

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

Case No: 1995/2021

In the matter between:

OLIVER REGINALD TAMBO DISTRICT MUNICIPALITY Applicant

and

INDEPENDENT ELECTORAL COMMISSION First Respondent

**EXECUTIVE MAYOR, O R TAMBO DISTRICT
MUNICIPALITY** Second Respondent

AND OTHERS Third to Forty Third Respondents

JUDGMENT

BROOKS J:

[1] The applicant is a district municipality as described in section 155 (1) of the Constitution¹, that has municipal executive and legislative authority over an area that includes the local municipalities cited in the application as the 39th to 43rd respondents and that falls within the geographical area of jurisdiction of this court.

[2] The first respondent is a chapter 9 institution² responsible for elections within the Republic of South Africa.

¹ Constitution of the Republic of South Africa, 1996.

² Chapter 9 of the Constitution of the Republic of South Africa, 1996, provides for the establishment of a group of institutions to guard democracy within the country. The first respondent is referred to inaccurately in the application papers as the Independent Electoral Commission (the IEC). This was the original name of the body created in 1993 to oversee the first democratic elections and other elections thereafter. See s 4 (1) of the Independent Electoral Commission Act 150 of 1993. It is now called the Electoral Commission (the EC). See s 3

[3] The second respondent is cited in his official capacity as the executive mayor of the applicant. He holds office within the applicant and has certain duties and obligations to the applicant. The application papers focus *inter alia* upon the consequences of a failure on his part to discharge the duty and obligation to implement with accuracy resolutions taken by the applicant's council.

[4] Apart from the 39th to 43rd respondents, the local municipalities that share municipal executive and legislative authority in their respective areas with the applicant, the remaining respondents are either councillors of the applicant or employees of one of the 39th to 43rd respondents.

[5] In the notice of motion the applicant seeks the following relief:

1. That the applicant be granted leave to bring this application as one of urgency in terms of rule 6 (12) of the Uniform Rules of Court and that time frames for serving and filing be dispensed with;
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's 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;
6. Those respondents who oppose this application are ordered to pay costs of this application jointly and severally with the one paying the others to be absolved from liability;
7. Granting such further and/or alternative relief as this Honourable Court may deem meet.

[6] The application has been opposed by the 3rd, 4th, 5th, 6th, 10th and 11th respondents, as well as the 39th to 43rd respondents.

[7] Some of the persons who would be affected by the grant of an order in accordance with prayers 4 and 5 of the notice of motion have brought counter-applications against the applicant, the 21st to 26th respondents and the 29th to 43rd respondents. The relief set out therein can be amalgamated and summarised as follows:

1. That the failure by Oliver Reginald Tambo District Municipality to invite the applicants to the meetings of its municipal council, to accord and extend to the applicants the status of the municipal councillors who represent [the relevant local municipality] in the municipal council of Oliver Reginald Tambo District Municipality, with effect from 03 March 2021, be and is hereby declared unlawful;
2. That the counter-applicants be and are hereby forthwith permitted to discharge the functions of municipal councillors who represent [the relevant local municipality] in the municipal council of Oliver Reginald Tambo District Municipality, unreservedly in accordance with the law;
3. That Oliver Reginald Tambo District Municipality, acting through anyone of its officials, political office bearers or otherwise, be and is hereby interdicted and restrained from, in any manner whatsoever unlawfully taking steps and/or failing to take steps, the effect of which would be to denude the applicants of the authority, power and status which the position of municipal councillors who represent [the relevant local municipality] in the municipal council of Oliver Reginald Tambo District Municipality confers on them;
4. That the meetings and resolutions taken in the meetings of the municipal council of Oliver Reginald Tambo District Municipality on 5 March 2021, 10 March 2021, 17 April 2021 and 07 May 2021 be and are hereby reviewed, set aside and declared unlawful;
5. Directing Oliver Reginald Tambo District Municipality and any other respondent who opposes the relief sought in the counter-application to pay the costs of the counter-application on an attorney and client scale.

6. That such further and/or alternative relief as this Court may deem fit be granted in the applicants' favour.

[8] The counter-applications are opposed by the applicant in the main application.

[9] It is unnecessary to set out in detail the time frames that were contained in the notice of motion. It is sufficient for present purposes to record that in the notice of motion the applicant included a prayer seeking leave of the court to bring the application as contemplated in rule 6 (12) of the Uniform Rules of Court, that is as an urgent application. In response to the service of the main application, those respondents who decided to oppose the relief sought by the applicant ensured that notices of opposition, answering affidavits and the notices of their counter-applications were served and filed within a truncated time period. Indeed, it was at the instance of certain respondents that the matter was enrolled for hearing through the office of the registrar of this court. Initially, the matter was allocated to the opposed motion court roll in this court for 2 December 2021. Subsequent to an approach being made to the acting deputy judge president, who entertained the matter in accordance with current case flow management principles and practices, an agreement was reached by the attorneys of record representing the various parties. Pursuant thereto, a directive was issued on 19 July 2021 in the following terms:

By agreement between the parties the following order is made:

1. The matter is brought forward and set down for 12 August 2021.
2. The applicant is to deliver heads of argument on or before 29 July 2021.
3. The respondents are to deliver their heads of argument on or before 5 August 2021.
4. The parties are to file a joint practice note on 6 August 2021.

[10] It is a well-established principle that an applicant has to set forth explicitly the circumstances which he or she avers render the matter urgent. More importantly, the applicant must state the reasons why it is claimed that he or she cannot be afforded substantial redress at a hearing in due course.³ These requirements must be met in

³ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W); *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) par 18; *East Rock*

the allegations made in the founding affidavit.⁴ On behalf of the 39th to 43rd respondents it was argued that the main application fell to be dismissed because the applicant had failed to make out a case for urgency in the founding affidavit. It was submitted that not only did it fail to set forth explicitly the circumstances which it averred rendered the matter urgent, but it failed to state reasons why it claimed that it could not be afforded substantial redress at a hearing in due course. The argument was developed by placing reliance upon the judgment in *Caledon Street Restaurants CC v Monica D'Aviera*⁵ where the applicant was non-suited for its failure to accord the respondent or her legal representatives proper respect by adhering to the time periods set out in rule 6 of the Uniform Rules of Court. There the court held that it was irrelevant that at the time the matter was heard a full set of affidavits had been exchanged and the respective parties were represented in court.

[11] It is so that in the founding affidavit the applicant has failed to deal specifically with the circumstances upon which it relies in seeking that the application be heard as a matter of urgency. It has also failed to address the reason why it would be unable to seek redress at a hearing in due course. In my view, where the matter is of such a nature that the court is required to address allegations pertaining to irregularities and illegality within the realms of local, provincial or national governance, but specific allegations relating to urgency are not made in the founding affidavit, it remains open to a court to assess the facts placed before it in the founding affidavit to determine whether or not the matter indeed is urgent. The court has a wide discretion. It is incumbent upon it to ensure that its constitutional role in providing access to justice is not fettered by placing an emphasis on form, regulated by the Uniform Rules of Court, over substance, in circumstances where the need for speedy intervention is clearly demonstrated in the facts set out in the founding affidavit. The present matter contains allegations which reveal a significant failure on the part of an executive mayor to perform with due diligence certain basic duties required of him. There are also allegations that demonstrate that the Electoral Commission has failed to deal effectively with communications from the applicant

Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2012] JOL 28244 (GSJ) par 6; *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) par 17.

⁴ *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 L(LC) par 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) par 11.

⁵ [1998] JOL 1832 (SE)

addressing the need to ignore a communication from its acting municipal manager relating to the replacement of councillors. At the end of the day, the application reveals that the Electoral Commission in any event failed to promulgate the names of some of the respondents who are intended by the relevant local municipalities to replace others as their councillors within a district municipality. The prejudice to them is self-evident. These allegations are largely unchallenged. It is plain that, viewed from the perspectives of constitutionality and public policy, such circumstances require speedy attention. The urgency, too, is self-evident. The applicant should not be penalised for its failure to address the issue of urgency more directly in the founding affidavit. Indeed, had it done so, many of the same factual allegations and legal conclusions as are set out in the founding affidavit already would merely have been repeated under an appropriate sub-heading relating to urgency. The matter is entirely distinguishable from one which addresses a purely commercial dispute, such as *Caledon Street Restaurants CC v Monica D'Aviera*⁶.

[12] There is another development which distinguishes this matter from others that have given rise earlier to the development of the basic legal principles relating to the issue of urgency. This matter was the subject of a case flow management process before the acting deputy judge president. This was attended by the attorneys of record representing the various parties. It produced an agreement which had the effect of advancing the date upon which the matter would be heard and setting a time frame for the production of heads of argument. No prejudice to any party was recorded in respect of the time periods which had governed the development of the matter, the case flow management procedure, or the subsequent directive, and none was claimed during argument in this court.

[13] In the absence of any prejudice having been demonstrated by the respondents as a consequence of the invocation of rule 6 (12) of the Uniform Rules of Court by the applicant, and particularly in the light of the issues with which this matter is concerned, I am of the view that there is no merit in the argument advanced on behalf of some of the respondents to the effect that the application should be

⁶ Footnote 5 (*supra*).

summarily dismissed because the applicant failed to make out a case for urgency in the founding affidavit.

[14] Both the applicant and the first respondent are organs of state. It is plain that a dispute between them has given rise to the relief set out in prayers 4 and 5 of the notice of motion in the main application. Section 41 (3) of the Constitution⁷ provides as follows:

“An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purposed and must exhaust all other remedies before it approaches a court to resolve the dispute.”

The Intergovernmental Relations Framework Act⁸ gives effect to this principle.

[15] It was argued on behalf of some of the respondents that the applicant had failed to give effect to the principle of exhausting all other remedies before approaching the court for relief. The argument lacks merit. There is no dispute about the fact that on 19 April 2021 the applicant addressed a letter to the first respondent. The letter was copied to the local municipalities that are now before the court as respondents. In the first paragraph of the letter the applicant quotes in full the provisions of s 41 (3) of the Constitution⁹. In the second paragraph of the letter the applicant refers to the Intergovernmental Relations Framework Act¹⁰. Thereafter the applicant sets out unequivocally the nature of the dispute that had arisen between it and the first respondent and the fact that as organs of state they had an obligation to make every reasonable effort to settle the dispute. A specific paragraph in the letter records that it is to be regarded as constituting a reasonable effort to settle the dispute. The letter sets out fully the circumstances which gave rise to the dispute and attaches the five *memoranda* it received from the local municipalities within its district. It requests them to furnish specific information in respect thereof as part of the mechanism of achieving an *extra curial* resolution of the dispute that had arisen. It refers to the subsequent chain of communications between the applicant and the first respondent that form an integral part of the circumstances which gave rise to the

⁷ Footnote 1 (*supra*).

⁸ Act 13 of 2005.

⁹ Footnote 1 (*supra*).

¹⁰ Footnote 8 (*supra*).

dispute. Notwithstanding the care and clarity with which the contents of the letter express the origin and nature of the dispute that had arisen and solicit assistance from the first respondent and the respective local municipalities in its settlement, no response to the letter was ever received by the applicant.

[16] In such circumstances it is difficult to imagine what else the applicant could have done in an attempt to settle the dispute that had arisen. There was also an obligation on the part of the first respondent, as an organ of state, to make every reasonable effort to resolve the dispute. What was required was a response to the applicant's letter, followed by a genuine attempt to resolve the dispute. It was not only the first respondent that failed to respond to the applicant's letter. None of the local municipalities to whom it had been copied made any attempt to reply to the letter or to provide the applicant with the explanations it sought therein. The first respondent has not opposed the relief sought against it in the notice of motion. In my view the point raised *in limine* that the application should be dismissed because the applicant failed to make a reasonable effort to settle the dispute has no merit.

[17] The merits of the dispute can be addressed shortly. Many of the allegations upon which the relief in the main application is founded are undisputed in the respondents' answering affidavits. The more important of these establish the following:

- ~ In November 2020 the applicant convened a council meeting to deal with the widely publicised alleged maladministration and fraud that had taken place within the applicant.
- ~ An investigating team was set up to probe allegations of financial maladministration and looting.
- ~ The applicant's council took a decision to suspend the municipal manager.
- ~ The applicant wrote to the Minister of Cooperative Governance and Traditional Affairs and to the Member of the Executive Council responsible for Cooperative Governance and Traditional Affairs in the Eastern Cape, seeking an intervention in terms of s 154 (1) of the Constitution¹¹ to assist the applicant with administrative support in certain areas of governance.

¹¹ Section 154 (1) of the Constitution provides: "*the National government and Provincial government by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.*"

~ A team was accordingly despatched to provide the applicant with the support that it required.

~ On 26 February 2021 the applicant's council met and decided to appoint an acting municipal manager until such time as the applicant was in a position to appoint a permanent municipal manager. It was resolved to appoint the director of local economic development, Ms Dunywa, as acting municipal manager for a period of three months.

~ Notwithstanding the clarity of the resolution the second respondent unlawfully and unconstitutionally appointed Ms Dunywa as acting municipal manager for a period of three days.

~ Thereafter the second respondent unlawfully and unconstitutionally appointed a friend, Mr Madzidzela, as acting municipal manager for a period of two days.

~ On 4 March 2021 Mr Madzidzela wrote to the first respondent and attached certain correspondence and resolutions received from the local municipalities that are now respondents in this application, stating that the applicant "notes and approves the replacement of local representatives to the district council...declares the vacancies and requests the IEC to process the referred replacements."

~ On 5 March 2021, and acting in accordance with a resolution of the applicant's council bearing the same date, Ms Dunywa wrote to the first respondent and alerted it to the fact that the applicant had never appointed Mr Madzidzela as its acting municipal manager and that the correspondence emanating from him the day before and addressed to the first respondent was unlawful and had been nullified by the applicant's council.

~ On 15 March 2021 the applicant's attorneys of record addressed a letter to the first respondent and confirmed that it had been advised of the "fraudulent activity committed by Mr Madzidzela of misrepresenting" the applicant. It was confirmed therein that there was no council resolution declaring a vacancy within the applicant. A demand is made on behalf of the applicant that "an unequivocal undertaking" be given by close of business on the same day that the first respondent "will not give effect to and implement any and all instructions given to you by Mr Madzidzela".

~ Relying upon the legitimacy and accuracy of the letter addressed to it by Mr Madzidzela on 4 March 2021, the first respondent has relied upon the provisions of item 23 of Schedule 2 of the Local Government: Municipal Structures Act¹² (the Act). It issued *memoranda* on 13 April 2021 and 14 April 2021 declaring those whose names had been forwarded to it by Mr Madzidzela “elected” to the applicant’s council “as prescribed in item 23 of Schedule 2...”

~ No vacancies had arisen within the applicant’s council.

[18] At this point it is convenient to record that at the commencement of the proceedings Mr *Katz* SC, who appeared on behalf of the applicant together with Mr *Maliwa*, identified what he referred to as a “speed wobble”. It had been established that in fact the first respondent had not published the names of the “replacement councillors” in the Government Gazette on 15 April 2021. Nor had it taken the “decision” to replace eighteen of the applicant’s councillors. Accordingly, prayer 4 of the notice of motion did not accurately express the nature of the conduct on the part of the first respondent that had resulted from the letter written to it by Mr Madzidzela. Counsel sought the amendment of prayer 4 to read:

The first respondent’s conduct of accepting and acting upon the unlawfully appointed municipal manager of the applicant’s letter to it dated 4 March 2021 is declared inconsistent with the Constitution and invalid.

[19] The respondents did not oppose the amendment but remained opposed to the relief sought.

[20] In support of the relief claimed in the counter-application it was submitted that all Mr Madzidzela had done was to act as a conduit for the announcement of the

¹² Act 117 of 1998. Item 23 of Schedule 2 deals with the filling of vacancies. It states: “If a councillor elected from a candidates’ list ceases to hold office or the list has become exhausted, the corresponding provisions of item 11 must be applied to the extent that that item can be applied.”

Item 11 also deals with the filling of vacancies. It states: “(1) (a) If a councillor elected from a party list ceases to hold office, the chief electoral officer must, subject to item 13, declare in writing the person whose name is on the top of the applicable party list to be elected in the vacancy. (b) Whenever a councillor referred to in paragraph (a) ceases to hold office, the municipal manager concerned must within seven days after the councillor has ceased to hold office, inform the chief electoral officer thereof. (2) Where a party list has become exhausted, item 10, adjusted as may contextually be necessary, applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.”

outcome of the resolutions taken by the local municipalities to replace certain councillors with others. It was submitted that those councillors fell within the category referred to in s 23 (1) (b) of the Act. The relevant portion of s 23 reads:

(1) The council of a district municipality consists of –

(a)...

(b) councillors appointed in accordance with Schedule 2 by the councils of the respective local municipalities within that district municipality, to directly represent those local municipalities; and

(c)...

The submission was that the provisions of s 27 of the Act are also applicable. The relevant provisions of the section read:

A councillor vacates office during a term of office if that councillor –

(a)...

(b)...

(c)...

(d)...

(e) is a representative of a local council in a district council and ceases to be a member of the local council which appointed that councillor to the district council or is replaced by the local council as its representative in the district council; or

(f)...

[21] It is apposite to record that the applicant does not seek any relief in the main application which makes a direct challenge to the validity of the council resolutions taken by the local municipalities with a view to replacing the councillors who acted as their representatives on the applicant's council.

[22] The applicant's opposition to the counter-applications is based upon the illegality of the communication to the first respondent by Mr Madzidzela of the names of councillors who were intended by the relevant local municipalities to replace others as councillors representing the local municipalities on the applicant's council. The opposition is also based upon a number of allegations made on behalf of the applicant in the answering affidavit filed in response to the counter-applications. It is

clear from the title given to the affidavit that it also serves as the applicant's replying affidavit in the main application. Therein the following allegations are made:

- ~ The only issue in the counter-applications is the proper construction of the Constitution¹³ and the Act¹⁴.
- ~ On their version, the applicants in the counter-applications were sworn in as district councillors by the chief magistrate on 17 April 2021, rather than at a meeting of the applicant's council. Consequently, their "swearing in" was irregular and of no force and effect.
- ~ Those councillors on the applicant's council who have purportedly been replaced by the applicants in the counter-applications have launched proceedings to review and set aside the resolutions taken by the relevant local municipalities to replace them as councillors on the applicant's council.
- ~ This court has already decided¹⁵ that the applicant's council meeting on 5 March 2021 was scheduled lawfully and constituted validly. Accordingly, it is not open to the applicants in the counter-applications to challenge, as they have done, the validity of the applicant's council meeting on 5 March 2021.

[23] In the applicant's answering affidavit to the counter-applications the relevant local municipalities, which were cited therein as respondents, are invited to file affidavits to indicate:

- ~ who was invited to the five meetings held by the local municipalities;
- ~ who attended the five meetings;
- ~ whether the replacement of district councillors was on the agenda of each of the five meetings;
- ~ if it was on the agenda, when it was placed thereon;
- ~ who voted in favour of the resolutions to replace the district councillors;
- ~ who voted against the resolutions to replace the district councillors;
- ~ whether the persons proposed as replacements for those representing the local municipalities as district councillors on the applicant's council had consented to replace the existing district councillors and, if so, when such consents were furnished.

¹³ Footnote 1 (*supra*).

¹⁴ Footnote 12 (*supra*).

¹⁵ *Dambuza and Others v Oliver Reginald Tambo District Municipality and Others*, Case number 1029/2021.

[24] In the answering affidavit in the counter-applications the applicant makes a number of observations and calls upon the relevant local municipalities, cited by the applicants in the counter-applications as co-respondents along with the applicant, to explain the apparent relationship between the important resolution to put an end to corruption and looting within the applicant, taken by the applicant's council on 25 February 2021, and the resolutions purportedly taken by the relevant local municipalities to "replace" district councillors who represented them on the applicant's council. The deponent to the applicant's answering affidavit in the counter-applications states unequivocally that if no explanation is forthcoming it would be argued at the hearing of this matter that what had occurred was an attempt to "reshuffle" district councillors on the applicant's council "to achieve a nefarious unlawful purpose".

[25] Both invitations extended by the applicant to the relevant local municipalities have been ignored. No answering affidavits were filed by the relevant local municipalities. Moreover, none of the applicants in the counter-applications have filed a replying affidavit.

[26] The provisions of s 26 (1) of the Act are relevant to the issue of whether or not the applicants in the counter-applications are entitled to the relief sought therein. The same provisions are relevant to the issue of the legality of the communication on 4 March 2021 by Mr Madzidzela to the first respondent and the first respondent's action in response thereto. The relevant portions of the section read:

Term of office of councillors

(1) A person –

- (a) Is elected as a member of a municipal council for a period ending when the next council is declared elected; or
- (b) Is appointed as a representative of a local council to a district council for a period ending when the next local council is declared elected, except that where such a person is replaced as a result of the provisions of item 6 (a) of Schedule 6B to the Constitution, the newly appointed representative is appointed for the remainder of the replaced representative's term.

In terms of the provisions of s 26 (1) (b) of the Act, the district councillors remain in office as representatives of the relevant local municipalities on the applicant's council until such time as the next local council is declared elected. Nothing in the main application or the counter-applications suggests that elections were held which led to the declaration of the next local council as elected. There is nothing in the main application or the counter-applications to suggest that any of the applicants in the counter-applications are entitled to appointment because of a replacement as a result of item 6 (a) of Schedule 6B to the Constitution¹⁶. Accordingly, no basis emerges from any of the affidavits or the annexures thereto which have been placed before the court upon which the court might conclude that the applicants in the counter-applications have a legitimate entitlement to their appointment as district councillors on the applicant's council. This may well explain why none of the relevant local municipalities accepted the invitation extended by the applicant to file an affidavit dealing with the circumstances which gave rise to and surrounded the local council resolutions to "replace" councillors on the applicant's council. The councils of local municipalities have no right to simply ignore the provisions of the Act and to "reshuffle" district councillors. The allegation made by the applicant that this was done "to achieve a nefarious unlawful purpose" is met only by a deafening silence.

[27] In the circumstances, the allegation made by the applicant that no vacancies had arisen within the applicant's council, which is unchallenged, excludes a finding that the applicants in the counter-applications are entitled to "replace" the existing district councillors appointed to the applicant's council. The information and request to that end that was forwarded to the first respondent on 4 March 2021 was invalid. Moreover, given that his appointment was not authorised by the applicant's council, the second respondent's appointment of Mr Madzidzela as acting municipal manager for two days was unlawful. His communication to the first respondent on 4 March 2021 was unlawful. Pursuant to the resolution taken by the applicant's council on 5 March 2021, the communication directed by the legitimate acting municipal manager, Ms Dunywa, to the first respondent on the same day, addressing the nullity of the communication from Mr Madzidzela on the previous day, ought to have been heeded by the first respondent. It was not. In the circumstances, the first respondent's

¹⁶ Footnote 1 (*supra*).

conduct of accepting and acting upon the unlawfully appointed acting municipal manager's letter to it dated 4 March 2021 was unlawful and must be set aside. The outcome found expression in the *memoranda* issued by the first respondent on 13 April 2021 and 14 April 2021. Those *memoranda* must be set aside.

[29] Section 172 (1) (a) of the Constitution¹⁷ mandates the court to issue a *declarator* in circumstances where a finding of constitutional unlawfulness is made. With some amendment, the relief sought by the applicant in prayers 2 to 5 of the notice of motion would constitute such an order. Section 172 (1) (b) thereof permits a court making such a *declarator* to exercise its discretion in considering whether the circumstances of the matter require the court to issue a further order that is just and equitable. Given that the uncontested allegations in the applicant's affidavits state that the resolutions taken by the councils of the respective local municipalities are to be taken on review and that, in any event, local elections may well be held in October 2021, which will have a direct bearing on the issue of who is to represent those local municipalities on the applicant's council, I am of the view that it would be undesirable to make any further order purporting to address what the first respondent should do in respect of the status of the district councillors serving on the applicant's council or those who seek to replace them.

[28] Bedevilled by the blight caused by the failure on the part of the relevant local municipalities to have regard to the provisions of the Act and to respect the integrity of those district councillors who had been appointed to represent them on the applicant's council, the receipt and transmission on 4 March 2021 by an unlawfully appointed acting municipal manager to the applicant of decisions taken by the same local municipalities to "replace" district councillors that palpably are in contravention of the provisions of the Act, the resultant unlawfulness and invalidity of the first respondent's acceptance of the communication and its subsequent actions, the relief sought by the respondents who have filed counter applications cannot be granted. It follows that the counter-applications must be dismissed.

¹⁷ Footnote 1 (*supra*).

[29] What remains is the question of liability for costs. In the notice of motion the applicant seeks an order for costs against those respondents who oppose the application. In the circumstances of this matter, it is lamentable that the respondents filed and pursued opposition to the relief sought by the applicant in the main application. So palpable is the illegality of the conduct on the part of the second respondent identified in the applicant's affidavit and the resultant unlawfulness and invalidity of the first respondent's conduct, that one would reasonably have expected the relevant local municipalities, the individual respondents who entertained the idea that they had rights created or confirmed by the first respondent, and their respective legal representatives, to appreciate that the applicant's main application had merit and should not be opposed. However, not only did some of the respondents oppose the main application, they also introduced counter-applications in which they sought costs on an attorney and client scale against the applicant "and any other respondent who opposes the relief sought in the counter-application". After argument on behalf of the applicant had been heard, the court took the mid-morning adjournment. Before doing so, the court urged those appearing on behalf of the respondents to reconsider the opposition by the respondents to the relief sought. It had been indicated on behalf of the applicant that if the opposition was withdrawn, even at that late stage, the applicant would seek no order for costs. However, if upon a resumption of the court proceedings the respondents persisted with their opposition, the applicants would seek a costs order. When the court proceedings resumed, the respondents' legal representatives had made their election. It was to continue with the opposition to the main application and to argue the counter-applications. In my view, nothing emerges at the end of the day to justify a departure from the ordinary principle that costs should follow the result. Accordingly, liability for the costs of the litigation must accrue to the respondents. This must include the costs that result from the dismissal of the counter-applications.

[30] The following order will issue:

1. The applicant is granted leave to bring this application as one of urgency in terms of rule 6 (12) of the Uniform Rules of Court.
2. The second respondent's appointment on 3 March 2021 of Mr Madzidzela as the acting municipal manager of the applicant for a period of two days (4th and 5th March 2021) is declared to be in direct contravention of the applicant's

council resolution of 26 February 2021, inconsistent with the provisions of the Constitution of the Republic of South Africa, 1996 and invalid.

3. The appointment referred to in paragraph 2 of this order is reviewed and set aside.

4. The first respondent's conduct of accepting and acting upon the unlawfully appointed municipal manager of the applicant's letter to it dated 4 March 2021 is declared inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid.

5. The replacement of district councillors in the applicant's council declared in the *memoranda* issued by the first respondent on 13th and 14th April 2021 is reviewed and set aside.

6. Those respondents who opposed the application are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.

7. The counter-applications are dismissed with costs.

R W N BROOKS

JUDGE OF THE HIGH COURT

Appearances

For the applicant

Instructed by

Adv A Katz SC and Adv S Maliwa

Z MFIKI INC

60 Wesley Street

Mthatha

For the 39th to 42nd respondents

Adv A Bodlani, Adv B Flathela,

Adv S Mapekula, Adv L Ntikinca,

Adv Z Mashiya and Adv B Maswazi

Instructed by

T L LUZIPHO ATTORNEYS

Cnr Victoria and Madeira Streets

Mthatha

JOLWANA MGIDLANA INC

19 Park Road

Mthatha

W T MNQANDI ATTORNEYS

74 Madeira Street

Mthatha

MAKHANGELA MTUNGANI INC

50 Blakeway Road

Mthatha

For the 43rd respondent

Adv Z Matabese SC and

Adv N Mxotwa

Instructed by

TONISE ATTORNEYS

4 Prestwitch Avenue

Mthatha

Date heard

12 August 2021

Date delivered

24 August 2021