

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2590/2006

In the case between:

MAYIHLOME ELECTRICAL (PTY) LTD

Applicant

and

MATJABENG MUNICIPALITY

1ST Respondent

DR BENJAMIN MALAKOANE 2nd Respondent

(In his capacity as the Municipal Manager
of the First Respondent)

M E MATHABO MOKAPO

3rd Respondent

(In her capacity as the Executive Mayor
of the First Respondent)

JUDGMENT: RAMPAL, J

HEARD ON: 24 AUGUST 2006

DELIVERED ON: 5 OCTOBER 2006

- [1] The matter came to this court by way of a semi urgent application. It was first launched on Thursday the 27 July 2006 before Van der Merwe J who then postponed it to

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Thursday the 8th August 2006. On that day Wright J postponed it to Thursday the 24 August 2006 on which day it was argued before me. Having heard argument I reserved judgment.

[2] The relief sought by the applicant is threefold. If you will you may say in these proceedings there are three cases in one. The first prayer is that certain specific resolution taken by the 1st respondent in Welkom on the 12 May 2006 be reviewed and set aside. The second prayer is that the respondents be directed to furnish the applicant with a copy of the forensic report compiled by Price Water Cooper and handed to the respondents in Welkom on the 12 May 2006. The third prayer is that the respondents be directed to pay to the applicant all the money the respondents owe to the applicant in terms of a contract which money the respondents have been withholding since the 12 May 2006 on account of the said resolutions.

[3] The relief claimed in this application is based on the following overall grounds:

3.1 That resolution SA10/2006 of the 1st respondent's council was *ultra vires* because it was illegally taken in contravention of rule 29(1)(a) of the Standard Rules and Orders.

3.2 That resolution SA10/2006 was *ultra vires* because it was illegally taken in contravention of rule 94, rule 95 and rule 98 of the

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Standard Rules and Orders as well as section 20(1) of the Municipal Systems Act No. 32/2000.

3.3 That resolution SA10/2006, the prior forensic report which gave rise to it and the subsequent contract termination which flowed from it were all unlawful because the respondents did not observe the *audi alteram partem* rule before taking the resolution.

3.4 That resolution SA10/2006 was unlawfully used by the respondents to wrongfully withhold payment to the applicant for the services duly rendered to the respondents.

[4] The applicant and the 1st respondent concluded an agreement in Welkom on the 20 May 2005 whereby the applicant undertook to do high mask lights maintenance in the streets of Matjhabeng family of communities and the 1st respondent undertook to pay the applicant for providing the required services. The contractual relationship endured for approximately a year. During that period a forensic audit of the 1st respondent was done. A special mandate to the outside auditors led to the investigation of certain employees and service providers of the first respondent. The auditors completed their special investigation, compiled an audit report and finally presented their report to the 1st respondent.

[5] The 1st respondent held a special council meeting in Welkom on the 12 May 2006. Present at the meeting was,

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among others, a representative of the auditors. He presented the written audit report to the councillors. The forensic audit report implicated the applicant and certain employees of the 1st respondent in connection with certain irregular dealings associated with the service contract between the applicant and the 1st respondent. The report was debated by the councillors at that meeting in the presence of the outside investigator.

[6] On account of the forensic assessment report the municipal council of the 1st respondent resolved *ex tempore*, among others:

- to hand the forensic assessment report to the South African Police Service.
- to terminate, with immediate effect, the agreement between the applicant and the 1st respondent.
- to withhold payment of money due and payable to the applicant in respect of services provided prior to the termination of the agreement.

These then are the main features of resolution SA10/2006 which triggered this litigation off.

[7] The applicant's case was that it had, at least, a three year

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contract with the 1st respondent and that the respondent was not entitled, without good reason, to terminate such contract as it did. The respondent put up a defence that the said contract was a month to month agreement and not a three year agreement and that there were valid reasons which justify the council's decision to terminate such agreement with immediate effect. These in brief are the background facts and the broad parameters of the dispute.

- [8] I shall revert to the merits later in respect of each separate relief claimed. Before I do that I have to deal with the point raised *in limine* first. The main point *in limine* taken by the applicant was that the deponent to the opposing affidavit lacked authority to depose to such an affidavit on behalf of the respondents. Obviously this objection cuts across the entire spectrum of the defences of respondents relating to all the three dimensions of the relief sought. The joint opposing affidavit of the three respondents was made and signed by Mr. Segalo, the acting departmental head of the finance department of the 1st respondent. He stated that the municipal manager of the 1st respondent, Dr. Malakoane, was out of the country at the time and that before Dr. Malakoane left the country he had appointed him, the deponent, Mr Segalo, as the acting municipal manager of the 1st respondent.

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[9] The authority of Mr. Segalo was questioned by the applicant in the replying affidavit. The applicant alleged that Dr. Malakoane did not have the necessary authority to delegate his powers to Mr. Segalo. In the rejoinder, the respondent confirmed that the municipal manager, Dr. Malakoane and not the municipal council had appointed Mr. Segalo to act as a municipal manager but denied the applicant's contention that for that reason Mr. Segalo lacked authority to depose to the opposing affidavit as he did on behalf of the respondents.

[10] Before me, Mr. Van Rhyn, counsel for the applicant, contended that in the light of the maxim *delegata potestas non potest delegare*, the municipal manager did not have the power to delegate the powers already delegated to him. He relied on the case of **W A MNGOQI v THE CITY OF CAPE TOWN AND OTHERS**, case number 3619/06, Cape Provincial Division and the case of **THE CITY OF CAPE TOWN v W A MNGODI AND ANOTHER**, case number 3944/06 also unreported. He submitted that seeing that the respondents rejoinder did not cure the defect in the opposing affidavit there was technically no opposition to the relief sought by the applicant. If the submission is correct then it meant that the respondents were not properly before the court in these proceedings.

[11] But counsel for the respondents, Mr. Danzfuss, disagreed. He contended that Dr. Malakoane, as the municipal manager of the first respondent, acted within the framework of the law when he delegated his powers to Mr. Segalo. Therefore he submitted that Mr. Segalo as the deponent of the opposing affidavit lacked no authority to depose to the opposing affidavit on behalf of the

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respondents as he did.

[12] Section 82(1), Municipal Structures Act No. 117/1998 provides that a municipal council must appoint (a) a municipal manager who is the head of administration and b) an acting municipal manager when necessary.

[13] Section 59, Municipal Systems, Act No. 32/2000 among others provides:

- that a municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances.
- that a municipal council may delegate appropriate powers to any of its staff members, among others.
- that a municipal council cannot delegate its powers as specified in section 76(b) and its supreme power as specified in section 160(2) of the 1996 RSA Constitution. See subsection 1(a).
- that a delegation must be in writing.
- That a delegation may be restricted by means of limitations, conditions and directions imposed by the municipal council.
- That a municipal council may authorise its functionary to whom it has delegated a certain power to redelegate such a delegated power farther. See subsection 2(d).

[14] Section 60, Municipal Systems Act No. 32/2000 among others provides:

- that the power of the municipal council itself to delegate certain powers is strictly confirmed to

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specified municipal structures only and nobody else and it further provides that the power of a municipal to make a determination or adjustment of the employment benefits in respect of a municipal manager may be delegated to an executive committee or executive mayor only.

[15] Section 238 of the 1996 RSA Constitution provides that an organ of the state may delegate any power or function. In terms of section 239 of the same constitution a local government such as the 1st respondent is an organ of the state.

[16] Section 160(2) of 1996 RSA Constitution restricts the *carte blanche* powers of a state organ, in the context of this case, a local government to delegate powers or functions. This exclusionary provision of the constitution expressly prohibits a municipal council from delegating certain specific functions. The excluded functions are the following matters: the passing of by-laws; the approval of budgets; the imposition of rates, taxes, levies and duties as well as the raising of loans. Therefore, delegation of all these matters is absolutely prohibited by the constitution. The powers in respect of these special class of functions are constitutionally delegated to a local organ and to the local organ of government only. The powers in respect of this

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special class of functions can never be delegated further to any sub-structure of that local organ let alone its functionary.

[17] It is crystally clear that the power of a local organ of government to appoint its functionaries is not one that may not be delegated. Since delegation of such powers is not absolutely and expressly prohibited in terms of section 160(2), it may consequently be delegated in terms of section 238. This is so because the power to appoint administrative managers does not permanently resides in the highest echelons of the local government, namely a municipal council. This interpretation is in keeping with the rule: *expressio unius est exclusio alterius* – **CHOTABHAI v UNION GOVERNMENT AND ANOTHER** 1911 AD 28.

[18] In terms of section 82(1)(b), Local Government Municipal Structures Act No. 117/1998 a municipal council is empowered to appoint a deputy municipal manager. In the instant case, the municipal council of the 1st respondent delegated such authority to its municipal manager who exercised such power. See a document marked annexure “D1” which appears on page 494 of the paginated record. The delegation of the functions of the municipal manager to the acting municipal manager was approved of and adopted by the 1st respondent on the 25th April 2006. The

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contention that Mr. Segalo was not a departmental head but merely an acting head of a department was shallow argument. The powers conferred on an acting head are precisely the same as those of a permanent but absent or still to be appointed departmental head.

[19] The municipal council of the 1st respondent had original authority and not derivative authority to appoint. And the same municipal council delegated its original authority to its municipal manager whom it empowered to appoint an acting municipal manager from a specific pool of its identifiable employees. The delegation of the authority to appoint an acting municipality was thus not a delegation of a delegated power. It follows, therefore, that the principle of *delegatus non potest delegare* does not apply here. But even if it did, it would still not prohibit sub-delegation of the powers we are here concerned with. Section 59(2), Local Government: Municipal System Act no. 32/2000 provides for such sub-delegation.

[20] That a power which entails no discretion or little discretion in respect of a delegate can be sub-delegated without really offending the spirit, purpose and objective of the principle *delegare potestas non potes delegare* was affirmed in the case of **NELSON MANDELA METROPOLITAN MUNICIPALITY v GREYVENOUW CC** 2004 (2) SA 81 SECLD at paragraph 50 on 98 F where the

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court held per Plasket AJ:

“The principle against delegation of delegated powers is not offended in these circumstances. It is intended to ensure that when discretionary powers are vested in an official because of his or her seniority, responsibility or expertise, the purpose of the empowering provision cannot be defeated by a delegation of authority to another official who does not possess the requisite qualities.”

Also see Baxter: **Administrative Law** at page 439.

In *casu* the municipal manager exercised almost virtually no discretion in appointing the said deponent as an acting municipal manager in terms of the strict power delegated to him. He did not have a free and unlimited discretionary power to select whosoever he preferred. It was even prescribed to him from which small class of senior officials he could make an appointment. It is a matter of logic and not debate that an acting departmental head is for all practical intents and purposes a departmental head.

[21] The applicant heavily relied upon a decision of **W A MNGOQI v THE CITY OF CAPE TOWN AND OTHERS**

delivered on the 19th May 2006. There the court itself clearly drew a distinction between, firstly the appointment of a municipal manager which matter could not be delegated on the one hand and secondly the determination

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of the condition of employment of a municipal manager on the other which could. Van Zyl J writing for the unanimous full bench said the following at paragraph 104:

“[104] Mr Binns-Ward contended that, upon a proper construction of the provisions of section 82(1) of the *Structures Act*, read with sections 59 and 60 of the *Systems Act*, the power to appoint a municipal manager vests exclusively in the municipal council and is not capable of being delegated at all. I agree with this contention. In terms of section 60(1) of the *Systems Act* the municipal council’s power to deal with issues such as remuneration, benefits or other conditions of service of the appointee may be delegated to an executive mayor or executive committee only. Any such delegation must, however, be effected within a “policy framework, a term which is not defined in the *Systems Act* but which appears to be expressed in section 59(1) of such Act as “a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances”. The absence of any reference in section 60(1) to the delegation of the decision regarding the appointment of a person to the position of municipal manager supports that construction.”

I am in respectful agreement.

See 60(1) as summarised spells out which matters a municipal council may competently delegate to its executive committee or executive mayor.

[22] The foregoing decision is the correct exposition of the law as regards the legal position pertaining to the appointment

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of what I may call a permanent municipal manager – for a lack of a better descriptive adjective. The appointment of such an official is the exclusive prerogative of a municipal council. However, the decision does not support the applicant's case in any way. Here unlike there the objection raised *in limine* revolves around the appointment of a temporary municipal manager, in other words an acting manager to be precise. Whereas section 82(1) prohibits a municipal council from delegating to anybody whatsoever its exclusive power to appoint a municipal manager it does not have a similar prohibitive provision as regards delegation of the power for the appointment of an acting municipal manager – vide section 60(1)(b), Local Government: Municipal Systems Act No. 32/2000.

[23] In **W A MNGOQI V THE CITY OF CAPE TOWN AND OTHERS** *supra* at paragraph 109 Van Zyl J said in an *obiter dictum*:

“By contrast, the power to appoint an acting municipal manager has been expressly delegated to the executive mayor....”

In the instant case, I may paraphrase the words of Van Zyl J by saying that by contrast, the power to appoint an acting municipal manager has been expressly delegated to the permanent municipal manager in terms of a document

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marked annexure “D1”. Such delegation does not entail determination of conditions of service such as remuneration, period of contract, fringe benefits or ancillary conditions. Therefore the implied prohibition in section 60(1)(b) Local Government: Municipal Systems Act No. 32/2000 does not apply.

[24] It is significant to bear in mind that the respondent’s deponent whose sworn statement is central to the applicant’s preliminary objection was appointed an acting municipal manager and the powers of the municipal manager delegated to him on the 25th April 2006. That earlier decision of the 1st respondent taken in collaboration with its municipal manager has not been nullified. It’s still stands, with or without its legal imperfections if any. In these proceedings I am grappling with the later decision taken on the 12 May 2006.

It being the case, the applicant cannot now be heard to say that the earlier decision of either the appointment of the acting municipal manager or the delegation of the power relating thereto was illegal or irregular in this application for review of an entirely different decision, a decision to terminate the agreement.

[25] **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA) at 242A per Howie P *et* Nugent JA:

“Until the Administrator's approval (and thus also the

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consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[26] It is not the applicant’s case that the earlier decision of the 1st respondent relating to the delegation of its powers or the appointment of the acting municipal manager has since been set aside or that any application is pending to have it set aside. Therefore, it is of no consequence for the purpose of this application before me whether such earlier decision of the 1st respondent or the 2nd respondent was regular or not. Until it is set aside, it cannot be ignored and more importantly the decisions made and the acts performed by such an acting municipal manager are deemed valid. They cannot be wished away. Their legal force and effect must be respected and obeyed.

[27] The duly appointed municipal manager, Dr. Malakloane who is also the 2nd respondent in *casu*, stated in a rejoinder affidavit that he had read the answering affidavit

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by the acting municipal manager, Mr. Segalo, and he confirmed the averments contained in the opposing affidavit to be true and correct. He also supported the relief prayed for therein. By virtue of section 238, RSA Constitution the 1st respondent was and still is expressly authorised to delegate any power or function other than those expressly excluded in terms of section 160(1).

[28] For the reasons given above I have come to the conclusion that the applicant's preliminary objection that the respondent's deponent lacked authority to file an opposing affidavit on behalf of the respondent was not well taken. The applicant's point *in limine* must therefore fail. The respondents are properly before the court. I shall deal with the other points *in limine* as we go along to deal with the specific relief in connection with which they were raised.

* [29] I deal first with prayer 1 of the notice of motion. On the 12 May 2006 the 1st respondent's municipal council adopted resolution SA10/2006. Among others, a decision was taken that the agreement between the 1st respondent and the applicant had to be cancelled with immediate effect. Now the applicant seeks a review and setting aside of such a decision. Subsequent to the resolution the 2nd respondent notified the applicant of the 1st respondent's

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decision to terminate the agreement. The letter in question was dated the 24th May 2006. The applicant was given a 30 day notice of the 1st respondent's intention to cancel the agreement. The effective date of the termination was the 23rd June 2006. On the 14th May 2006 this application was launched to have the decisions whereby the agreement was terminated set aside. This is the real purpose of this application although there are all sorts of other technical reasons advanced on behalf of the applicant.

[30] I start with a challenge to resolution SA10/2006. The first relief sought is to have the resolution reviewed and set aside. The challenge is based on three grounds of invalidity. In the first place, Mr. Van Rhyn, on behalf of the applicant contended that resolution SA10/2006 was *ultra vires* on the grounds that the municipal council of the 1st respondent contravened a number of Standard Rules and Orders which regulate the conduct of proceedings in a local government council.

[31] It is common cause that the said resolution was taken at a special meeting of the 1st respondent's municipal council held on the 12 May 2006; that a certain Mr. M. Gerber apparently a representative of Price Waters Cooper, also

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attended the same special meeting and that he was afforded an opportunity to address the municipal council.

[32] Mr. Van Rhyn submitted that the municipal council violated rule 29 read with rule 48 SRO by allowing Mr. Gerber to address the meeting. Now rule 29(1)(a) provides that a member of the public attending a municipal council meeting may not address such a meeting unless he or she is a member of a deputation in terms of rule 48. This latter rule 48(1) provides that anybody who wishes to obtain an interview with the municipal council must lodge a written application with the municipal manager and must state the representation he or she wishes to make.

[33] According to the applicant, it was irregular for Mr. Gerber to address the municipal council of the 1st respondent. I am not persuaded by this contention. It seems to me clear that the underlying aim of rule 29(1)(a) is to ensure orderliness during the meetings of the municipal council. The aim was not to prohibit members of the public from addressing the municipal council but rather to regulate the way in which they can do so. The integrated common purpose of these rules is to prevent possible disruptions to the proceedings in the municipal council meeting by random, unexpected and impromptu public requests to address the council at any time inopportune to a municipal council.

[34] These rules lay down a procedure to be followed by a member of the public who on his own accord, wishes to have a collective audience of the members of the council. The phrase “anybody who wishes” clearly conveys this message in a simple and straight forward manner. As I see it, these rules do not regulate the position of an outsider who attends the meetings of

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the municipal council not on his own accord, but on the invitation of the municipal council itself and at the request of the municipal council itself, addresses its meeting. In such a case the element of surprise is eliminated. The orderliness and dignity of the proceedings are not jeopardised. The speaker and the council at large know about the visit well in advance and expect a speech or an address by an outsider well in advance. The purpose for which the aforesaid rule was enacted is in no way undermined.

[35] Mr. Danzfuss referred me to rule 16(6) SRO which provides that the municipal council speaker may invite any person to attend a meeting of the municipal council. He argued that although this particular rule does not expressly authorise such an invited guest to address the municipal council, it could never have been the intention of the lawmaker in making the standard rules and orders to prevent a municipal council from inviting a non councillor to address the members of the municipal council. I agree with this submission. The power of the speaker to request an outsider to address a municipal council is implicit in the authority of the speaker to invite.

[36] Mr. Van Rhyn's argument that rule 16(6) only regulates attendance and not participation of outsiders fails to persuade me. The attendance of outsiders voluntary is adequately regulated by rule 29 and rule 48. Between these two rules there is a positive link. However, there is no apparent connection between rule 16(6) on the one hand and rule 29 or rule 48 on the other. That alone indicates to me that rule 16(6) was designed for something more than mere attendance. Nobody needs a speaker's invitation to attend a meeting of a municipal council. However, an uninvited outsider is ordinarily an observer. Giving an invited outsider a platform to address councillors adds mean, value and purpose to the speaker's invitation. If any outsider who wishes to address the council is welcome to do so, why is there no provision made in the same rules for a council that wishes to have an outsider to address such a council?

[37] In my view rule 16(6) provides a less cumbersome avenue for such a scenario. The absence of a specific provision or rule which caters for this scenario tends to show that where a council itself invites an outsider the strict and formal procedure laid down

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in rule 29 and rule 48 should not apply. Therefor the respondents were not required to comply with rule 29 and rule 48 before Gerber was asked to address the meeting of the municipal council. The procedure laid down in these rules does not apply. It is a lame and almost absurd argument to say it does. It is queer to invite a guest and then burden him with such procedural formalities.

[38] The requirements of the Standard Rules and Orders are clearly directory and not peremptory. Vide **VENTER v RANDBURG TOWN COUNCIL** 1968 (4) SA 302 (WLD) and **MAHARAJ AND OTHERS v RAMPERSAD** 1964 (4) SA 638 (AD). What happened in the instant case was as follows: The 1st respondent requested an investigation by external investigators. Mr. Gerber was a member of the appointed team of investigators. He reported to the 3rd respondent, the executive mayor of the 1st respondent. She had to inform the 1st respondent about the forensic report. She consulted with the speaker. Together they decided to afford Mr. Gerber the opportunity of explaining the forensic audit report to the municipal council at large.

[39] The executive mayor later proposed to the municipal council that the speaker allow Mr. Gerber to present his forensic audit report to the municipal council and that the presentation be done behind close doors. No objections were raised against the executive mayor's proposal. The councillors unanimously supported the proposed procedure. Mr. Gerber's address entailed presenting his

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report, elucidating its contents or findings and answering questions by the councillors to clarify the report. That was the extent he participated in the debate which revolved around his report afterwards. I can find nothing irregular about his participation in those proceedings. The 3rd respondent herself could as well have presented the forensic audit report to the meeting of the municipal council. However, it was recognised by all the councillors that hearing the story from the horse's mouth would enhance better understanding of the report by the councillors before the vote was taken.

[40] In the case of **JOHANNESBURG CONSOLIDATED INVESTMENT COMPANY LIMITED v MARSHALLS TOWNSHIP SYNDICATE, LTD** 1917 AD 662 on 666 the court observed that:

“And jurisdiction given in respect of a general subject matter must be taken to include all powers reasonably required for the purpose of dealing fully with the subject assigned in accordance with the conditions and requirements prevailing at the time. But only such powers will be implied as are reasonably ancillary to the main purpose.”

I hold the view that Gerber's address in the municipal council meeting was reasonably required for the purpose of dealing fully and effectively with the investigative mandate assigned to him. The address was reasonably ancillary to

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the main objective of forensic investigation to ensure clean administration in general and clean financial administration in particular. No narrow view should be taken of what is implied in the express power granted to the speaker of a municipal council to invite outsiders to the council meetings. To do so would render rule 16(6) meaningless and defeat the purpose of a discretionary power. The restrictive construction that the rule merely regulates attendance and not participation of the speaker's guest can only make a municipal council a prisoner of its rules. It falls to be rejected.

Similar sentiments were expressed in **JOHANNESBURG MUNICIPALITY v DAVIES AND ANOTHER** 1925 AD 395 on 403; **BRAKPAN TOWN COUNCIL v BURSTAIN** 1932 TPD 336; **GOUWS v ORANJE-VRYSTAAT ONGEDIERTE BESTRYDINGS- EN WILDBESKERMINGSVERENIGING** 1970 (1) SA 508 (AD) on 518H – 519D.

- [41] At the request of the 3rd respondent the speaker agreed that Mr. Gerber be invited and that he be given the platform to address the council. All the councillors unanimously agreed to the proposal by the 3rd respondent. None of them raised any objection. The maxim of “unanimous consent” is well known and recognised particularly in our company law. I know of no sound reason why it cannot find similar recognition in our local government law or

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public law to be precise. By virtue of the maxim the courts have always been inclined and prepared to condone non-compliance with a variety of formalistic requirements or to attach no adverse consequences to such non-compliance on the grounds that the stakeholders had unanimously consented to dispense with such formalities.

[42] In GOHLKE & SCHNEIDER AND ANOTHER v WESTIES MINERALE BEPERK AND ANOTHER 1970 (2) SA 685 (AD) the court held:

At 693 G:

“After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective?”

At 694 E:

“Because the principle, as applied in those cases, is a sound one, giving effect to the substance rather than the mere form of the members' assent, I think that we should accept it as being settled law. Consequently, the assent of all the members and Sarusas, as evinced by the agreement of 28th January, 1965, rendered clause 8 binding on all of them **just as if they had approved it by ordinary resolution in general meeting.**”

[43] The following passage in LEVY AND OTHERS v ZALRUST INVESTMENT (PTY) LTD 1986 (4) SA 479 (WLD) at 485F:

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“I am hence of the opinion that the **unanimous consent** of the shareholders of a company to a specific transaction has the same effect and validity as the approval of such transaction by a general meeting of the company.”

Vide also **ADVANCE SEED CO (EDMS) BPK v MARROK PLASE (EDMS) BPK** 1974 (4) SA 127 (NCD) at 132F – 133D.

[44] The legal author Lewin: **The Law Procedure and Conduct of Meetings**, 5th edition on page 27 refers to a passage by a British judge, Lord Maugham in the case of **CARRUTH v IMPERIAL CHEMICAL INDUSTRIES, LTD** (1937) 2 ALL England Law Reports 422 who had this to say about the role of a chairperson or the speaker, if you will:

“As regards the conduct of such a meeting, that is a matter largely in the hands of the chairman, with the assent of the persons properly present. Just as documents which have to be presented to a meeting can be taken as read, and just as a meeting can decide either that an untiring speaker shall be no longer heard, or that a much debated question shall be put to the vote without further discussion, so – in my opinion – **the holders of deferred shares were entitled to waive the objection to the presence of strangers**, including holders of ordinary shares, and if they choose to do so, it would not, I think, be open to anyone to assert that the meeting was not being properly held within the meaning of art 71.

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‘The conclusion at which I arrive is that, in the circumstances, the meeting of deferred shareholders was properly convened, that the objection which might have been raised to the presence of holders of shares of another class was waived, that the poll was duly demanded and that the extraordinary resolution was passed by the requisite majority.’

[45] In that case, the ordinary shareholders attended a special meeting convened exclusively for deferred shareholders in terms of article 71 of the statute. Notwithstanding the fact that the ordinary shareholders were legally not supposed to attend such a special meeting, those who were entitled to attend such a meeting, in other words, the holders of the special class of shares called deferred shareholders did not object to the presence of the ordinary shareholders. Because they did not object to the presence of the strangers, the court held that it was not open to anyone to claim that the meeting was improperly conducted and therefor irregular. The special resolution passed, not unanimously but by the requisite majority was found not to have been tainted by illegality. Therefor the extraordinary resolution so adopted was held to be *intra vires*.

[46] The applicant contended that resolution SA10/2006 was invalidated by the participation of an outsider. Mr. Van Rhyn relied on the case of **D THAMAE & TWO OTHERS v SETSOTO MUNICIPALITY & 31 OTHERS** where my brother Kruger J said on page 7:

“Where debate on a resolution takes place with the

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participation of a person who is disqualified from taking part in the debate, the subsequent resolution of that body will be invalid, even though the disqualified person did not vote.”

See Case No. 1742/2003 unreported decision of OPD.

[47] Briefly restated the facts of that case were that the three applicants were members of the African National Congress, the majority party in the municipal council of the Setsoto Municipality; that the first applicant, the second applicant and the third applicant were the municipal council speaker, the municipal executive committee member and the municipal council councillor respectively; that the ANC caucused shortly prior to the council meeting; that the caucus decided to remove the applicants from their aforesaid positions; that the council meeting was held shortly after the said caucus for the restructuring of the council; and that the chief whip of the ANC stood up in the council meeting where he announced the earlier decision of his caucus for the restructuring of the council; that no debate took place in the council meeting afterwards.

[48] The facts in that case are distinguishable from the facts in the instant case. In that case, there was no stranger in other words a non councillor who addressed the municipal council as in the instant case. In that case unlike in this case nobody participated in any debate. In that case the decision to restructure the municipal council concerned was taken outside the council chamber by the ANC caucus and simply imposed on the council by the majority party.

[49] Since no outsider had participated in the council debate the passage relied upon by the applicant was not the *ratio decidendi* but rather an *obiter dictum*. Kruger J merely

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likened the caucus decision to an external undue influence or predetermination which is a recognised ground of review of an administrative decision and in fact cited **KIRK v WOODHOUSE LICENSING BOARD** 1924 EDL 297 on 302 – 303. It is conceivable that Kruger J might have reasoned that since it was not the council but in fact the ANC, which made the decision, the chief whip or the announcer of such decision in a council meeting in a deep sense, was analogous to an unqualified outsider, although in truth and in reality, Kruger J did recognise that the announcer was a councillor.

Be that as it may, it is trite law that a court of law is not bound by a statement of law or observation made in passing but not underlined by the facts for its decision. An *obiter dictum* has little persuasive value.

[50] In **PIETERSBURG CLUB LTD v PIETERSBURG LICENSING BOARD** 1931 TPD 217 on p. 223 the court found that a certain Dr. Andrew has a personal animosity against the club. Although he was a duly appointed member of the said liquor licensing board he was hostile because he had been expelled as a member of the same club that was applying for the liquor licence, the court found that he was so biased against the club that his personal animosity made him a disqualified person from attending the board meeting in which the application of the club for a

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liquor licence was considered. The court held that the fact that such a hostile person participated in the relative discussion of the board meeting vitiated the board's decision. See **EX PARTE SCHNEIDER** 1950 (2) SA 807 (C) on p. 810.

[51] Needless to say no such accusations or suggestion of personal animosity were levelled against Gerber, the outsider in the instant case. It was hardly the applicant's case, that had the third respondent herself presented the report in stead of Gerber the municipal council of the first respondent would not have passed resolution SA10/2006. The essence of the applicant's case, as I have already pointed out elsewhere in the cause of this judgment, was that Gerber was disqualified from participating in the debate because, as the applicant said, Gerber did not lodge a written application to the municipal manager for consideration by the municipal council speaker in terms of rule 48(1). I was not impressed by that argument. The first ground of challenge must therefore fail.

[52] The applicant also contended that resolution SA10/2006 was invalid on the grounds that it was debated in camera and taken in contravention of section 21 Municipal Systems Act No. 32/2000 read with rules 94 and 95 and 98. Section 20(1) decrees that the meetings of a municipal council are open to the public. That is the general provision. But there are exceptions to this general provision. The same section authorises a municipal council to hold its meetings behind closed doors when the nature of the business being transacted dictates that it is reasonable to exclude

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the public.

[53] Rule 94 echoes the substance of the above general rule. It provides that a municipal council may resolve to close any part of its meeting, in other words an open meeting of a municipal council may be converted into a close meeting. A municipal council may decide by way of a resolution that a certain particular item on its agenda be discussed, debated and resolved behind closed doors. That is precisely what happened in this case. Only part and not the entire proceedings of the municipal meeting were in camera. This rule also spells out circumstances which must prevail in order to justify the proposal and ultimately the resolution to hold a close council meeting.

Rule 95 regulates that a councillor may, when an item is put to order or at any time during the debate on an item, propose that the matter be further transacted in closed session. Therefore this rule empowers the municipal council where the discussion of a particular item has already started in an open meeting to stop the open discussion close its meeting for the purposes of further discussion of that particular item and re-open the doors of the council chamber to the public once the discussion of the item concerned has been finalised.

[54] It was contended on behalf of the applicant that from the minutes of the municipal meeting held on the 12th May 2006 there was no indication that the aforesaid section and the aforesaid rules were complied with. See annexure “MM4”. Mr. Rhyn’s contention is incorrect. It appears that there was an explicit proposal that the report of Gerber be presented and discussed under item SA10/2006 in camera. The formal procedure might not strictly have been adhered to in the sense that no formal resolution was taken. But objections were invited but none were raised. The speaker therefor dispensed with the formal resolution. To the extent

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that there was or might have been procedural deviation, the proceedings pertaining to the particular item were somewhat flawed.

[55] In the opposing affidavit the deponent stated on behalf of the respondents that the item in question entailed a sensitive matter pertaining to certain employees of the 1st respondent who were implicated in certain irregular activities detrimental to the respondent's administration. The sensitive nature of the item that was about to be discussed made it reasonably necessary to exclude the public. There can be no question about it. Considering the inevitable gravity of the harm, had the meeting remained open, to the employees concerned, I am of the view that the harm caused to the democratic values of the transparent, open and accountable governing of local affairs was proportionally less harmful to the members of the public who were excluded and denied their right to observe the workings of the council than the harm to the implicated employees.

[56] On the averments by the respondents which I not seriously disputed by the applicants, I find that there were much more compelling reasons to close the doors than to keep them open at the time the item in question was discussed. The procedural deviation was not so radical as to justify the setting aside of the subsequent resolution passed in

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camera. The aforesaid rules of procedure are directive and not peremptory. I am further fortified by rule 19(3) of the same Standard Rules and Orders which provides that the chairpersons ruling as to the procedure is final unless it is contested in the next meeting. By their unanimous adoption of resolution SA10/2006 the councillors thereby implicitly signified that they condoned the speaker's ruling. During argument it was never contended on behalf of the applicant that the speaker's ruling was subsequently questioned by any councillor. Therefor the ruling with whatever defects it may have, has now become final. It cannot now be revisited and set aside at the instance of a non-councillor for that matter.

- [57] Time after time our courts have held that an applicant who seeks an order which nullifies any decision of a regulatory organ or any other body, necessarily has to allege and prove that she or he was prejudiced by the alleged irregularity. See for instance the following cases: **JOCKEY CLUB SA & OTHERS v FELDMAN** 1942 (AD) 340 on 359; **ROBERTS v CHAIRMAN LOCAL ROAD TRANSPORTATION BOARD AND ANOTHER(1)** 1980 (2) SA 472 (CPD) at 477D- E and 479H; **RAJAH & RAJAH (PTY) LTD & OTHERS v VENTERSDORP MUNICIPALITY & OTHERS** 1961 (4) SA 402 (AD) at 407E – 408A; **GROVE PRIMARY SCHOOL v MINISTER OF EDUCATION & OTHERS** 1997 (4) SA 982 (CPD) at 996G

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-997l.

[58] In this case, even if there had been an irregularity, there is virtually no averment made to the effect that the applicant was prejudiced by the alleged irregularity which, as the applicant contended before me stemmed from the council decision to discuss item SA10/2006 in camera. Certainly it was not the applicant's contention that had the item been discussed in an open council meeting or put more appropriately, that had the doors of the council chamber remained open when the particular item was discussed, the council would not have passed the resolution complained of. I fail to see in what way the presence of the members of the public could possibly have deterred the council from resolving the matter as it did.

[59] On the contrary, the respondents have shown that certain specified employees of the 1st respondent would have been severely prejudiced if the council had proceeded to discuss the sensitive matter with the doors of its chamber still open and in the presence of the members of the public. Moreover, it was not contended that the applicant's deponent or any of its directors was physically present in the council chamber among the members of the public before the public was evacuated and the doors closed. The applicant has therefor failed to show that the in camera proceedings caused him to suffer any prejudice which he otherwise would not have suffered.

[60] It seems to me that, for the sake of all concerned, including the respondents themselves as well as the applicant itself, the matter was conveniently and advantageously discussed

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in camera. **COTTRELL v CAPE TOWN COUNCIL** 18 SC 296 as discussed by Dönges & Van Winsen: **Municipal Law, 2nd Edition.** In my opinion the second ground of the challenge must fail.

[61] The submission by the council of the applicant that the respondents were attempting to rely on Standard Rules and Orders which they alleged had not been adopted and which they, therefor contended were not binding appears to be based on an incorrect premise. The correct contention of the respondent was not that the rules were not binding because the 1st respondent had never adopted them. The crux of their averment was that the applicant did not aver in the founding affidavit that the 1st respondent's municipal council had adopted the rules. In the absence of such a necessary averment it could not be said that the rules were therefor binding.

[62] In the light of the above, council for the respondents contended that no case had been made out in the founding affidavit that these Standard Rules and Orders had been adopted by the 1st respondent. Therefor, he submitted that the applicant was not entitled to rely on the rules it has not averred to have been adopted by and binding on the 1st respondent. Be that as it may, I considered the substance

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of the dispute and ignored the technical but valid objection raised by the respondents. The second ground of invalidity raised by the applicant can therefore not be upheld. The respondents did not violate the said rules or the sections by debating the particular item in camera.

[63] In the third place the applicant contended that resolution SA10/2006 was invalid on the grounds that the municipal council of the 1st respondent without first hearing its version unilaterally adopted the resolution in violation of the basic rule of natural justice. Here the applicant was particularly aggrieved by the segment of the resolution which not only cancelled the agreement but also suspended further payments of money to the applicant by the first respondent. The third ground of the attack of invalidity will now be examined.

[64] The parties were bound to each other by a written agreement in terms of which they performed their respective contractual obligations until the 12 May 2006. The 1st respondent resolved on that day to summarily end the agreement with immediate effect and withhold further payment to the applicant of any money whatsoever pending the final outcome of an investigation. Mr. Van Rhyn submitted that in the circumstances of this case the respondents should have afforded the applicant an

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opportunity to state its case prior to adopting such a drastic resolution.

[65] In support of his submission council cited the following decided cases: **ADMINISTRATOR, NATAL, AND ANOTHER v SIBIYA AND ANOTHER** 1992 (4) SA 532 (AD), **LANGENI AND OTHERS v MINISTER OF HEALTH AND WELFARE AND OTHERS** 1988 (4) SA 93 (WLD), **MYBURGH v DANIëLSKUIL MUNISIPALITEIT** 1985 (3) SA 335 (NCD), **MINISTER OF HEALTH, KWAZULU, AND ANOTHER v NTOZAKHE AND OTHERS** 1993 (1) SA 442 (AD), **GRAND MINES (PTY) LTD v GIDDEY NO** 1999 (1) SA 960 (SCA), **TOERIEN EN 'N ANDER v DE VILLIERS NO EN 'N ANDER** 1995 (2) SA 879 (CPD), **SLAGMENT (PTY) LTD v BUILDING, CONSTRUCTION AND ALLIED WORKERS' UNION AND OTHERS** 1995 (1) SA 742 (AD), **NTSHOTSHO v UMTATA MUNICIPALITY** 1998 (3) SA 102 (Transkei), **MINISTER OF SAFETY AND SECURITY AND ANOTHER v NOMBUNGU AND OTHERS** 2004 (4) SA 392 (Transkei High Court).

[66] In none of the cases cited above could I find any authoritative support for the contention of the applicant that because the respondents did not observe the *audi alteram partem* rule before terminating the agreement, the respondent's decision must be set aside. With one

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exception only namely GRAND MINES v GIDDEY NO
supra the rest are characterised by one common feature.
The feature is that the relationship between the parties was
based on the unequal terrain of employment. The instant
case is distinguishable on that score.

[67] Mr. Danzfuss, on the other hand submitted that the rule of
natural justice *audi alteram partem* rule did not apply in the
instant case where the aggrieved party complains of a
unilateral termination of a civil agreement where, as in the
instant case, the parties had contracted on an equal footing
and the decision did not entail the exercise of public power.
I am in respectful agreement. The law tells us that only
administrative actions must be procedurally fair.

[68] As regards the procedural fairness of an administrative
action, section 3, Promotion of Administrative Justice Act No.
3/2000 provides:

**“3. Procedurally fair administrative action affecting any
person**

(1) Administrative action which materially and adversely
affects the rights or legitimate expectations of any person must
be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances
of each case.”

The question therefor arises whether the termination of the
agreement by the 1st respondent without first affording the

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applicant opportunity to give its reasons why the agreement should not be terminated was an administrative action as section 3 *supra* envisages.

[69] In the case of CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES (WESTERN CAPE) CC AND OTHERS 2001 (3) SA 1013 (SCA) the court grappled with section 33, 1996 RSA Constitution which provides that everyone has the right to an administrative action which is lawful, reasonable and procedurally fair. At 1023B the court observes:

“The section is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it performs an act of public administration ie when it exercises public power...”

[70] At 1023H the court further observes:

“The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power **to cancel the contract** from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in

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respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power.”

[71] I hasten to point out that in its judgment the Cape High Court in the above case had earlier ruled in favour of the said close corporation but on appeal to the SCA the finding of the court *a quo* was overruled.

In *casu* none of the parties contended that the cancellation was based on any particular statutory authorisation. In the case of **CAPE METROPOLITAN COUNCIL** *supra*, at 1025C the court stressed that the cancellation had its *fons et origio* in the contract law domain and not in the public law domain. The learned judge decided:

“It purported to cancel the contract, not on the ground of being satisfied of the existence of any of the circumstances referred to in reg 22, but on the ground that substantial fraudulent claims had actually been submitted and that such **fraudulent claims** constituted a material breach of contract entitling the appellant to cancel in terms of the law of contract.”

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[72] For the reasons advanced above I have come to the conclusion that the termination of the agreement was not an administrative action. It follows therefor that it was not open to the applicant to contend that the 1st respondent's termination of the contract which gave rise to the withholding of the money was invalid on account of the perceived lack of procedural fairness. That being the case, I have come to the conclusion that the natural rule of justice, the *audi alteram partem* rule does not come into play.

[73] Now that all the three grounds on which the applicant relied in support of its prayer for the review and nullification of resolution SA10/2006 have fallen by the wayside, the resolution has to remain as a valid decision of the municipal council of the 1st respondent. This then disposes of the first issue. On review the applicant is not entitled to such a relief.

* [74] Next I proceed to deal with prayer two of the notice of motion. Here the relief sought by the applicant is that the respondents be directed to provide the applicant with a copy of the forensic report. The presentation of such report precipitated the termination of the agreement. It stands to reason therefor, that the real source of the pain is the sudden severing of the commercial ties which started on

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the 20th May 2005. The deal was evidenced by three important documents, which I shall discuss later in connection with the third relief.

[75] It is undisputed that on the 12th May 2006 the municipal council of the 1st respondent held a special meeting at which a forensic audit report was presented and discussed. The minutes of the meeting were recorded, as reflected in annexure “mm4” to the founding affidavit. The forensic audit report painted an unfavourable picture as regards to the applicant’s business dealings with the 1st respondent. The municipal council of the 1st respondent after listening to Mr. Gerber and after debating the report resolved to terminate the agreement for the maintenance of the street lights in the 1st respondent’s operational area.

[76] Pursuant to the adoption of resolution SA10/2006 the 2nd respondent executed the resolution of the 1st respondent by writing a letter on the 24th May 2006 to inform the applicant of the 1st respondent’s intention to terminate the maintenance agreement within thirty days. Three weeks later on the 14th July 2006, to be precise, the applicant initiated these proceedings to demand a copy of the

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forensic report which led to the termination of the contract it had with the 1st respondent.

[77] Mr. Van Rhyn submitted that, in the light of the first three annexures to the founding affidavit, and specifically the respondent's failure to react to the applicant's letter, dated the 23rd May 2005, the applicant had at least a three year contract with the 1st respondent, and that the 1st respondent was not entitled to terminate the said maintenance agreement within one year without good reason. He then referred me to the decision of **SEEFF COMMERCIAL AND INDUSTRIAL PROPERTIES (PTY) LTD v SILBERMAN** 2001 (3) SA 952 (SCA) and **McCAIN FROZEN FOODS (PTY) LTD v BEESTEPAN BOEDERY (PTY) LTD** 2003 (3) SA 605 (TPD). In developing that argument further Mr. Van Rhyn submitted that the applicant was entitled to have a copy of the forensic audit report in question.

[78] The applicant requested for a copy of the said report in order to satisfy itself that such a report contained sufficient reasons to justify the decision to terminate the agreement. However, the respondents declined to make the required report available to the applicant.

[79] Mr. Danzfuss countered the above argument. He made the submission that the applicant was precluded from seeking such a relief from this court on the ground that the extra-

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curial remedies had not been exhausted as section 39(1) Promotion of Access to Information Act No. 2/2000 read with section 78 thereof provided. This was obviously the point taken *in limine*.

[80] As a general proposition a public body such as the 1st respondent is obliged to supply a copy of the required record to the information seeker. Such a general obligation was re-affirmed in the recent decision of **CCII SYSTEMS (PTY) LTD v FAKIE AND OTHERS NNO (OPEN DEMOCRACY ADVICE CENTRE, AS AMICUS CURIAE)** 2003 (2) SA 325 (TPD) at 334G, a case where ODA Centre intervened as *amicus curiae*. The respondent contended *in limine* that those and other related legislative provisions have not been complied with. On the contrary the applicant contended that it did not comply with provisions of the said legislation because such legislation was not applicable to this case.

[81] The report compiled by Price Waterhouse Cooper constitutes a record as envisaged and defined in section 1, Promotion of Access to Information Act No. 2/2000. This averment by the respondent is not disputed by the applicant. Section 78 read with section 11(1)(a) provides that an information seeker whose request for information has been turned down by the possessor thereof can approach a court of law for an order in terms of section 82 only if the procedure prescribed by the legislative act has been followed and the internal remedies have been exhausted.

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[82] Section 3, Act No. 2/2000 provides that this statute applies to: (a) a record of a public body and (b) a private body irrespective of when such a record came into existence. The information seeker's request has, in terms of section 11(1), to comply with all the procedural requirements of this legislation.

The applicant relied on section 7 for its contention that this particular legislation does not apply. The section provides:

“7. Act not applying to records requested for criminal or civil proceedings after commencement of proceedings

(1) This Act does not apply to a record of a public body or a private body if-

(a) that record is requested for the purpose of criminal or civil proceedings; (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.”

[83] It seems to me that the section disqualifies a request by an information seeker whose aim is to use the required information in connection with pending legal proceedings if there are other avenues through which the required recorded information of a public or a private body or entity can be accessed. The underlying theme of the section is that where there are other remedies available prescribed by any other legislation such remedial avenues and not those created by this particular legislation have to be followed first.

[84] In the case of **RAIL COMMUTER ACTION GROUP AND OTHERS v TRANSNET LTD t/a METRORAIL AND OTHERS** (No 1) 2003 (5) SA 518 (C) at 587I the court held per Davis J *et Van Heerden J*:

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“As submitted by applicants' counsel, the purpose of s 7 is seemingly to prevent the Information Act from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings...”

See also **DAVIS v CLUTCHCO (PTY) LTD** 2004 (1) SA 75 (CPD) at 86C.

[85] The applicant's request for the required information was first made on the 29th May 2006. Mr. Sizephe, applicant's attorney, wrote in a letter which now appears on page 99 of the record:

“In the light of the above and in terms of the **Promotion of Access to Information Act, No. 2 of 2000** our instructions are to demand from you, as we hereby do, copies of the **Price Waterhouse Cooper** report, ...”

[86] About two weeks later, Mr. Mayekiso, the applicant's chief executive officer, stated, in paragraph 11.2 of the founding affidavit, the reason why the applicant required the said report:

“So it is imperative that the Applicant be furnished with the copy of the said report as the Applicant cannot enforce any of its rights or exercise any remedy (in) the situation without knowing the contents of the said report;”

[87] It is therefor crystal clear that it is indeed the applicant's case that it requires the information contained in the report for the purpose of enforcing its rights. The applicant makes it quite clear from the outset not only that it required the report for the purpose

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of asserting its rights by way of civil proceedings but, and this is very important, also that its request to access the information contained in the report emanated from this particularly legislative act. There can be no shadow of doubt, that the applicant's request is governed by the legislation we are here dealing with.

[88] Section 39(1)(b) empowers the information officer of a public organ to refuse access to a record in certain circumstances. But even before such officer can consider such request the prescribed procedure must have been complied with by the information seeker. Of vital importance is the procedural requirement that a prescribed minimum period of 30 days has to be allowed for the consideration of the report by the information officer of the public body or private body concerned. It was never done in this case. The prescribed moratorium necessary for the consideration of the request was not observed by the applicant. It was violated. Certain things are sacrosanct in law. This period is one of them.

[89] However, generous I may want to be to the applicant as regards the procedural defects of its request, I find myself unable to ignore such a serious procedural violation of the 1st respondent's right. As already pointed out the applicant's request was made on the 29th May 2006, these proceedings were initiated fifteen days later, on the 14th June 2006, to be precise. Therefor the applicant violated the respondent's rights as protected by section 25.

[90] It follows therefor that since no compliant and valid request has ever been made for the required record, it cannot be argued that the 1st respondent has refused to furnish the applicant with a copy of the report in question. Since no valid request was ever delivered to the information officer

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of the 1st respondent, such information officer was, accordingly, not at all called upon to make a decision whether to refuse or to accede to any request. It is a simple matter of logic.

[91] In view of the foregoing conclusion it becomes academic to consider the vigorous argument pertaining to the question of whether any unit of the South African Police has been placed in possession of the said forensic report for the purpose of investigating criminal charges against the directors of the applicant. The heated debate before me sparked off by two irreconcilable exhibits: exhibit “A” dated the 23rd August 2006 by Advocate M.P. Mdlana on behalf of the National Prosecuting Authority was handed in by counsel for the applicant on the one hand whereas exhibit “AA” dated the 22nd August 2006 by Detective Inspector E. Crous on behalf of Welkom Police was handed in by the counsel for the respondents.

[92] The former wrote in a **letter** that no such forensic report by Price Waterhouse Cooper had been handed to the National Prosecuting Authority after 12th May 2006 and that there was no investigation against the applicant by any unit of the South African Police. The latter averred in an **affidavit** that the South African Police Service was in possession of

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the forensic report by Price Waterhouse Cooper and that such a forensic report formed part of the investigation against the applicant which started during the year 2005, under the police reference Welkom Cas 93.04.2005.

The letter was exhibited in an attempt to show that there was no good cause for the **refusal** by the 1st respondent to give the applicant access to the record. The affidavit was exhibited for the contrary purpose. On the facts as examined and digested the issue is premature and does not arise. It is a secondary issue. It can only arise provided the primary issue has been established. Seeing that the applicant has been failed to jump over the first hurdle, the valid request, the primary issue, this is where the train has to stop. We cannot proceed any further. The secondary issue falls away. We are not there yet. We cannot proceed to that bridge as yet. For now the argument about the particular point is premature, fruitless and academic. It does not arise. It follows therefor that the respondent's preliminary point *in limine* was well taken. This then disposes of the second prayer sought by the applicant. The applicant is not entitled to the second relief. I would therefor dismiss this particular leg of the motion.

* [93] I turn now to the third relief sought which is prayer 3 of the notice of motion. In the final analysis I am called upon to

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consider whether or not the 1st respondent was entitled to terminate the agreement as he did and withhold payment due to the applicant. To do so it is necessary to take a closer look at annexure “mm3”. It is the applicant’s case that the agreed duration of the agreement is three years and that this documentary evidence supports the applicant’s contention. However, the respondent’s case is that the agreed duration of the agreement was a month to month period and that annexure “mm3” does not support the applicant’s contention.

[94] The version of the applicant was that during March 2005 the 1st respondent invited tenders for the street lights maintenance. The closing date for the submission of the tenders was the 5th April 2005. The applicant tendered and submitted its tender, annexure “mm1”, on the 5th April 2005. On the 20th May 2005 the 1st respondent informed the applicant by way of a letter, annexure “mm2”, that it had awarded the tender to the applicant. The applicant states that it accepted the awarding of the tender, annexure “mm3”, a letter dated the 23rd May 2005. Since the respondents did not react to the letter, such failure, justified an inference that the respondent accepted the applicant’s assertion that the duration of the agreement was indeed three years as stipulated in clause 3.18 of the tender

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documents, annexure “mm1”.

[95] The version of the respondents was that last year it identified certain service providers and invited them to submit quotations for streetlight maintenance. The electric service providers so approached and invited were provided with documentation containing conditions and schedules applicable to the quotation for completion. The documentation appended to the founding affidavit as annexure “mm1” was an incomplete part of the quotation documentation which the respondents had handed to the applicant. The applicant submitted its quotation on the 5th April 2005. The applicant’s documentation, annexure “mm1”, was incomplete because it did not contain the first page of the quotation documentation the respondent had originally handed to the applicant. The respondent averred that a document appended to the opposing affidavit as annexure “o2” was a true replica of the missing first page of the quotation documentation.

[96] The 1st respondent’s operational domain was divided into four areas. The applicant had been awarded the quotations in respect of all the four domains. However, the applicant’s quotation documentation in respect of Virginia domain could not be found. Every set of the bundle of quotation documentation given to each interested

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prospective service provider had a cover-sheet prefixed to it. In the case of the applicant the cover sheets were annexure “03.1” in respect of Allanridge/Odendaalrus domain, annexure “03.2” in respect Ventersburg/Hennenman domain and annexure “03.3” in respect of Welkom domain. The cover-sheets formed part of the standard quotation documentation completed by all the prospective service providers. Such a cover-sheet qualified the various documents customarily used for the purpose of an ordinary tendering process.

[97] The applicant was awarded a quotation on the 20th May 2005 as set out in annexure “mm2”. The respondent’s annexure “mm2” was a response to the applicant’s quotation, annexure “mm1”. The time period of the agreement was limited to a month to month arrangement or work allocation according to annexure “mm2”. The quotation allocation process was a temporary relief. It was resorted to because the tender allocation process was retarded by several complicating factors. The applicant’s letter, annexure “mm3”, never came to the attention of the respondents. Therefor the respondents denied the applicant’s contention that the contract period was 3 years. This then completes the version of the respondents.

[98] In a case where there are no armed combatants on the battle field, but the battle is fought by the firing of long

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range combat missiles across the battle lines into the enemy camp, the conflict between the warring forces has to be adjudicated and resolved on the facts as averred by the defensive combatant and not the offensive combatant. Vide **PLASCON-EVANS** *infra*.

[99] The respondents contend that the standard quotation documentation the 1st respondent supplied to the applicant and indeed to all the prospective service providers was endorsed as follows:

“Please note: The time period of 3 years mentioned in this document should be ignored. The correct time period will be put in writing with the awarding of this tender.”

See page 121 of the paginated court record.

[100] The endorsement was printed on the cover-sheet, not just a loose insignificant piece of paper, or a covering letter. The cover-sheet was an important document, a detailed, descriptive and informative index which systematically catalogued fifteen different types of forms. These are the forms which are collectively called tender documents. It therefore makes sense to me to read that it forms an integral part of every tender documentation the respondents ordinarily uses.

[101] In the opposing affidavit Mr. Segalo makes a point that the ordinary tender allocation process was plagued by numerous obstacles which retarded the finalisation of that tender process. The retardation led the respondents to come up with a temporary solution. This speedy and interim measure was the extra-ordinary quotation allocation process. The underlying idea for the short-term quotation allocation process was never to abandon the long

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term tender allocation process, but to render an important service while the respondents were still trying at the same time to sort out the obstacles that were impeding the ordinary tender allocation process.

[102] Apparently the respondents did not have distinct separate and special documents specifically designed for the quotation allocation process they were embarking upon. So it was that they decided to improvise what they already had. Documents ordinarily used in connection with the tender allocation process. They did this simply by adjusting the cover-sheet. The first special feature of the adjusted index was that all references to the word tender in the traditional tender allocation documentation supplied to the prospective service providers must be read as quotation. The second special feature of the adjusted index was an endorsement I have already referred to in paragraph 78 above.

[103] The endorsement was written in bold capital letters. It was written in red. The rest of the index was written in black and about 80% thereof was written in small fine print. All these things were obviously intended to give the endorsement remarkable maximum and conspicuous pro-dominance to anyone who cared to read the index. The endorsement makes it pertinently clear that the three year period in clause 3.18 of annexure “mm1” does not apply. This is perfectly understandable because the documents were intended for a special process, the quotation allocation process. The second part of the endorsement also makes sense. It makes it perfectly clear that the respondents reserved unto themselves the exclusive right to determine the contract period of the quotation allocation process.

[104] Although poorly worded and constructed, the endorsement conveys a clear and loud message that the successful applicant or competitor in the quotation allocation process would be informed of the duration of the agreement in the written quotation award in due course. Such a quotation award was made in favour of the applicant on the 20th May

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2005, annexure “mm2”. The contract period, the respondent’s quotation award stipulates, is a month to month agreement. Nothing can be clearer. This then is the version of the respondents which the law commands me to accept. And I do.

[105] The respondents considered annexure “mm1” as amplified in accordance with their version, to be an offer. I agree with this contention. I also agree that it was an offer relating to the invitation for the submission of the quotation allocation process and not the tender allocation process as the applicant contended. The applicant completed and submitted the quotation allocation documentation fully aware of the informative index as well as the important and strikingly conspicuous red and bold endorsement strategically printed high up on the index, the very first page of the bundle of the quotation allocation documentation. The fact that annexure “mm1” consisted of documents drafted by the respondents is of no consequence. It does not change the legal status of this particular document. It is an offer by the applicant, the offerer, to the respondents.

[106] The author Christie RH: **The Law of Contracts in South Africa**, 4th edition, on page 32 writes:

“A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed.”

The respondents reacted positively to the applicant’s offer. The respondents conveyed the necessary quotation award to the successful offeror, the applicant. Such quotation award as embodied in annexure “mm2” was the

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respondent's acceptance of the offer made by the applicant. Therefor the 1st respondent became the offeree on the acceptance of the offer. Christie, still on page 29, goes further to say:

“What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance.”

[107] It is my considered view that annexure “mm1” was the applicant's firm offer made as it were, with the serious intention that it be accepted, and more importantly that upon its acceptance it would immediately bind the offeror and the offeree without something more on the part of the offeror. Vide **WASMUTH v JACOBS** 1987 (3) SA 629 (SWA) at 633D.

[108] Quite in keeping with the red endorsement on the first page of the applicant's offer, the respondents declared in their acceptance thereto that they have decided to fix the contract period and granted the quotation award on the interim basis of a month to month rendering of maintenance services. To me this is also perfectly understandable. The respondents were still hard at work to remove the obstacles that bogged down the tender allocation process, with is a long term process of at least three years. The acceptance of the offer by the offeree for

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this short term arrangement was duly communicated to the offeror. See annexure “mm2” dated the 20th May 2005. The applicant acknowledged receipt. See annexure “mm3” dated the 23rd May 2006. Once that written acceptance of the offer was communicated to the applicant by the respondent a valid short term agreement was concluded between the parties.

[109] The applicant had it all wrong. On numerous occasions in the founding affidavit, the applicant’s deponent repeatedly used the word **tender** instead of **quotation**. In paragraph 7.2 he stated:

“The applicant **accepted** the awarding of the said **tender** as per its letter to the 1st respondent dated the 23rd May 2005.”

[110] We know now that the letter referred to was annexure “mm3”, that the alleged tender was in actual fact the quotation, annexure “mm1” in other words the **offer** and that the alleged tender award was in actual fact the quotation award, annexure “mm2” or better still the **acceptance** of the offer. The above quotation or passage extracted from the founding affidavit aptly demonstrates the applicant’s misconceptions. The applicant labours under the wrong perception that annexure “mm2” was an offer by the respondent and that annexure “mm3” was the

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applicant's counter offer. The correct legal position is that the respondent had communicated annexure "mm2", that is the offer acceptance, to the applicant. There was nothing for the applicant as the offeror to accept after the acceptance of the offer was communicated to it. The accepting business was the offeree's business and not the offeror's. That is the basic principle of the law of contract.

By the 23rd May 2005 when the applicant purported to accept annexure "mm2" as an offer and subsequently purported to make a counter offer, through annexure "mm3" there was no offer for him to accept. In law the counter offer can only emanate from the offeree and not the offeror. **SEEFF COMMERCIAL AND INDUSTRIAL PROPERTIES (PTY) LTD v SILBERMAN** 2001 (3) SA 952 (SCA).

[111] In the instant case the letter annexure "mm3" by the applicant can never be construed as a counter offer. It contains no indication whatsoever that a counter offer is made which is open for acceptance. Instead it claims that the portion of the respondent's letter, annexure "mm2", in other words the respondent's acceptance of the offer is incorrect and that it contradicted clause 3.18 of annexure "mm1". But the same annexure "mm3" states that now that the respondents have accepted the tender quotation "mm1" by means of annexure "mm2" "... binding contract between us" has thereby been constituted. See page 85 of the paginated record. At best for the applicant annexure "mm3" was an acknowledgement of annexure "mm2" which had already sealed a valid and a binding contract three days before "mm3" was penned down.

[112] In any case the respondents averred that none of its

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functionaries was authorised to accept annexure “mm3”. This is common cause since the applicant did not dispute it. But even if the respondents did receive annexure “mm3” which allegation they deny, their failure to repudiate it, can never be construed as acquiescence because there was simply no counter offer and there could not have been one in the circumstances.

[113] Above all these reasons, the applicant’s offer annexure “mm2” itself devastatingly militates against the applicant’s own contention that annexure “mm3” was a counter offer. It states:

“This tender (quotation) together with you(r) written acceptance thereof shall constitute a binding contract between us.”

Vide page 17 annexure “mm1” on page 58 of the record. As I have already pointed out annexure “mm3” also correctly echoed these same sentiments.

[114] The quotation allocation documentation, annexure “mm1” considered as it must together with annexure “03.1”, “03.2” and “03.3” which appear on page 163 to 165 of the record constituted an offer by the applicant which contained nor fixed contract period for the contemplated agreement. It gave the respondents the latitude to determine such a period and to advise the winner accordingly when awarding the quotation. For these reasons I am of the view that it was within the province of the respondent’s contractual rights to cancel the agreement on 30 day notice as they did. This has a bearing on the last relief sought by the applicant.

[115] Now, I am nearing the end of the third issue - the final relief sought in terms of prayer 3 of the notice of motion. In this relief the applicant seeks that the respondents be ordered to pay to the applicant all moneys owed due and payable to

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the applicant by the 3rd respondent. Its contention is that the respondents are wrongfully withholding payments thereof. Such withholding, so argued counsel for the applicant, was based on an invalid resolution. On behalf of the respondents it was contended that there was nothing wrongful about the withholding of payment because, as counsel for the respondents argued, the withholding was based on a valid resolution which was justified in the circumstances.

[116] I have already found that the resolution, which was challenged by the applicant, was perfectly sound and that no grounds existed to have it nullified. Notwithstanding such finding I shall for the purpose of this leg of the notice of motion consider the relief sought as a separate and independent leg of the notice of motion.

[117] I point out that the applicant did not ask that the first respondent be directed to pay a specific amount. In its founding affidavit the applicant merely alleged that the 1st respondent was indebted to the applicant in the amount of approximately R300 000,00. In the opposing affidavit it was alleged that the 1st respondent owed nothing to the applicant and that, in fact, the converse was true.

[118] It is therefor clear and obvious that a real factual dispute exists as to really who owes who and precisely what. I am of the opinion that in the light of the above allegations of

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facts, a genuine dispute on facts cannot be resolved on the papers as they stand. There is a need for oral evidence to ventilate the alleged facts. In a case such as this, where a genuine factual dispute exists, the court has to decide the matter in accordance with the version of the respondent.

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PAINTS (PTY) LTD 1984 (3) SA 623 (AD) on 634.

[119] Applying this principle to the allegations of fact at hand, I am moved to say, even if I should accept as true, the applicant's version, namely that an amount of approximately R300 000,00 is owed, due and payable to the applicant by the first respondent, I am nevertheless unable to dismiss outright the respondents' version as farfetched and false. The first respondent's version that an amount of over R422 000,00 is owed by the applicant to the 1st respondent appears plausible. This finding does not in any way suggest that I accept the veracity of the 1st respondent's version, far from it. It simply means that, the respondents have, at least made out an arguable case – a *prima facie* case, to use a common legal lingo.

[120] In the replying affidavit the applicant states that it will produce documentary evidence in support of the amount owing by the respondents to the applicant by means of invoices and reminders addressed to the 1st respondent.

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Implicit in this averment is the inevitable conclusion that the applicant concedes on its own version that it still has to quantify its claim-something it has not done on the founding affidavit or indeed in any of the two subsequent affidavits. This averment strengthens the contention that the applicant should have enforced its claim against the respondent by way of action proceedings and not motion proceedings as has been done. It is highly undesirable to adjudicate the merits by way of motion proceedings and the quantum by way of action proceedings. This is precisely what the applicants are urging me to do. Even if I were to dismiss the version of the respondents as a farfetched and a frivolous ploy with no substance and accept the version of the applicant, still this matter cannot be finalised before me. On the applicant's own say-so its claim of the money owed due and payable to it has not been accurately quantified.

[121] Besides the foregoing considerations, there is no averment in all the affidavits filed on behalf of the applicant that prior notice of the applicant's intention to institute these legal proceedings against the 1st respondent was ever given in terms of section 3, Act No. 40/2002. The section must be read in conjunction with section 5(2), "Institution of Legal Proceedings against Certain Organs of the State Act". The former section provides that a prescribed minimum period of 30 days calculated from the date on which the requisite notice was served has to be allowed

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before legal proceedings are instituted against an organ of the state. None of these peremptory legislative provisions were complied with. This was a fatal procedural defect. I could have dealt with this point *in limine* right from the onset. It would have completely wiped the applicant's entire case off at great expense. For the sake of the applicant, I decided to put it aside and to deal with the merits once and for all.

[122] In the circumstances I have come to the conclusion that the relief sought by the applicant cannot be granted. There is a clear dispute of fact. The dispute was foreseeable. The applicant took a calculated risk in trying to enforce the disputed payment by way of motion proceedings instead of action proceedings. Besides, the point *in limine* referred to in the foregoing paragraph, in fact spelled the end of the matter without further ado. I would therefore dismiss this claim for payment which is the third leg of the notice of motion.

[123] The respondents have been successful. Therefore they are entitled to the costs, including the costs of previous postponement unless it was otherwise agreed *inter partes*. In my opinion the facts do not justify a punitive order of costs on the scale between attorney and client as was contended for by Mr. Danzfuss. The two counsels were *ad idem* that the complexity of the matter justified the

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employment of two counsels. Indeed each one of them was assisted by a junior. In turn each of them acknowledged that the victorious party should be entitled to costs occasioned by the employment of two counsels. This is how I also see the matter.

[124] Accordingly I make the following order:

124.1 As regards the first prayer for the review and setting aside of resolution SA10/2006 the application is dismissed with costs.

124.2 As regards the second prayer for a copy of the forensic auditing report by Price Water and Cooper the application is dismissed with costs.

124.3 As regards prayer three for payment of certain money due to the applicant in terms of the relevant agreement the application is dismissed with costs.

124.4 The applicant shall pay such costs as on the scale between party and party.

124.5 The costs shall include those that were occasioned by the employment of two counsels.

M.H. RAMPAL, J

On behalf of the applicant:

Adv. A. J. R. van Rhyn SC
with him

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On behalf of the respondents:

Adv. F. W. A. Danzfuss SC
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