third respondent for a period of three months as Acting Municipal Manager taking over from Ms Dunywa effective from 1 June 2021. In this meeting, the Council further resolved that the Mayor be placed on special leave pending an investigation by the special ad-hoc committee. It resolved further that Mr Madzidzela be suspended from duty pending the finalisation of a disciplinary process against him.

[16] Pursuant to the meeting alluded to above on 26 May 2021 Ms Dunywa addressed a letter to Mr Madzidzela suspending him with immediate effect pending the outcome of a disciplinary process against him. Mr Madzidzela has ignored the suspension and is performing his duties as an Acting Municipal Manager hence he made representations at the budget Steering Committee under items listed for Municipal Manager's portfolio on 28 May 2021.

[17] The net result of the current situation at O R Tambo Municipality is that there are two incumbents acting as Municipal Managers in a post of one incumbent. I am therefore effectively called upon to pronounce that Mr Madzidzela was not lawfully appointed as Acting Municipal Manager and therefore he must be interdicted from acting as such.

[18] Mr *Solomon SC*, who together with Ms *Haskins*, appeared for the applicants, submitted that the applicants seek an interim order interdicting Mr Madzidzela from performing any duties and functions of an acting Municipal Manager of the O R Tambo Municipality. Further I should make a declaratory order that his appointment as such by the Mayor was invalid and of no force and effect.

[19] Mr *Bodlani*, submitted that the initial case of the applicants was that the Mayor did not possess powers to appoint an Acting Municipal Manager. This, case changed, so the argument ran, as the replying affidavit was filed. The new case brought about by the applicants is that while the Mayor had the power to appoint she did not exercise that power in concert with the Executive Mayoral Committee. I am not sure whether anything turns on this argument in light of the view I take of this matter. First, no application to strike out the new point as a new matter was made. Second, the Mayor has responded by filing an additional affidavit to deal with the so-called new matter. Third, it seems to me in any event, that to analyse the point in that way would amount to splitting hairs. To say that the Mayor had no power to appoint the Acting Municipal Manager must of necessity include the failure to take the decision with the Executive Mayoral Committee.

[20] Mr *Bodlani* contended that the holding of the meetings of 22 May 2021 and 26 May 2021 at which the decisions were taken was unlawful and invalid because of the fact that councillors who should have been invited to the meetings were not invited by the Speaker. Mr *Solomon* on the other hand submitted that the Speaker was not



obliged to invite the councillors referred to by the Mayor on the grounds that they were not registered councillors of O R Tambo Municipality. He argued further the inclusion of these councillors in the O R Tambo Municipality was the subject matter of a pending litigation in this court in case number 1995/2021. In that case the parties are, *inter alia* O R Tambo Municipality and the disputed councillors including the IEC.

[21] I deem it expedient to set out fully the relief sought in case number 1995/21 excluding the prayer for urgency and costs the relief sought there is an order:

- “2. *That the second respondent’s appointment on 3 March 2021 of Mr Madzidzela as the Acting Municipal Manager for two days on 4 and 5 March 2021 (the appointment) of the applicant was in direct contravention of the applicant’s Council resolution of 26 February 2021 was inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;*
3. *Reviewing and setting aside the appointment;*
4. *Declaring the first respondent decision to replace eighteen of the applicant’s councillors (the replacement) and the publication on 15 April 2021 of such replacements in the Government gazette was inconsistent with the constitution and invalid;*
5. *Reviewing and setting aside the replacement.”*

From the above it is obvious that the validity of the appointment of Mr Madzidzela for two days by the Mayor and the replacement of the disputed councillors are challenged.

[22] At the hearing of this matter I invited both Counsel to address me as to why I should make a ruling on the validity of the impugned meetings in this matter in view

thereof that there is a pending dispute in relation to the replacement of councillors in another court. Mr *Solomon* submitted that the dispute about the replacement of councillors is *lis pendens* in case number 1995/2021. Furthermore, he submitted as a matter of fact that this dispute is *res judicata* in that in case number 1029/2021 Nhlangulela DJP dismissed the application for the recognition of these councillors on the basis that there was a dispute of fact which could not be resolved on the papers and the applicants did not ask for referral to oral evidence.

[23] Mr *Bodlani* submitted that the dispute is not *lis pendens*. He argued that the relief sought in the matter before Nhlangulela DJP is not the same as the present one and the parties are not the same. He argued that the impugned meeting was not the meeting of 22 May 2021 and 26 February 2021 but the meeting of 5 March 2021. Furthermore, the order of Nhlangulela DJP is the subject matter of the petition to the Supreme Court of Appeal.

[24] The principle of *lis pendens* is trite. The substance of the principle and the object thereof is to avoid a multiplicity of actions with all the inconvenience and expense that would be involved and to avoid conflicting judgments in the same cause of action. In case number 1995/2021 Mr *Bodlani* submitted that the O R Tambo Municipality seeks an order setting aside the replacement of the councillors and the replacing councillors brought a counter application seeking an order declaring that the failure by the Speaker to invite them in the meeting of 3 March 2021 was unlawful and that they should be permitted to perform their duties as councillors representing their local municipalities.

[25] Mr *Bodlani* argued that this court is not called upon to decide whether or not the disputed councillors are councillors of O R Tambo Municipality. What this argument overlooks is that for me to decide whether or not the disputed councillors should have been invited in the impugned meetings it must first be established that they are councillors of O R Tambo Municipality because the Speaker is only obliged to invite councillors of the Municipality. Once their legitimacy is challenged that must be resolved first before I can decide that the Speaker was obliged to invite them. In my view, it matters not that the meeting impugned in the other case was convened on 3 March 2021. There is no substance in distinguishing these meetings. The point of dispute in all of them is the failure to invite these disputed councillors. Furthermore, the replacement is the subject of dispute in the above quoted case.

[26] Mr *Bodlani* further argued that on the authority of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)** the decision to replace those disputed councillors remains valid until set aside by a court of law. This debate may be shelved for another day. In light of the dispute which cannot be resolved on these papers as shown hereunder I cannot declare that the meetings held on 22 May 2021 and 26 May 2021 were unlawful.

### **Was the appointment of Mr Madzidzela as acting municipal manager lawful?**

[27] In order to decide on the validity of appointment of Mr Madzidzela, legislative framework must first be considered. The Municipalities derive their existence and powers from sections 151 to 163 of the Constitution of the Republic of South Africa,

1996. Any National Legislation regulating the exercise of the powers of the municipalities must be in line with the Constitution.

[28] Section 54A of the Local Government: Municipal Systems Act 32 of 2000 provides:

*“Appointment of municipal managers and acting municipal managers*

*(1) The municipal council must appoint-*

- (a) a municipal manager as head of the administration of the municipal council; or*
- (b) an acting municipal manager under circumstances and for a period as prescribed.*

*(2) ...*

*(2A) (a) A person appointed in terms of subsection (1) (b) may not be appointed to act for a period that exceeds three months.*

*(b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.*

*(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-*

- (a) ...*
- (b) the appointment was otherwise made in contravention of this Act.*

*(4) If the post of municipal manager becomes vacant, the municipal council must-*

- (a) advertise the post nationally to attract a pool of candidates nationwide; and*
- (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.*

*(11) A person who has been appointed as acting municipal manager before this section took effect, must be regarded as having been appointed in accordance with this section for the period of the acting appointment.”*

It is perhaps expedient at this stage to observe that the power to appoint a Municipal Manager including Acting Municipal Manager is expressly conferred on the municipal Council. The acting appointment of any person may not exceed three months unless approval from the MEC for the extension of the period has been obtained. I assume that it was on this basis that Ms Dunywa's appointment was not extended beyond three months.

[29] Section 59 deals with delegations. It provides:

*“(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may-*

- (a) delegate appropriate powers, excluding a power mentioned in section 160 (2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76 (b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;*
- (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and*
- (c) withdraw any delegation or instruction.*

*(2) A delegation or instruction in terms of subsection (1)-*

- (a) must not conflict with the Constitution, this Act or the Municipal Structures Act;*
- (b) must be in writing;*
- (c) is subject to any limitations, conditions and directions the municipal council may impose;*

- (d) *may include the power to sub-delegate a delegated power;*
- (e) *does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and*

[30] Section 36 of Local Government: structures Act 117 of 1998 (the Structures Act) deals with the election of speakers and provides that each municipal council must have a chairperson who will be called the speaker. The functions of the Speaker are set out in section 37 and they are:

*“The speaker of a municipal council-*

- (a) *presides at meetings of the council;*
- (b) *performs the duties and exercises the powers delegated to the speaker in terms of section 59 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000);*
- (c) *must ensure that the council meets at least quarterly;*
- (d) *must maintain order during meetings;*
- (e) *must ensure compliance in the council and council committees with the Code of Conduct set out in Schedule 1 to the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000); and*
- (f) *must ensure that council meetings are conducted in accordance with the rules and orders of the council.”*

[31] The functions of a Mayor are set out in section 49 of the Structures Act as follows:

*“(1) The mayor of a municipality-*

- (a) *presides at meetings of the executive committee; and*
- (b) *performs the duties, including any ceremonial functions, and exercises the powers delegated to the mayor by the municipal council or the executive committee.”*

[32] Mr *Bodlani* persisted that the appointment of Mr Madzidzeni was lawful in that the Mayor was authorised by means of a delegation to appoint the Acting Municipal Manager. He contended that the decision of the Mayor remains valid until set aside by a court of law. In this regard, he relied on **Oudekraal's** case quoted above. On the other hand, Mr *Solomon* argued that the Mayor did not have authority to appoint the Acting Municipal Manager. He referred me to the case of **Muldersdrift Sustainable Development Forum v Council of Mogale City Local Municipality and Others [2015] ZASCA 118: para [13]**

[33] As can be gleaned from section 54A (1)(b) the power to appoint an Acting Municipal Manager vests in the Municipal Council. In support of the argument that the Mayor had no authority to appoint an Acting Municipal Manager Mr *Solomon* relied heavily on the case of **Mogale City Local Municipality** *supra*. In that case, the SCA was dealing with an appointment of a Municipal Manager. It concluded that the delegation of that power was impermissible. In my view since the power to appoint an Acting Municipal Manager is also vested in the Council in terms of section 54A(1)(b) of the Systems Act I see no distinction in this case from that of **Mogale City Local Municipality**. I did not understand Mr *Bodlani* to be contending otherwise.

[34] In my view reliance on **Oudekraal** is misplaced. The Mayor cannot act in contravention of the Systems Act and expect this court to endorse such acts. It is

trite law that anything done in contravention of the statute is unenforceable in a court of law.<sup>1</sup>

Mr Bodlani's argument can be dealt with by reference to the statement of Cameron J in **Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) para 116**

Where he said

*"I must state at the outset that Oudekraal is not authority for the proposition that an invalid administrative act is binding as long as it is not set aside by a competent court. No court has the power of converting an unconstitutional and invalid act with no legal force into a valid act with binding effect. This is so, it must be stressed, because the Constitution is supreme and it declares that conduct inconsistent with it is invalid. That which is proclaimed to be invalid by the Constitution cannot be overruled by any court. Courts are established and derive their powers from the Constitution which is binding on all arms of government, including the judiciary."*

[35] Courts are obliged in terms of the Constitution to ensure that all branches of the State in the performance of their public duty act within the parameters of the law and anything contrary thereto will not be enforced.<sup>2</sup> Consequently, I hold that the Council was not entitled to delegate the power to appoint Acting Municipal Manager to the Mayor. Accordingly, the appointment of Mr Madzidzela by the Mayor was unlawful for this reason alone.

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<sup>1</sup> Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA) ([2009] ZASCA 66): para [16] ; Valor It v Premier, North West Province and Others 2021 (1) SA 42 (SCA) para.41; Premier, Free State, and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247; [2000] ZASCA 28) para 30; Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) ([2001] 4 All SA 273) paras 8 – 9.

<sup>2</sup> My Vote Counts NPC v Speaker of the NA 2016 (1) SA 132 (CC) (2015 (12) BCLR 1407; [2015] ZACC 31) para. 152; Merafong Demarcation Forum v President of the RSA 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10) para.262



[36] In any event even if the Council had authority to delegate its power to the Mayor, which I hold it did not have, the Mayor had no right to exercise that power in the face of the existing appointment of Ms Dunywa having already been made by the Council. In terms of section 59(2)(e) the Council was still entitled to exercise this power itself notwithstanding any delegation.

[37] The Mayor contends that the meeting of 22 May 2021 at which the third respondent was appointed was unlawful by reason of the exclusion of certain Councillors in that meeting. She contends that it is her appointment of 24 May 2021 of Mr Madzidzela, which is valid. I have already found that the delegation was unlawful and that she was not entitled to override the Council's appointment.

[38] In my view there is no legal basis for contending that the meeting of 22 May 2021 was unlawful. There is no statutory sanction to the effect that if certain disputed councillors are not invited to a meeting such a meeting is unlawful. Furthermore, there is no contention that there was no Coram in that meeting. However, for purposes of this judgment I refrain from deciding the status of the disputed councillors. I agree with Nhlangulela DJP that the dispute is so serious that it cannot be resolved on the papers. In support of the Mayor, thirteen people have deposed to affidavits contending that they had replaced certain councillors in their respective local municipalities. Again, in support of the Speaker thirteen councillors have deposed to affidavits denying that they had been replaced. Consequently, in the absence of the resolution of the dispute of fact I must reject the argument that the councillors have been replaced.

[39] What attracts curiosity in this whole saga is the conduct of the Mayor. On 3 March 2021, the Mayor appointed Mr Madzidzela as the Acting Municipal Manager for two days. The appointment was to commence on 4 March 2021 and to end on 5 March 2021. On 4 March 2021, Mr Madzidzela wrote a letter to the IEC stating that the Council had approved the replacements of the councillors from various local municipalities and requested the IEC '*to process the referred replacements*'. At that time Ms Dunywa was still the Acting Municipal Manager. The inference is irresistible that the Mayor appointed an additional Acting Municipal Manager in order to request the IEC to replace councillors. In my view, the applicants are entitled to the restraining order sought.

#### **Counter-application:**

[40] This brings me to the counter-application. The Mayor seeks an order nullifying the decisions taken by the Council at the meetings of 22 and 26 of May 2021 by reason of failure to invite the disputed councillors. In order to succeed the Mayor must show that the disputed councillors are indeed councillors of the local municipalities and therefore were entitled to be invited to the meetings. Secondly, it must be established that failure to invite them to those meetings rendered the decisions taken thereat null and void in terms of the Structures Act or any statutory provision. Furthermore, the Mayor does not contend that the meetings took place in the absence of a Coram as required by the Structures Act.

[41] I have already dealt with the decisions, which were taken at the meeting of 22 May 2021 I have made a finding that I cannot pronounce that the meeting was unlawful because of the dispute of fact.

[42] As regards the meeting of the 26<sup>th</sup> of May 2021 there is no record of such a meeting and the Mayor has not pointed out to any resolutions in relation to that date. What the Mayor is saying is that on 26 May 2021 councillors of the second applicant convened a meeting in anticipation that the first applicant would convene that meeting. She does not take the matter any further than that.

[43] As regards the meeting of 26 May 2021 no resolution has been put forward which is alleged to be unlawful. In any event, the same reasoning in relation to the meeting of 22 May 2021 would apply here.

[44] In terms of section 30 of the Structures Act a majority of the councillors must be present at a meeting of the Council before a vote may be taken on any matter. Subsection (3) provides that all other questions before a Municipal Council must be decided by a majority of the votes cast, subject to section 34. I have not been referred to any statutory requirements, which would render the impugned meetings unlawful. Above all in the midst of the conflicting evidence relating to the replacements of councillors and in the light of failure to request a referral to oral evidence I have decided to reject the so-called newly elected councillors. Consequently, the Mayor cannot succeed on this prayer.

[45] In addition to the above the Mayor has asked this court to make an order compelling the Speaker to issue a notice, within five days of this order, convening a special Council meeting of the second applicant at which the removal of the Speaker and Deputy Executive Mayor including the appointment of the Acting Municipal Manager shall be debated. In the event the Speaker fails to convene such a special meeting within the stipulated period the Mayor or any other person be authorised to convene it.

[46] With regard to the above prayer the Mayor stated that the councillors have petitioned the Speaker for the special meeting. In terms of section 18(2) of the Structures Act, a Municipal Council must meet at least quarterly. In terms of section 29(1) it is the duty of the speaker of a Municipal Council to decide when and where the Council meets subject to section 18 (2), but if a majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request to debate the matter referred to in the request. In terms of Rule 9 of the Standing Rules where there is a request of a special meeting of the Council the Speaker must give at least forty eight hour notice before the start of the meeting.

[47] The Speaker denies that the notice complied with the statutory requirements. He maintains that the petition was not signed by a majority of councillors. The names on the petition included the names of the disputed councillors and that the dispute in relation thereto is pending in this court. Out of 29 people who petitioned only 20

names appeared in the register as councillors. The petition therefore was not signed by a majority of councillors. Furthermore, the inclusion of the disputed councillors in the petition had an effect on the validity of the petition. In the circumstances, this prayer has to be refused as well.

### **Costs:**

[48] What remains is a question of costs. The general rule is that costs should follow the event. The court however, depending on facts of each case, has a discretion in this regard. Both parties have asked for costs *de bonis propriis* in the event of succeeding in the case. Mr *Bodlani* has argued that the principle regarding costs in **Biowatch**<sup>3</sup> *supra* was applicable. He submitted that the matter involved constitutional issues and therefore the State would not be entitled costs in the event of succeeding.

[49] Generally in cases where a public official of the organ of State is acting in his/her official capacity costs are borne by that organ of State. However, the conduct of the official concerned may turn the scale and invite court's attention to that conduct to decide whether the conduct is reprehensible or that he acted in the furtherance of his interests rather than the interests of the State. Where an official acts in bad faith or is grossly negligent, the courts will visit him/her with cost orders in his/her personal capacity.

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<sup>3</sup> *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)

[50] In this case the following can be noted in the conduct of the Mayor: On 3 March 2021 despite the presence of an Acting Municipal Manager, she appointed her own manager, and, immediately thereafter, a letter was written to the IEC to change the face of the O R Tambo Municipality councillors. This appointment appears to have been done for this purpose hence there is no explanation why, in the face of an existing Acting Manager, an additional manager was appointed. Secondly, there is no explanation why the appointment was for only two days. Furthermore, the Council had appointed an Acting Manager but despite knowledge thereof, the Mayor went around introducing Mr Madzidzela as the Acting Manager.

[51] On 21 May 2021 she issued circular informing senior managers that Mr Madzidzela was the Acting Municipal Manager and on 28 May 2021, she allowed him to play a role of an Acting Manager in the Budget Steering Committee. On 21 May 2021, she arrogated to herself the power she did not have by terminating the Council's appointment of Dunywa as an Acting Municipal Manager. Her fight appears to be the removal of the Speaker and her deputy. The reasons for this action have not been disclosed in the papers. It seems to me that this is a fight for positions rather than furthering the service delivery of the Municipality. In terms of Structures Act, her functions are limited to presiding in executive meetings and performance of delegated work. She abused her position as the Mayor and acted in flagrant disregard of her constitutional duties. She was obliged to respect the Council's decisions and to set an example to members of the staff of the Municipality.

[52] In litigations between the government and a private party seeking to assert a constitutional right, the Constitutional Court established the principle that ordinarily, if

the government loses, it should pay the costs of the other side, and if the government is successful, each party should bear its own costs.<sup>4</sup> This is the point Mr *Bodlani* was trying to advance.

[53] Mr *Bodlani* argued that this matter ‘implicates’ constitutional issues. He submitted that if the counter- application is successful the Mayor would be entitled to her costs. I cannot understand this argument if reliance is placed on **Biowatch**. I was under the impression that the Mayor has brought the counter-application in her official capacity and not as an ordinary private individual. This aspect was not made clear either in papers or during argument hence the request for an order *de bonis propriis*.

[54] In my view the relevant case in this matter is that of **Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)**: In that case it was said:

*“[t]he imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution. The Supreme Court of Appeal in Gauteng Gambling Board opined that public officials who act improperly in ‘flagrant disregard of constitutional norms’ should be personally liable for legal costs incurred by the state. The Supreme Court of Appeal reasoned that the imposition of personal liability might have a ‘sobering effect on truant public office bearers’ and would avoid the taxpayer ultimately having to bear those costs.*

*[159] The fears that the Public Protector has about the impact of a personal costs order on the institution of the Public Protector are unwarranted. Personal costs orders are not granted against public officials who conduct themselves*

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<sup>4</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3) at para 139.

*appropriately. They are granted when public officials fall egregiously short of what is required of them. There can be no fear or danger of a personal costs award where a public official acts in accordance with the standard of conduct required of them by the law and the Constitution.” [Footnotes omitted]*

[55] The above *ratio* takes care of the *Biowatch* argument. In my view, this fight at the O R Tambo Municipality ought to be discouraged by making the losing parties who are grossly in violation of their constitutional duties to fill the chilling effect of the litigation risks rather than depleting the public purse, which is so hopelessly needed for the service delivery.

[56] In the result the following order is made:

1. The first respondent is hereby interdicted and restrained from performing any duties and functions of an Acting Municipal Manager of O R Tambo District Municipality;
2. The second respondent's appointment of the first respondent dated 21 May 2021 as an Acting Municipal manager for O R Tambo District Municipality is hereby declared invalid and of no force and effect.
3. The second respondent is ordered to pay costs of the application in her personal capacity and such costs are to include costs of two Counsel
4. The counter-application is dismissed with costs.

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**B R TOKOTA**



## **JUDGE OF THE HIGH COURT**

Appearances:

For the applicants: R Solomon SC

L Haskins

Instructed by Mvuzo Notyesi Inc.

Mthatha

For the second respondent: A Bodlani

N Ntikinca

Instructed by T L Luzipho Attorneys

Mthatha

Date Heard: 11 June 2021

Date delivered 18 June 2021