

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Case no: 3136/2025

In the matter between:

NKETOANA LOCAL MUNICIPALITY

APPLICANT

and

**MALINGA NTOMBIZODWA ALICE
MOTLOUNG MATHAPELO SELINAN
BOLIBE ALINA MEKODI
SIMELA DIPUO
MAKHOBHA MAMOQEBELO ANNAH
MLANGENI PALESA PRUDENCE
THLANAKWE NTHABISENG
MOKOENA MMAMOLOYI ALINA
MTHEMBU ADELINA
TSOTETSI MOSELANTJA MAGRET
MNGUNI GCINIMUZI MIKE
LENDABABALA HEYA SEINA
MOKOENA PALESA
MODISE PAKISO MERRIAM
NKABINDE SIBONGILE INGRIOT
LEKOTJOLA MATHAPELO SELINA
JANTJIE ELISIWE**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT
ELEVENTH RESPONDENT
TWELVTH RESPONDENT
THIRTEENTH RESPONDENT
FOURTEENTH RESPONDENT
FIFTEENTH RESPONDENT
SIXTEENTH RESPONDENT
SEVENTEENTH RESPONDENT**

MOTSOENENG MORONGOE LUCIAH
 SIBEKO NTOMBIZODWA
 MOFOKENG PUSE JOHANNES
 MOFEKENG MATLAKALA LUCY
 TSHABALALA MOIPONE YVONNE
 MLANGENI BONGANI KOOS
 MOSIKIDI MANTOA LORRAINE
 MOTLOUNG MATELA SAMUEL
 MOTAUNG MMAKWENA MERRIAM
 MOHLABANE RAMOETI DANIEL
 MOEKENA MAMOTJHATO JERMINA
 MAHLASELA MATSHEDISO
 DHLAMINI JOSEF KGOBONYE
 KHOMBELWAYO MBOESWA AMOS
 MOKOENA PAKISO JONAS
 SEJAKE REBECCCA MMAFUSI
 MOSIA MOHAU ABRAM
 MTHEMBU NTHABISENG LUANDA
 MOHLABANE PULE JOSEPHINE
 MOTLOUNG THABISO SIMON
 MOKOENA TEBOHO ERNEST
 MOKOENA MADINTJA ADELINAH
 MOTAUNG MADIJENG MEGAN
 LESENJEHO SEPHENA JOSEPH
 MOHOLO TLALENG EVODIA
 MOTAUNG MMAPHALA CICILIA
 MOEKETSI MANS SHADRACK
 MOTLOUNG KEKETSO ELIAS
 MOTAUNG NTAFUWA
 MOSIA HLOPHEHO VINCENT
 MASOPHA NTSIKI VICTOR
 SIFOMBE ANELE JONAS
 MALINDI KENEUWE YVONN
 NZIMANDE MAMOTUBA SELINA

EIGHTEENTH RESPONDENT
 NINETEENTH RESPONDENT
 TWENTIETH RESPONDENT
 TWENTY-FIRST RESPONDENT
 TWENTY-SECOND RESPONDENT
 TWENTY-THIRD RESPONDENT
 TWENTY-FOURTH RESPONDENT
 TWENTY-FIFTH RESPONDENT
 TWENTY-SIXTH RESPONDENT
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 THIRTY-FIRST RESPONDENT
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 FORTY-FIFTH RESPONDENT
 FORTY-SIXTH RESPONDENT
 FORTY-SEVENTH RESPONDENT
 FORTY-EIGHTH RESPONDENT
 FORTY-NINTH RESPONDENT
 FIFTIETH RESPONDENT
 FIFTY-FIRST RESPONDENT

RAMMILE PATRICK JONAS	FIFTY-SECOND RESPONDENT
MOKOENA MOHANE PETRUS	FIFTY-THIRD RESPONDENT
MOKWENA MOOKGO JULIA	FIFTY-FOURTH RESPONDENT
MOKOENA TELLO JANABARIE	FIFTY-FIFTH RESPONDENT
MABASO MADINGAAN JOHANNA	FIFTY-SIXTH RESPONDENT
MOKOENA DIKELEDI JEANETT	FIFTY-SEVENTH RESPONDENT
MASEKO PULENG LIESBETH	FIFTY-EIGHTH RESPONDENT
MOLETE PHINDIWE CONSTANCE	FIFTY-NINTH RESPONDENT
NALE MAHADIYO EVA	SIXTIETH RESPONDENT
DHLAMINI MAMOKETE SHIRLEY-ANN	SIXTY-FIRST RESPONDENT
RADEBE SEBONGILE IMMACULATE	SIXTY-SECOND RESPONDENT
RADEBE MAFA GOODWILL	SIXTY-THIRD RESPONDENT
NKATLO DIHLABI PATRICK	SIXTY-FOURTH RESPONDENT
RADEBE PHAKISO	SIXTY-FIFTH RESPONDENT
MPHUTI MODISE	SIXTY-SIXTH RESPONDENT
LETETE MAKHOLOTSO LIZBETH	SIXTY-SEVENTH RESPONDENT
MASEKO MZONDEKI ABRAM	SIXTY-EIGHTH RESPONDENT
MOTSOENENG MAHLOMOLA CEDRICK	SIXTY-NINTH RESPONDENT
MOTSOENENG BETALIS	SEVENTIETH RESPONDENT
NYAMA MOHLOPHEHI PETRUS	SEVENTY-FIRST RESPONDENT
MNGUNI MFIKI JAMES	SEVENTY-SECOND RESPONDENT
SIKHOSANA SIMON	SEVENTY-THIRD RESPONDENT
SIKHOSANA PASEKA	SEVENTY-FOURTH RESPONDENT

Neutral citation: *Nketoana Local Municipality v Malinga Ntombizodwa Alice and Others* (3136/2025) [2026] ZAFSHC 242 (17 April 2026)

Coram: NAIDOO J et CRONJÉ AJ

Heard: 16 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for the hand-down is deemed to be 15H00 on 17 April 2026.

Summary: Review of illegal state action terms of s 172 of the Constitution – municipality appointing 67 general workers without complying with applicable legislation - more

workers employed than were budgeted for and advertised – appointing seven contract workers into permanent positions – appointments illegal – appointments reviewed and set aside – workers acting bona fide when accepted appointments – each party pays its own costs.

ORDER

1 The appointment of the first to seventy-fourth respondents as general workers and thus employees of the applicant on or about 15 or 25 April 2025 is reviewed and declared unlawful and set aside.

2 In accordance with s 172 of the Constitution of the Republic of South Africa, 108 of 1996, the first to seventy-fourth respondents are to be remunerated for services rendered in their capacities as employees until the end of September 2025.

3 Each party shall pay its own costs.

JUDGMENT

Cronjé AJ

[1] This is a legality review in terms of s 172 of the Constitution of the Republic of South Africa. A government institution cannot review its own administrative decisions under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but must do so in terms of s 172 of the Constitution. The applicant is a local sphere organ of state (municipality) provided for in s 151 of the Constitution, which leads to this s 172 review.

[2] It is created and regulated by a number of legislative instruments, of which the Constitution, the Local Government: Municipal Structures Act 117 of 1998 (Structures Act), the Local Government: Municipal Systems Act 32 of 2000 (Systems Act), and the Municipal Finance Management Act 56 of 2003 (MFMA) are material to this application. The applicant (the municipality) governs the municipal affairs of the small rural towns of Reitz, Petrus Steyn, Lindley, and Arlington in the Free State Province. It serves a population of approximately 69,000.

[3] Some of the respondents are members of the Independent Municipal and Allied Trade Union (Imatu), while others are members of the South African Municipal Workers'

Union (Samwu). Imatu and Samwu appeared to have funded the litigation on behalf of their respective member respondents, on whose behalf several preliminary (*in limine*) points were raised. The court was advised at the start of the hearing that the point in respect of jurisdiction was being abandoned.¹ The other points *in limine* will be dealt with in the judgment as they are intertwined with the merits.

[4] One of the preliminary points raised is that Samwu and Imatu should have been joined to the proceedings in their capacities as unions. The municipality states that neither union has standing to represent members or to argue their case. The legal principles of joinder are trite. Direct and substantial interest in the subject matter before the court is the prerequisite for joinder. If a direct and substantial interest is established, a joinder of a party is necessary. In my view, the unions are unlikely to be affected by the outcome.² The judgment in this matter has no adverse effect to them; this judgment affects the respondents personally and has no bearing on their membership of a union. Although not all respondents have filed supporting affidavits, I will accept that all are affected in a similar fashion and granting the relief that the municipality seeks binds them.

The municipality's case

[5] The municipality advertised 43 vacant positions for which it budgeted on its existing staff establishment. The first to sixty-seventh respondents were shortlisted and interviewed. During the same period, the sixty-eighth to seventy-fourth respondents (referred to as 'the Seven'), who were contract employees, were permanently appointed to positions in which they had been acting. They could not permissibly be appointed permanently as their appointments were the consequence of an incorrect application of a collective agreement.

[6] The applicant states that it may do no more and perform no more functions than those conferred upon it by legislation. It relies on s 195(1) and (2) of the Constitution, which broadly provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that a high standard of professional ethics must be promoted and maintained, efficient, economic and effective

¹ Reference was made to *Booyesen v Beaufort West Municipality and Another* [2025] ZALAC 49; [2025] 10 BLLR 981 (LAC); (2026) 47 ILJ 129 (LAC).

² *J.C.S v J.J.S and Others* [2021] ZAGPPHC 647 para 25-27.

use of resources must be promoted, public administration must be accountable, transparency must be fostered by providing the public with timely, accessible and accurate information, and good human-resource management and career-development practices must be cultivated to maximise human potential.

[7] The municipality alleges further that its duties, powers and obligations are also governed by the Systems Act, the relevant sections of which I deal with briefly herein. Section 55(1)(e) of the Systems Act provides that as head of administration, the municipal manager is, subject to the policy directions of the municipal council, responsible and accountable for the appointment of staff other than those referred to in s 56(a) of the Employment Equity Act 55 of 1998.

[8] Section 66 of the Systems Act provides that no person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment and a decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3). It appears that several persons applied and were interviewed, whereafter 67 were recommended for appointment. These appointments took effect on 25 April 2025. The municipality states that this was the first irregularity, as there were only 43 vacancies advertised.

[9] Section 67 of the Systems Act provides that a municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of s 72(1)(c), to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons as staff members.

[10] It is common cause between the parties that the salient provisions of the Local Government: Municipal Staff Regulations³ (Staff Regulations), with the exclusion of Regulation 19, were adhered to. The divergence between the municipality and the respondents arises in respect of regulation 19, which provides that reference checks and

³ GNR.890 of 20 September 2021: Local Government: Municipal Staff Regulations, *Government Gazette* No. 45181, with effect on 1 July 2022.

personal credential verification for shortlisted candidates must be conducted by verifying the candidate's suitability for the position with the current or previous employer and establishing the validity of the candidate's qualifications. It includes determining whether the candidate has been dismissed previously for misconduct or poor performance by another municipality or employer, and, if so, the nature of that misconduct or poor performance; and verifying any other additional personal credentials as may be required by the nature of the job such as criminal records, identification document, security clearance and, where necessary, credit checks. Critically, a substantive written report on the outcome of the reference checks and personal credential verification must be compiled and considered before the appointment is concluded. It is not a mere checklist. Regulation 20 provides that before deciding to appoint, the municipal manager or delegate must satisfy himself or herself that the candidate meets the relevant requirements of the post.

[11] The municipality adopted a Recruitment Policy (the policy).⁴ The policy is unsigned, and when the respondents disputed it, the municipality states that it was adopted during a virtual meeting of the council held on 30 June 2022. Item 137/06 in the minutes indicates that the council noted that the Staff Regulations apply to all municipalities and staff members. In Item 138/05, it was noted that the council approved the recruitment policy. The policy is attached to the minutes. I am not convinced that the respondents' dispute is a genuine dispute of fact. The respondents did not refer to any other document, except for the Local Government: Guidelines for the Implementation of the Municipal Staff Regulations⁵ (the guidelines) and alleged verification to show how the statutory prescripts were complied with. I am satisfied that the policy was lawfully adopted, and even if I am wrong, the staff regulations still govern the process.

[12] The municipality states that the policy was applied when it advertised the 43 positions. It provides for conducting reference checks and credential verifications of all shortlisted candidates for a specific position. A written report must be compiled pursuant to these steps being undertaken and be considered before the appointments are made.

⁴ Reviewed Recruitment Policy 2022-2023, Nketoana LM.

⁵ Local Government: Guidelines for the Implementation of the Municipal Staff Regulations, promulgated under s 72, read with s 120 of the Local Government: Municipal Systems Act 32 of 2000, published in *Government Gazette*, No. 45181, Notice 891 on 20 September 2021.

According to the municipality, no such reports were compiled and were not considered before the appointments were made. This was unlawful, and there is no room for differentiating among those appointed. The policy in this material respect mirrors the regulations.

[13] In respect of the Seven, the municipality states that they were appointed at a meeting of the Local Labour Forum⁶ (LLF) held on 11 April 2025. The municipality states that LLF is not an independent, autonomous, and recognised decision-making body for conclusive, outward, and effective action. Attached to the minutes is a list containing the names of the Seven. They would be employed at Reitz. Item 011/04 in the minutes of the meeting concerns the permanent appointment of contractual employees. It reads:

'Section 61 of the Local Government Municipal System [sic] Act No. 32 of 2000 direct [the] municipality, in accordance with law and subject to any collective agreements to develop and adopt appropriate systems and procedures, consistent with any prescribed in terms of section 72(1)(c) to ensure fair, effective and transparent personnel administration.

Kindly find the attached list of employees that ere [sic] on contract now permanently appointed, and a list of those that are still on contract that needs to be confirmed as permanent employees of the municipality.

Resolved:

That the Local Labour Forum take note and condone the confirmation of contractual employees to permanent bases.' (Own emphasis.)

[14] In respect of the Seven, the South African Local Government Association (SALGA) collective agreement provides in clause 18 for the appointments and promotions of employees. The municipality states that there are two provisos for such appointments. Firstly, the position and the remuneration associated with it must be budgeted for by the municipality; secondly, the position itself must have been established in terms of s 66 of the Systems Act. The collective agreement does not provide for temporary workers appointed under a temporary contract to be appointed permanently. All seven were appointed on temporary employment contracts, and these positions do not form part of the staff establishment. Beyond providing temporary work, the municipality has not budgeted for those positions. After the LLF meeting and erroneously so, the Seven were appointed. This was unlawful.

⁶ These structures are workplace forums established in Chapter V of the Labour Relations Act.

[15] Clause 18.2 provides:

'18.2 The affected employees in a section that qualifies for a promotional position that becomes available must be considered and having regard to the following:

18.2.1 to follow due formal processes;

18.2.2 be informed by the approved recruitment policy of the municipality;

18.2.3 to be transparent and fair and;

18.2.4 in the event that the policy does not exist the process of promotion must form subject of consultation in the Local Labour Forum.' (Own emphasis.)

[16] The Chief Financial Officer (CFO) reported the irregularities in a memorandum to the Director of Corporate Services. He states that discrepancies were identified and needed to be addressed before the persons could be added to the payroll. Twenty-eight of the positions were not advertised, which would cost the municipality R3 620 131.48 per annum in basic salaries alone. The Director of Corporate Services was made aware that the MFMA dictates that the CFO is to ensure that unauthorised, irregular, fruitless and wasteful expenditure and any other loss be prevented in terms of s 78(1)(c).

[17] Section 172(3) provides that a senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of s 79, commits an act of financial misconduct if that senior manager or official deliberately or negligently fails to carry out the delegated duty, contravenes or fails to comply with a condition of the delegated power or duty, makes an unauthorised, irregular or fruitless and wasteful expenditure, or provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection (1)(d).

[18] After the CFO's concerns came to the municipal manager's attention, he ordered an internal investigation. The municipality held a meeting with the affected persons on 11 June 2025 and with Imatu and Samwu on 13 June 2025, but no resolution was reached. Both Imatu and Samwu state that the application is premature. An internal investigation is already underway and incomplete. The outcome of that investigation may be resolved, narrowed, or altered, rendering the present application speculative and a waste of judicial resources.

[19] In reply to Imatu's members' answering affidavit, the municipality emphasises that the answers are bald, vague, and merely dismissive of the assertion that verification checks were not conducted. If a report was compiled, both Imatu and Samwu would have had access to it. Although a court may exercise its discretion under s 172 of the Constitution, the question of prejudice does not arise in assessing whether an irregularity has occurred. The municipality lacks the funds to remunerate all the respondents and cannot incur unlawful or unauthorised expenditure. The municipality maintains that clause 5 of the guidelines mirrors the requirements of regulation 19. It demonstrated its sympathetic stance by making payments to the respondents until the end of September 2025. It acted equitably and justly. It needs to appoint 43 workers, for whom it has allocated a budget. It cannot use funds from other sources to fund the illegality.

Imatu's version

[20] Imatu is not a party to the proceedings but represents some of the respondents.⁷ It appears that these opposing respondents, although not 43 individuals, maintain that their positions should be differentiated because their appointments were lawful. According to them, they were appointed following a formal recruitment process that included comprehensive shortlisting and properly conducted interviews. Accordingly, the first 43 candidates were part of the recruitment process. Only the 43 shortlisted candidates had their appointments recommended. This has, in my view, important implications for all the respondents.

[21] The process was fair, transparent and lawful. It appears that councillors and political office-bearers purportedly demanded and submitted the names of preferred candidates who were not part of the recruitment and selection process and were introduced after the fact. The municipality, as the custodian of the recruitment documentation, should be able to distinguish between those lawfully appointed to the advertised and budgeted positions and those not appointed. After the short-listing process was completed, Ms Libuseng, a shop steward of Imatu, participated in the LLF meeting where it was agreed that certain employees on fixed-term contracts for more than two years should be permanently absorbed. This was apparently intended to avoid

⁷ The first, second, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth, twenty-seventh, twenty-eighth, thirty-first, thirty-second, thirty-fourth to thirty-seventh and fifty-eighth respondents.

potential labour disputes being referred by Imatu and Samwu.

[22] The respondents assert, without distinguishing between the 43 individuals and the remaining candidates, that there was full compliance with the Systems Act. They maintain that the recruitment and appointment processes complied in all material respects with the staff regulations. They contend that they met or exceed the minimum standards required for the positions and therefore satisfy the competency and qualification requirements mandated by the regulations. According to them, reference checks were conducted. This assertion is, however, qualified when they state: 'However, in the unlikely event that this Honourable Court finds that some references or credentials were not properly verified, I am advised, which advice I accept, that such failure constitutes a procedural irregularity of a minor and non-material nature.'

[23] The respondents argue that a well-established principle in administrative and labour law holds that minor procedural deficiencies that do not compromise the substantive fairness of a process or the legality of a decision do not automatically render a contract void or unlawful. If verification of references or credentials was not conducted, such an omission does not fundamentally undermine the contractual relationship nor disqualify the respondents from their positions. Such an oversight cannot serve as a valid ground for the review or invalidation of appointments, especially where the respondents clearly demonstrate that they meet the requisite qualifications and experience. They assert that the recruitment and appointment processes followed complied with the guidelines, which set out detailed procedural requirements to ensure transparency, fairness, and legality. They agree that clause 5 of the guidelines stipulates that reference checks and personnel credential verifications *must* be conducted in accordance with Regulation 19. They aver that the checks were conducted, but if the court finds any deficiencies, these shall constitute minor procedural irregularities that do not invalidate the appointments, particularly when other substantive criteria and procedural safeguards were satisfied.

[24] It is contended that not all 67 appointments are irregular or unlawful. There is no basis for distinguishing between those appointed to the original 43 positions and the others. It is later stated that there is a clear and material distinction between those appointed to the approved and budgeted posts and those whose appointments may be

in dispute. Their appointments (apparently those on whose behalf the affidavit is drawn) were valid and lawful and should be upheld, and that any attempt to cluster them with other appointees in discrimination is factually incorrect and legally unfounded.

[25] The municipality has alternative remedies and must exhaust internal and statutory procedures. They contend that the restriction on compensation for services rendered after 1 July 2025 is arbitrary and unjust and constitutes a failure to comply with the Labour Relations Act 66 of 1995 (LRA) and collective agreements. The respondents rely on the validity of their appointments, undertake duties and responsibilities in good faith, and would be unjustly deprived of their livelihoods if these matters are challenged, thereby contravening their constitutional right to fair labour practices. Section 86 of the LRA provides for joint decision-making in the LLF (workplace forums). A reading of the section does not, in my view, answer whether the forum has the power to appoint contract employees to the permanent staff establishment or even condone it. It can therefore not be accepted that the staff structure overrides the explicit provisions of the regulations and the staff policy.

Samwu's reply

[26] Samwu is not a party to the proceedings but represents some of the respondents.⁸ Their case is virtually on all fours with the case of the respondents represented by Imatu. They state that the municipal manager is authorised to appoint them, did so, and failed to append the staff establishment. It is not within the municipality's power to review the employment of all respondents because *some may* have been appointed irregularly. The municipality should be able to differentiate between the respondents. It is, however, also stated that on the municipality's papers, it is impossible to determine which 43 were, presumably, lawfully appointed.

[27] There are 83 vacant positions, which were budgeted for and the municipality needs the employees to ensure service delivery. The incorrect number of vacancies that were advertised, is on their version, immaterial and of no consequence. If some appointments were irregular the court retains a just and equitable discretion, presumably

⁸ The third to eleventh, thirteenth, eighteenth, twentieth to twenty-third, twenty-fifth, twenty-sixth, twenty-ninth, thirtieth, thirty-third, thirty-eighth to fifty-first, fifty-third-fifty-seventh, fifty-ninth-sixty-seventh respondents.

to dismiss the application which would then confirm the appointments. They aver that it has become common practice that the municipality does not perform reference checks.

[28] According to them the Seven's appointments were deemed to be permanent in terms of the provisions of s 198D of the LRA. I could not find support for this assertion in the section. They rely on the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies (the Code).⁹ The Code, in my view, does not abolish the reference checks but provides that the checks should not be used indiscriminately or for purposes that are unrelated to the requirements for the position. It does not per se diminish the obligation or relevance of the checks. In their affidavit and, to some extent, in the affidavit of the other respondents, there are hints of estoppel. I will deal further with this aspect later in this judgment

Legal principles

[29] An illegality cannot be rectified by the actor itself. In *Merafong City Local Municipality v AngloGold Ashanti Limited*,¹⁰ the Constitutional Court held:

'[41] The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to *Kirland*, in *Economic Freedom Fighters*. He pointed out that our constitutional order hinges on the rule of law:

"No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No

⁹ *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices*, published in GN 1358 of 4 August 2005, issued by the Minister of Labour on the advice of the Commission for Employment Equity, in terms of s 54(1)(a) of the Employment Equity Act 55 of 1998.

¹⁰ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC).

binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.” (Footnotes omitted.)

[30] Imatu refers to *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (Gijima)*¹¹ where the Court emphasised that self-review applications must be properly pleaded and substantiated. According to Imatu, the municipality failed in this respect. I do not agree. The municipality pleaded illegality, and I found sufficient support for this. The Court in *Gijima* held:

‘[39] *Pharmaceutical Manufacturers* tells us that the principle of legality is “an incident of the rule of law”, a founding value of our Constitution. In *Affordable Medicines Trust* the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.”

[40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.’ (Footnotes omitted.)

[31] Raising estoppel against the clear provisions of statute will involve the development of the common law. There are limits to this. In *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd.*,¹² the Court held:

‘[20] I accept, as did Boruchowitz J, that courts are enjoined to develop the common law, if this is necessary. That power is derived from sections 8(3) and 173 of the Constitution. Section 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to ‘promote the spirit, purport and objects of the Bill of Rights’ (S v

¹¹ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).

¹² *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd.* [2007] ZASCA 28; [2007] SCA 28 (RSA); 2008 (3) SA 1 (SCA).

Thebus 2003 (6) SA 505 (CC) para 25). This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes (*Pharmaceutical Manufacturers Association of South Africa; In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 49). The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55).

[21] Faced with such a task, a court is obliged to undertake a two-stage enquiry. First, it should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent. If the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. (See *S v Thebus* para 26.)' (Footnote omitted.)

[32] This decision was referred to in *Merifon (Pty) Limited v Greater Letaba Municipality and Another*¹³ where the Constitutional Court also considered the application of the *Turquand* rule, a species of estoppel:

'[42] This brings me to another submission advanced by Merifon, namely, its reliance on the doctrine of estoppel and the *Turquand* rule. Does the *Turquand* rule apply in respect of municipalities and where innocent third parties are involved? It is trite that void acts cannot be resuscitated through the *Turquand* rule. It is also trite that the *Turquand* rule is a species of estoppel and therefore cannot be raised to cure an action that is *ultra vires*, as opposed to one that is *intra vires* (within one's legal powers), but suffers some other defect. The doctrine of legality is applicable and decisively trumps Merifon's argument. Furthermore, *Fedsure*, as referred to by the Supreme Court of Appeal, remains decisive authority especially in relation to acts in the local government sphere. The incorrect number of vacancies that were advertised, is on their version, immaterial and of no consequence.' (Footnotes omitted.)

Discussion

[33] The respondents' plight is understood. They aspired for employment and jumped through all the hoops, but one, to secure a position. They cannot be blamed for feeling done in and for being disgruntled. One gathers from the Imatu respondents' papers that councillors and political office-bearers purportedly demanded and submitted the names

¹³ *Merifon (Pty) Limited v Greater Letaba Municipality and Another* [2022] ZACC 25; 2022 (9) BCLR 1090 (CC),

of preferred candidates who were not part of the recruitment and selection process and were introduced after the fact.

[34] These councillors and political office holders have little, if any, say in how the municipality's executive should perform its statutory duties. In all spheres of government, legislation determines staff establishments, the approved number of positions, the qualifications required for appointment, the budgets for filling positions, and the criteria and processes to be followed in filling positions. The extent of politicians' involvement in these processes, namely, members of municipal councils, is also regulated. When these roles were blurred in the appointment of nearly twice as many persons as the posts approved for advertisements, something was bound to go wrong, and it did.

[35] The Systems Act imposes onerous duties on all employees, particularly senior managers and the municipal manager, who serves as the accounting officer. The Director of Corporate Services' sympathetic stance towards the respondents is understandable, but his views cannot oust the clear provisions of the operative instruments governing appointments.

[36] Unions in the workplace play an indispensable role in protecting and advancing their members' interests, but they also have a responsibility to ensure that prescribed processes are followed. To that extent, they also act in the interest of the fiscus and the public in general. They should have known that the reports were not prepared. The categorical statement of the municipality and the ambivalence expressed by the union representatives do not raise sufficient doubt about the veracity of the municipality's version.

[37] It is impossible for a court to accede to a proposal that the municipality differentiate between those lawfully appointed in the advertised and budgeted positions and the others when there is no report, even if any of the respondents met or exceeded the minimum standards required for the positions and satisfied the competency and qualification requirements mandated by the regulations.

[38] Both sets of respondents rely on material compliance. Imatu itself argues that the instruments establish minimum substantive and procedural safeguards. In support of this,

Imatu relies in part on *South African Municipal Workers Union v Letsimeng Local Municipality and Another*.¹⁴ The facts in that matter, however, differ markedly. The court did not determine the final relief but granted interim relief pending the substantive review application. Regulation 19 did not enter the fray.

[39] I agree that if the safeguards are the minimum to be complied with, the municipality failed and therefore acted illegally. Any argument that there was substantive compliance cannot succeed. The Regulations and the recruitment policy are clear on the requirements to be met. It cannot be accepted that the Code waters down the prescribed requirements. If it was intended to do so, it would have stated it explicitly. Wording to this effect is ordinarily found where a document uses the word 'notwithstanding', and this is not the case. Samwu relies on *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) (Allpay)*¹⁵ to support its argument that the materiality of the irregularity must be determined and that what would be just and equitable should be considered. I do not understand *Allpay* to hold that such compliance renders illegality moot. The Court accepted that the illegal actions had an effect, but also devised a mechanism for correction. The Court inter alia held:

'[30] Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.

[31] In the merits judgment this Court stated:

"Once a finding of invalidity . . . is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an

¹⁴ *South African Municipal Workers Union v Letsimeng Local Municipality and Another* [2024] ZALCJHB 106.

¹⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

unsuccessful bidder will have to be assessed in that context.” (Footnotes omitted.)

[40] It is speculative that the municipality's investigation may show that all respondents met the verification standards. This would still mean that only some of the applicants may be appointed. Samwu relies on *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*¹⁶ for the proposition that, *in appropriate circumstances, a court will, in the exercise of its discretion, decline to set aside an invalid administrative decision*. The facts, however, are different from those before us. The Court also remarked that the appellants' stance on the impracticability of restarting the tender process to complete the remaining work strikes it as correct. The repair and maintenance components of the contracts were interrelated. The order of the court *a quo*, if implemented, was likely to be not only disruptive but also to give rise to a host of problems, not only in relation to a new tender process but also in relation to the work to be performed.

[41] Samwu also relies on *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*.¹⁷ In that matter, the court noted that despite trying to do the right thing, the MEC delayed reprehensibly in bringing the application. She appointed the Task Team with relative haste after hearing of the complaints; however, after receiving the Task Team's Report, it took her about 20 months to bring the application, at which point the employee had occupied the post for over four years. The MEC also did not explain her delay.

[42] As indicated, the facts are different from those before us, but there are elements that may marginally favour the argument for prejudice. The Court in *Khumalo* also held: '[67] Thus it appears as if Mr Khumalo did not meet the requirements of the post and that his promotion, in consequence, was unfair. However, we are left with no means accurately to verify whether the absence of reasons to motivate the departure from the requirements reflects that there truly were no reasons or if those reasons are merely not discoverable at this late stage. A full picture of the promotion's legality is thus not reliably ascertainable on the evidence before the Court, nine years after the fact. While the MEC might not be responsible for the entire period

¹⁶ *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90; 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA).

¹⁷ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

of the delay that affects the Court's assessment of the decision's lawfulness, objectively the passage of the extended period of time since the decision was made stands in the way of this Court making a clear determination of the promotion's unlawfulness. This is a consideration rather peculiar to these facts and the particular basis of the challenge.

[68] The nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained, and although we might ameliorate the consequences of a possible finding of unlawfulness in remedy, the nature of the claim does not warrant condoning the delay.

[69] The Labour Court erred in overlooking the delay. While the Court was correct to be cautious in permitting the delay to non-suit the MEC, its simple reference to promoting public accountability and the balance of convenience, as the basis on which to condone, is an inadequate consideration of the depth of difficulties faced by a court when confronted with a review in the labour context, following the passage of an extensive and unexplained delay of this nature. While the Court accurately acknowledged its ability to ameliorate prejudice to Mr Khumalo in the remedy, it did not adequately consider the fact that the MEC gave no explanation for the delay or the extent to which the delay constrained an accurate review. In the result, the Court misdirected itself in overlooking the delay and the grounds for this Court's interference with its exercise of discretion are established. The delay should non-suit the MEC in relation to her application for the review of Mr Khumalo's appointment.' (Own emphasis.)

[43] It is not for this Court to decide which of the 43 candidates must be appointed or retained for the 43 budgeted positions. There is no entitlement to be appointed in unbudgeted positions. On the municipality's papers, it is impossible to determine which 43 succeeded or may succeed. The vacancies were advertised, and who fills them is material to the municipality and the communities to be served.

[44] A court cannot sanction an illegality. If the appointments are not set aside and left to the municipality and the respondents to address the issue, the illegality will continue and be given effect to. It is incomprehensible how a result that arose from the interference of politicians and counsellors, and from a lack of legislative compliance, can be lawful or condonable. In *Affordable Medicines Trust and Others v Minister of Health and Another*,¹⁸ on which Imatu also relies, it was affirmed that the doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public

¹⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49-50.

power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'¹⁹ In this sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[45] It can be accepted, in favour of the respondents, that entering employment contracts is not *ultra vires* the powers of the applicant. In *South African Municipal Workers Union and Others v Johannesburg Metropolitan Municipality and Others*²⁰ there was a conversion of fixed-term employees to permanent employment. The court held that the inference is that the conversion was not *ultra vires*. The respondent also regarded the conversion as irregular rather than *ultra vires*. The court did not find it desirable or necessary to determine whether the conversion fell within the powers delegated to the executive mayor, whether the municipal manager approved the conversion (he certainly supported it), what powers were delegated to the municipal manager, or whether the respondent's officers were clothed with actual or ostensible authority. The court held that the conversion certainly had legal consequences and could not be set aside unilaterally. The employer's decision to rescind the conversion could not stand.²¹

[46] I could not find references in that case to the legislation applicable to the facts before us. These were conversions and not fresh appointees from outside the organisation. More importantly, there were no more appointees than advertised positions, and the budgeting issue did not arise. A concerning fact is that the LLF apparently condoned the appointments of contractual employees to a permanent basis. I could not find a provision in the LRA that stretches its powers that far. In *Department of Transport and Others v Tasima (Pty) Limited*²² it was held:

'No constitutional principle allows an unlawful administrative decision to "morph into a valid act". However, for the reasons developed through a long string of this court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is

¹⁹ Ibid para 49.

²⁰ *South African Municipal Workers Union and Others v Johannesburg Metropolitan Municipality and Others* [2024] ZAGPJHC 200; (2024) 45 ILJ 1134 (GJ).

²¹ Ibid para 41.

²² *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 147.

adjudicated upon, it has binding effect merely because of its factual existence.'

Conclusion

[47] The appointment process was not finalised by a reference check, and the compulsory report was not prepared and considered. There was a budget only for 43 positions. With apparent external influence and overreaching by the LLF, all the respondents, including the Seven, were appointed. This is a classic case where the appointments cannot stand. Although one can sympathise with the respondents, there is no remedy available or reasonable discretion that can be exercised in their favour for this flagrant breach of the law and the impossible situation in which the municipality finds itself.

Costs

[48] The respondents applied for 43 positions. Whether they appreciated that more people (than there were available posts) were appointed is unclear. However, when the municipality made them aware of the illegality, they remained steadfast in enforcing their contracts. They, assisted by their unions, should have appreciated the risks of this litigation.

[49] The municipality's conduct is far from exemplary. The officials, and possibly politicians and councillors, negated the requirements of which they should have been aware. They, after all, adopted the recruitment policy in line with the regulations.

[50] The municipality succeeds with the application, and a successful party is normally entitled to its costs. In this matter, however, it would not be fair and just to order the respondents to pay the costs of opposing the application. They had everything to fight for, but the law is unfortunately not in their favour. Considering the facts, arguments and the law, it would be fair and just for each party to pay their own costs.

Order

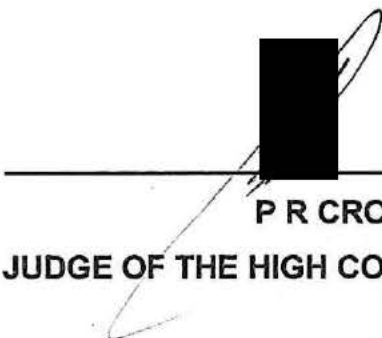
[51] In the circumstances, I propose that the following order be made:

1 The appointment of the first to seventy-fourth respondents as general workers and thus employees of the applicant on or about 15 or 25 April 2025 is reviewed, declared

unlawful and set aside.

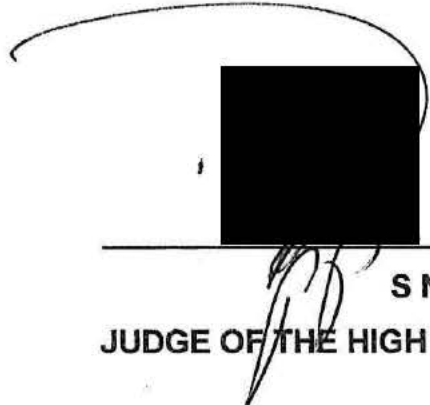
2 In accordance with section 172 of the Constitution of the Republic of South Africa, 108 of 1996, the first to seventy-fourth respondents are to be remunerated for services rendered in their capacities as employees until the end of September 2025.

3 Each party shall pay its own costs.



P R CRONJÉ
ACTING JUDGE OF THE HIGH COURT

I concur, and it is so ordered



S NAIDOO
JUDGE OF THE HIGH COURT

Appearances

For the Applicant:

Adv S Grobler SC

Instructed by:

Niemann Grobbelaar, Bethlehem
c/o Phatshoane Henney Inc, Bloemfontein

For the 1st, 2nd, 12th, 14th-17th,
19th, 27th, 28th, 31st, 32nd, 34th-
37th and 58th Respondents:

L A Pretorius

Instructed by:

Francois Du Plessis Attorneys
Pretoria
c/o Kleingeld Attorneys
Bloemfontein

For the 3rd-11th, 13th, 18th, 20-23rd
25th-26th, 29th-30th, 33rd, 38th-51st
53rd-57th, 59th-67th Respondents:

T Du Preez

Instructed by:

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