

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 89657/14

1/4/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
2016-03-22	
DATE	<i>Stienstra</i> SIGNATURE

In the matter between:

MOGALAKWENA LOCAL MUNICIPALITY
SHELLA WILLIAM KEKANA

1ST APPLICANT
2ND APPLICANT

and

MEMBER OF THE EXECUTIVE COUNCIL FOR
CO-OPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL AFFAIRS
(COGHSTA)

1ST RESPONDENT

THAPELO MATLALA
TLHALEFI ANDRIES MASHAMAITE
L.D. LANGA

2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

N.S. MONTANE
M.A. TSEBE
M.R. LEBELO
VAALTYN KEKANA
SANNY TLHAKU
SAMUEL MATHEBULA
LESIBA JACOB ASHALA
LESIBA JACKSON MATHABATHE
RAMASELA LINAH MAHLAELA
MOKGAETI FRANCINAH MUTSHIMYA
RAMOKONE MINKY MOLEKOA
DAVID MAGONGOA
LESETJA CHARLES KGANYAGO
MONICCA SENOAMADI
ERNEST RANTHUPA
NELSON NGWETJANA
NAKEDI MABULA
NELLY MONENE
LESIBA JAIRUS LEBELO
L.G. LEGODI
EMILY MANGANYI
LEBOGANG BRENDA MOKGOTHO
MAPHUTI RAHAB LEBELO
MAMMA MILOANA
ENOCK MANAMELA
LAWRENCE SOMO
RAISIBE ANDRINA MATSEMELA
ZUNAID SURTEE
MANKOPANE MICHAEL RAPATSA
MALESELA FRANS MOKWELE
LESETJA PHILLEMOM ERIC GWANGWA
MAHLODI JOSEPHINE MADIBA
MADIBANA CATHY LENTSOANE
MAPULA SHIRLEY TEFU

5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
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28TH RESPONDENT
29TH RESPONDENT
30TH RESPONDENT
31ST RESPONDENT
32ND RESPONDENT
33RD RESPONDENT
34TH RESPONDENT
35TH RESPONDENT
36TH RESPONDENT
37TH RESPONDENT
38TH RESPONDENT

MANKALE SOLOMON MOLABA
P.P. SELEPE
MINISTER OF POLICE
NATIONAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICE
PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE,
LIMPOPO PROVINCE
STATION COMMISSIONER, SOUTH AFRICAN
POLICE SERVICE, MOKOPANE,
COL. MOGWANENG

39TH RESPONDENT

40TH RESPONDENT

41ST RESPONDENT

42ND RESPONDENT

43RD RESPONDENT

44TH RESPONDENT

J U D G M E N T

HIEMSTRA AJ

INTRODUCTION

[1] This is an application for the review and setting aside of decisions made and actions taken by the first respondent, the Limpopo Member of the Executive Council for Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA) (the MEC) and the decisions made, resolutions purportedly adopted and actions taken by the 3rd to 40th respondents, who claimed to be the lawful council of the Mogalakwena Local Municipality.

[2] I cannot determine from the papers who exactly the MEC was from time to time during the events that are the subject matter of these proceedings. In the earlier stages the MEC was Mr Kgetjepe and in the later stages it was Ms M.G. Makhurupetje. If I use the wrong pronoun in the course of the judgment, it is because the deponents to the various affidavits have not made it clear which MEC they referred to.

[3] This application came before this court as an urgent application for interim relief pending the review application, which is set out in Part B of the Notice of Motion. There is also an application to hold the MEC in contempt of an order granted by Tuchten J on 19 June 2014 under case number 35248/14. I shall deal with these proceedings below.

[4] Whether the first applicant, the Municipality, is still an applicant is in issue. The 3rd to 40th respondents claim that they have withdrawn the Municipality as an applicant in their capacity as the lawful council.

[5] The 2nd respondent is an employee of the South African Local Government Association (SALGA). No relief is sought against him.

[6] The applicants have withdrawn the relief sought against the 41st to 44th respondents. They are the Minister of Police, the National and Provincial Commissioners of the South African Police Service (SAPS) and the Station Commissioner of Mokopane Police Station.

[7] I shall refer to the 1st applicant as the Municipality and to the first respondent as the MEC. As appears below, the 3rd to 40th respondents purported to take over the municipality and constituted themselves as the lawful council. I shall refer to that newly constituted body as the purported council. Where I refer to individual litigants by their surnames only I intend no disrespect.

BACKGROUND

[8] The deponent to the founding affidavit is the second applicant, Shella William Kekana. He was the municipal manager. The 2nd applicant claims that the 3rd respondent, Tlhalefi Andries Mashamaite, led a sustained campaign to remove him from his position as Municipal Manager. Mashamaite was the Mayor. According to the 2nd applicant, both MEC's supported Mashamaite throughout the events.

[9] The 2nd applicant gave a detailed account of the events leading up to this application. Ms Makoma Makhurupetje, MEC at the time, and the 3rd to 40th respondents filed separate answering affidavits but declined to deal with the 2nd applicant's version, claiming that it was irrelevant because, according to them, the 2nd applicant had been dismissed.

[10] In my view the 2nd applicant's account of the historical events is highly relevant. The alleged grounds for review appear from these facts. That is the essence of this litigation. Since the respondents did not respond to the 2nd applicant's factual account, I have to base my findings on the version of the 2nd applicant. I am mindful of the fact that his evidence is not objective and I therefore treat it with caution. However, despite this reservation, I find it compelling.

CAMPAIGN TO REMOVE THE 2ND APPLICANT FROM OFFICE

[11] The 2nd applicant alleges that Mashamaite had conducted a sustained campaign, with the MEC and her predecessor firmly in his camp, to remove him from his

position as Municipal Manager. They launched attack after attack, as described below, to achieve his objective. The 2nd applicant claims that the feud was caused by his refusal to engage in fraud, abusing the supply chain management system and unauthorised expenditure.

[12] The feud started sometime during 2013. The 2nd applicant says that Mashamaite had "engineered his removal from office in an underhand manner", resulting in him vacating his office on 12 July 2013. He gave no details as to how this was achieved, but that is water under the bridge and not crucial in the final analysis. However, the 2nd applicant gained the support of the majority of the councillors and was reinstated on 11 October 2013.

[13] Upon his reinstatement, he was instrumental in a resolution by the council to appoint forensic investigators, KPMG, to investigate whether there had been financial irregularities in the conduct of municipal affairs during his absence. The investigators found gross irregularities and unauthorised expenditure. It was found that Mashamaite, in his capacity as Mayor, had grossly abused the mayor's discretionary fund, which had been depleted from R1 784 311 to R192 352,20 during the period 1 July 2013 to 30 October 2013. The upshot was the removal of Mashamaite's from office on 17 April 2014. A new mayor, Mr Mabuela, was then elected.

[14] After the 2nd applicant's reinstatement the MEC and other respondents caused 23 councillors who had supported the 2nd applicant, to be disciplined by the ANC provincial structures. The charges were that they had voted in favour of the 2nd respondent's reinstatement as Municipal Manager on 11 October 2014. The Provincial

Disciplinary Committee (PDC) found them guilty and expelled them from the ANC. They appealed to the National Disciplinary Committee (NDC). The appeal was dismissed on 24 March 2014. The councillors then approached the National Executive Committee (NEC) to review the decision of the NDC. On 10 April 2014 the Secretary-General of the ANC wrote to the attorneys of the expelled councillors saying that the decision of the NDC was final. He further said that it was not permissible in terms of the ANC Constitution to seek a review by the NEC. He therefore effectively declined to place the matter on the agenda of the NEC. Paradoxically, he confirmed to the attorneys that notwithstanding the ruling of the NDC, the 23 councillors remained members of the ANC. He did not state until when they would remain so. Despite the Secretary-General's initial refusal to place the matter on the NEC agenda, he relented after the councillors brought an urgent application and he duly placed it on the agenda. On 21 September 2014 the NEC dismissed the application to review the expulsion of the councillors. One must therefore assume that their expulsion is effective as from 21 September 2014.

[15] In an application between the Municipality and the Provincial Executive Council and Others, case number 35248/2014, the same facts were considered by Tuchten J. He said in the course of his judgment that the councillors had been suspended for two years and not expelled. The fact that the Secretary-General confirmed that the councillors remained members of the ANC despite the finality of the NDC ruling, supports the notion that they may have been suspended rather than expelled. As will be seen later, this is important in deciding whether the councillors ceased to be councillors upon their expulsion or suspension, as the case may be. I must, however,

decide this matter on the facts and allegations before me, and I shall assume that the councillors had been expelled.

[16] There are two categories of councillors in terms of s 22(1) of the Local Government: Municipal Structures Act, 117 of 1998 (Structures Act). It provides as follows:

22 Election of metropolitan and local councils

(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule 1-

(a) by voters registered on that municipality's segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality; and

(b) by voters registered on that municipality's segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.

[17] Councillors elected in terms of s 22(1)(a) are referred to as Proportional Representation councillors (PR councillors). Nine of the 23 expelled councillors were PR councillors. It is a requirement for PR councillors to be members of the party from whose list they had been appointed. A PR councillor who is no longer a member of the party from whose list he or she had been appointed, ceases to be a councillor because he can no longer represent that party. This would have been irrelevant if the councillors had been suspended rather than expelled, but I will base my judgment on the facts alleged in this case. In the event nothing turns on this, because I reached the same conclusion I would have reached if the councillors had been suspended, albeit along a more tortuous route.

[18] The nine councillors held the balance of power between the two factions in the council. Their removal disturbed the balance in the council in favour of the Mashamaite faction. As will be seen below, the Mashamaite faction purported to appoint nine new councillors to replace the nine expelled councillors, no doubt, as Tuchten J said in paragraph [55] of his judgment referred to above, *"to do their bidding in the municipal council."*

[19] The next action was an attempt by the MEC to place the Municipality under administration. On 17 March 2014 the MEC issued a notice to the Municipality informing it that the Provincial Executive Council (PEC) would assume responsibility for some executive obligations of the municipality in terms of s 139(1)(b) of the Constitution. The notice further informed the municipality that the PEC would designate a person to act on its behalf to implement the decision. The person so appointed was a certain Mr Makobe.

[20] Tuchten J said in paragraph [43] of his judgment:

"[T]he seriousness of this step cannot be overstated. With a stroke of the pen, the MEC attempted in favour of functionary of the MEC's own choosing, to circumvent the carefully constructed network of constitutional and statutory powers which led to the vesting in the municipal manager, by the democratically elected representatives of the community served by the municipality, of the municipal manager's powers to administer the funds of the municipality. The functionary selected by the province, declared the MEC, would not be accountable to the council of the municipality and ultimately the voters within the municipality but effectively to the MEC."

[21] As mentioned in paragraph [15], the municipality brought an urgent application under case number 35248/14 for an interim interdict, pending a review application, restraining the PEC, the MEC and Mr Makobe from implementing the decision. The learned judge made the following order on 19 June 2014:

"Pending the final determination in this Court of the application for review set out in Part B of the applicant's notice of motion dated 15 May 2014:

1.1 the first second and sixth respondents are interdicted and restrained from:

1.1.1 implementing in any manner whatsoever, the first respondent's decision to assume, under section 139(1)(b) of the Constitution, responsibility for executive obligations of the applicant; and

1.1.2 Interfering in any way whatsoever with the ability or right of council of the applicant, its municipal manager or any of its officials to exercise powers or perform functions vested in them under the Constitution or any other applicable legislation.

1.2 the first respondent is interdicted and restrained from intervening in the applicant's affairs in terms of section 139(1) of the Constitution and particularly from appointing an administrator to act on its behalf in terms of this subsection;

1.3 the effect of the first respondent's decision to assume responsibility for executive obligations of the applicant under section 139(1)(b) of the Constitution as set out in annexure M2 to the applicant's notice of motion as well as of any actions performed by the sixth respondent relating to such decision are suspended with immediate effect."

[22] Tuchten J said in paragraph [46] of his judgment that the *"intervention appears to be an attempt to gain control of and administer every facet of the Municipality, including the all-important allocation of its available funds, ..."*

[23] The next step in the campaign was the following: On 15 May 2014, Makobe produced a memorandum from the Independent Electoral Commission (IEC), dated 25 April 2014. The memorandum conveyed that nine persons had been declared elected to the council and that they replaced the nine "outgoing councillors". The last-mentioned nine are part of the 23 councillors who had been expelled from the ruling party. They are the 30th to 39th respondents.

[24] On 16 May 2014 the 2nd applicant wrote to the IEC the following:

1. That the 2nd applicant never informed the IEC of any vacancies in the council;
2. Only the municipal manager has the power to declare vacancies in terms of Item 18 of Schedule 1 to the Structures Act.
3. Requested the IEC to provide documentary proof of the basis for the memorandum of 25 April 2014.
4. Requested the IEC to withdraw the memorandum.

[25] On 23 May 2014 the 2nd applicant addressed a letter to the Chief Electoral Officer raising the following matters:

1. The authenticity of the memorandum of 25 April 2014;

2. The fact that the "outgoing councillors" listed in the memorandum were still members of the ruling party. This fact was confirmed by the Secretary-General of the ruling party in a letter date 10 April 2014;
3. Proof that the councillors had ceased to be members of the ruling party.

[26] The Chief Electoral Officer responded on 2 June 2014 in which he:

1. Confirmed "... *the issuance of the PR replacement letter in respect of the nine councillors representing the ANC*".
2. Explained that the replacement letter was a consequence of a declaration of vacancies by the MEC, that he had accepted her *bona fides* and that he had acted in good faith.
3. Stated that in view of the disputed appointment of the administrator of the municipality, he is not in a position to process the filling of the vacant seats in the council until the disputed intervention is resolved by competent authorities.

[27] This letter amounts to a confession that the memorandum of 25 April 2014 had been issued in error as a result of a declaration of vacancies by the MEC. He had accepted her *bona fides* and acted in good faith. In any event, the MEC had no power to "declare vacancies". Only the municipal manager has that power. The filling of vacancies in a municipal council is regulated by Item 18 of Schedule 1 of the Structures Act. It provides as follows:

- (1)(a) *If a councillor elected from a party list ceases to hold office, the chief electoral officer must, subject to item 20, declare in writing the person whose name is at the top of the applicable party list to be elected in the vacancy.*

- (b) *Whenever a councillor referred to in paragraph (a) ceases to hold office, the municipal manager concerned must within seven days after the councillor has ceased to hold office, inform the chief electoral officer accordingly.*

[28] It is therefore clear that the process of filling a vacancy starts with the municipal manager informing the chief electoral officer within seven days after the councillor has ceased to hold office of the vacancy. This action by the municipal manager is commonly referred to as the "*declaration of a vacancy*". There is no provision in the Structures Act, or the Schedules thereto, for the MEC to declare vacancies. Only the municipal manager can declare vacancies. He did not, and correctly so. The nine councillors had not vacated their seats and there were therefore no vacancies.

[29] Despite the fact that the IEC had had all but conceded that the IEC had acted incorrectly upon the MEC's declaration of vacancies, the Limpopo Provincial Electoral Officer addressed an e-mail to both the 2nd applicant and the MEC stating that with reference to the memorandum of 25 April 2014, the nine PR councillors had been replaced in April 2014.

[30] Undeterred by the order of Tuchten J restraining the MEC from interfering in the affairs of the municipality, the MEC informed the 2nd applicant on 24 October 2014 that the nine purported PR councillors would be sworn in on 24 October 2014. The municipality's attorneys wrote a letter to the State Attorney and the MEC. The position of the applicants is set out comprehensively in the letter. It is not necessary for the purposes of this judgment to quote the letter or to deal in detail with its contents. The position of the applicants appears from what was said previously.

[31] On 27 October 2014 the MEC informed the 2nd applicant that the nine persons had been sworn in on 24 October 2014. She instructed the 2nd applicant to convene a special council meeting for 29 October 2014 for the purpose of the election of a new speaker, mayor and Executive Committee. He refused.

[32] On 3 November 2014 armed members of the SAPS in riot gear entered the municipal premises by force in order to give access to the nine purported new PR Councillors. They pointed firearms, broke doors and damaged other municipal property. In a radio interview, the MEC admitted that she had requested the SAPS to invade the premises.

[33] The applicants obtained an urgent interdict on 4 November 2014 restoring the status quo.

[34] On 5 November 2014 the 2nd applicant obtained from some councillors a copy of an invitation from the MEC to attend a special council meeting in terms of s 29(2) of the Structures Act on 6 November 2014 at the council Chamber at 14:00. The invitation was issued following a request by 3rd to 40th respondents. The invitation stated that the main business of the meeting would be to "appoint" a new Speaker, Mayor and Executive Committee as well as the "Role of the Municipal Manager." This invitation by the MEC to the councillors is again in defiance of the interdict against the MEC, restraining her from interfering with the affairs of the council.

[35] On 6 November 2014, the 2nd applicant noticed a number of police officers dressed in riot gear gathering near the municipal offices. He realised that the 3rd to 40th respondents would again attempt to gain entry to the offices in order to proceed with a meeting convened by the MEC. In order to ensure the safety of staff members the 2nd applicant ordered them to leave the premises.

[36] The Sheriff awaited the 3rd to 40th respondents and the police officers and served the court order obtained on 4 November 2014 on them. Undeterred, the respondents left the premises and proceeded to the Oasis Lodge in Makopane where they held their meeting.

[37] In addition to the submission that the convening of the meeting was in contempt of the interdict granted by Tuchten J, the applicants contend that the MEC had no power in terms of s 29(2) to call a special meeting of council. S 29(2) provides thus:

(1) The speaker of a municipal council decides when and where the council meets subject to section 18(2), but if a majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request.

(2) The municipal manager of a municipality or, in the absence of the municipal manager, a person designated by the MEC for local government in the province, must call the first meeting of the council of that municipality within 14 days after the council has been declared elected or, if it is a district council, after all the members to be appointed by local councils, have been appointed. [My emphasis].

[38] Subsection (2) provides for the calling of the first meeting of a municipal council. This was not a first meeting of the council. Nowhere in the Structures Act or the Schedules thereto is there provision for the MEC to call a special council meeting.

[39] The meeting was chaired by the 2nd respondent, Mr T. Matlala of SALGA. The minutes of the meeting are attached to the founding affidavit. The following transpired at the meeting:

A new Speaker was elected, Councillor Rahab Lebelo, the 27th respondent;

A new Executive Committee was elected;

A new Mayor was elected, the 3rd respondent, Mr T.A. Mashamaite.

[40] Councillor David Langa, the 4th respondent, presented an agenda item regarding the role of the municipal manager. He said that *"councillors are concerned by the role played by the municipal manager in the "saga" involving 23 former councillors in what councillors believe to be a private party matter between the former councillors and their political party, the ANC"*.

[41] Langa continued, claiming that the municipal manager was guilty, amongst others, of the following transgressions:

- "i. *Playing an active role in dispute involving the 23 former councillors and their political party, thereby taking their side and continuously aligning himself with their course [sic];*
- ii. *Refusing to objectively carry out his function and responsibilities by refusing to implement reasonable requests that are in line with his position as the Municipal Manager, by for example refusing to inform the PEO [Provincial Electoral*

Officer] of Independent Electoral Commission that certain Councillors' position are vacant when called upon by the political party concerned to do so; and using litigation as an excuse even in the absence of a court order when it is not his responsibility to do so;

- iii. *Actively participating in litigation over the saga involving the expelled councillors and their political party and allowing a council resolution to be passed that authorises the use of municipal resources to fund private litigation by the 23 expelled councillors with their political party when this dispute had nothing to do with the Municipality;*
- iv. *Obstructing the process to have the 9 PR councillors sworn in and proceed with their responsibilities in the municipality; and*
- v. *Obstructing them from accessing the municipal council so that they can start assuming their responsibilities as councillors.*

[42] The following resolutions were adopted:

- "1. *The Municipal Manager be immediately placed on special leave;*
- 2. *The Waterberg District Municipality would be approached to second an official.*
(The minutes do not state explicitly the purpose for seconding such an official, but it can be assumed that he would act as Municipal Manager in the place of the 2nd applicant);
- 3. *3. A forensic audit firm would be appointed to conduct comprehensive investigations on the two KPMG forensic reports. [This probably refers to the damning reports implicating Mr Mashamaite, referred to above.]*

4. *All cases relating to the 23 expelled councillors and the Municipal Manager in the name of the municipality be immediately withdrawn; and the all legal firms appointed by Mr S.W. Kekana also be withdrawn with immediate effect;*
5. *All security companies' services must be terminated immediately, allow the Executive Committee to determine where security needs to be deployed and South African Police Service should be requested to guard the municipal premises in the meantime;*
6. *All powers of running the municipality be given back to EXCO to map a way forward; and*
7. *SAPS should be requested to repossess the municipal vehicle that is with the former Mayor."*

[43] On 21 November 2014 the 2nd applicant received a letter from Mashamaite informing him that the new council had resolved to suspend him as Municipal Manager. The 2nd applicant responded by writing to Mashamaite that neither his suspension nor the election of Mashamaite as Mayor, nor any of the resolutions adopted at the meeting of 6 November were recognised.

[44] The disposed councillors, the Mayor, the municipal manager and staff remained in occupation of the municipal premises until 24 November 2014. During the course of 24 November a number of SAPS vehicles started gathering near the municipal offices. They withdrew at approximately 16:30 but returned after a short while, followed by Mashamaite and a number of civilian vehicles. The 2nd applicant gave instructions for the gate to be locked. The SAPS members requested Mashamaite to remove his private vehicle from the entrance and they positioned a Nyala armoured vehicle in

front of the gate. Mashamaite was inside the Nyala. In the meantime, members of the Mogalakwena Residents' Association, who were strongly opposed to the reinstatement of Mashamaite as Mayor, gathered at the gate. Stone-throwing ensued and the SAPS fired rubber bullets at the group. The SAPS contracted a locksmith to break open the gate. They then escorted Mashamaite and other persons onto the premises. At approximately 16:45 the SAPS opened the gates and chased employees from the premises. On 25 November 2014 staff members who wanted to report for work, were prevented from entering by members of a new security company, apparently employed by Mashamaite. Later in the day, Mashamaite addressed the staff members outside the gate and instructed them to return to their workstations. He warned them to obey his instructions or be dismissed. According to the 2nd applicant, Mashamaite was determined to access funds of the Municipality held in a walk-in safe. It is not necessary to deal with the details of this incident, but it resulted in a scuffle between Mashamaite and two employees of the Municipality over the keys to the safe.

[45] Officials of the Municipality attempted on several days after 26 November 2014 to gain access to the municipal offices but they were prevented by security guards.

[46] On 28 November 2014 the 2nd applicant and other applicants obtained another court order to allow them to enter the premises and to carry out their duties. I was not favoured with a copy of the order. However, security officers prevented the sheriff from serving the order.

[47] On 4 December 2014, the impugned council held another special meeting, presumably called by Ms Maphuti Rahab Lebelo, the 27th respondent, in her alleged capacity as speaker of the council.

[48] At this meeting Mashamaite tabled a report of the Executive Committee, in which it is recorded that all steps taken by the impugned council had been lawful; that all legal action launched by the 2nd respondent had been unauthorised; that such actions should be withdrawn and that the 2nd respondent might be guilty of gross misconduct. It was further reported that the Executive Committee had resolved that, pending investigation of the conduct of the 2nd respondent, he be placed on precautionary suspension.

[49] The impugned council then resolved as follows"

"Council resolved that:

"12.1 appoint _____ secondment from the Waterberg District Municipality from COGHSTA or Waterberg District Municipality as an Acting Municipal Manager with immediate effect for 3 months pending the finalisation of the investigations and the disciplinary processes to be instituted against the Municipal Manager."

[50] The council considered the report of Mashamaite regarding the position of the 2nd applicant and after "adjudicating" [sic] the report, the council resolved as follows:

"1.1... to allow the Executive Committee to terminate all legal firms' appointment by the Municipal Manager involved in various matters and cases pending in courts in the name of the Municipality and appoint other legal firms to review and advise the Municipal Council on their further conduct."

1.2 ... agreed to ratify or adopt the steps taken by the Mogalakwena Municipality Executive Committee in terms of putting the Municipal Manager on precautionary suspension instead of special leave as per council resolution of the 06th November 2014 at the Hall of Oasis Lodge.

1.3 The Mogalakwena Municipal Council further agreed to ratify that Coghsta be requested first to second the administrator and that the Waterberg District Municipality be approached for secondment if Coghsta is unable to second."

[51] This situation prompted another urgent interdict on 4 December 2014, which was blatantly ignored.

[52] On 4 December 2014 the 2nd applicant received a letter informing him that his suspension had been ratified by the new council.

[53] On 8 December 2014 the MEC wrote to Mr P.P. Selepe (the 40th respondent) informing him that she had approved his appointment as Acting Municipal Manager "with immediate effect until the post is filled."

[54] The applicants contend that the MEC had no power to appoint the 40th respondent as Acting Municipal Manager. S 54A, subsections (1), (2) and (2A)(a) of the Local Government: Municipal Systems Act, 32 of 2000 (Systems Act) provide as follows:

(1) *The municipal council must appoint-*

(a) *a municipal manager as head of the administration of the municipality;*

or

(b) *an acting municipal manager under circumstances and for a period as prescribed.*

(2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.

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

Subsection 6(a) provides:

"The municipality may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed." [My emphasis]

[55] The MEC purported to appoint the 40th respondent "with immediate effect until the post is filled." This she can only do in terms of subsection 54(6)(a). If she appointed him in terms of subsection 54A(1)(b), then she could not have appointed him for a period exceeding three months [See subsection (2A)(a)]. The two subsections are not contradictory, they envisage different situations. The situation contemplated in 54A(1)(b) is the temporary absence of the municipal manager, while 54(6)(a) contemplates the situation where the position of the municipal manager had become vacant and the position had been advertised. In this instance, the position was not vacant and a new position had not been advertised.

[56] The MEC has clearly exceeded her powers in appointing the 40th respondent.

[57] On 25 January 2015 the impugned council purported to withdraw the Municipality as an applicant in this matter and filed a notice accordingly.

[58] The 2nd applicant was summarily dismissed on 31 March 2015 following a disciplinary enquiry.

[59] On 13 May 2015 the 2nd applicant brought an urgent application against the Municipality, the MEC, Mr P.P. Selepe, the newly appointed Acting Municipal Manager, and other interested parties in this court under case number 28113/15. He sought to have his suspension and the disciplinary proceedings against him set aside. The matter came before Hughes J. She dismissed the application on the grounds that the High Court lacked jurisdiction in the matter. She found that only the Labour Court had such jurisdiction. The 2nd applicant then instituted proceedings in the Labour Court where judgment is still pending.

[60] In my respectful opinion the judgment of Hughes J on this score is clearly wrong. That case did not concern the fairness, or otherwise, of the dismissal. Only if the applicant in that case (the 2nd applicant in this case) had claimed that his dismissal had been substantively or procedurally unfair, would the Labour Court have had exclusive jurisdiction. At issue before Hughes J was the lawfulness of the decisions to institute disciplinary proceedings. The 2nd applicant, as applicant in that case, sought to have the disciplinary proceedings set aside, not the finding and sanction of the disciplinary committee. The applicants' case was, and still is, that the MEC and some councillors had violently overthrown the legitimate council and unlawfully installed the new council, and the new council had no power to act on behalf of the municipality.

CONTEMPT OF COURT

[61] This prayer, which is number 5 of Part A of the Notice of Motion, was postponed *sine die* by Ismael J on 29 December 2014. The original prayer was the following:

"5. That a rule nisi with return date 6 January 2015 do hereby issue calling upon the 1st Respondent to show cause why the following order should not be made a final order:

5.1 declaring that the 1st Respondent is in contempt of the Order of this Honourable Court granted under case number 35248/2014 on 17 June 2014 by His Lordship Mr Justice Tuchten;

5.2 that the 1st Respondent be incarcerated for a period of 90 days or such other period as his Honourable Court may deem fit;

5.3 that the 1st Respondent pay the costs of this application for an order of committal on a scale as between attorney-and-own-client."

[62] As appears from paragraph [21] above, Tuchten J made, amongst others, the following order in the application to interdict the attempt to place the municipality under administration:

"The first second and sixth respondents are interdicted and restrained from:

1.1.2 Interfering in any way whatsoever with the ability or right of council of the applicant, its municipal manager or any of its officials to exercise powers or perform functions vested in them under the Constitution or any other applicable legislation."

[63] As appears from the above, the MEC has thereafter, in alliance with Mashamaite and his supporters, imperiously interfered in the affairs of the council. Amongst others, she was instrumental in the violent invasion of the council offices on

3 November 2014 and 24 November 2014; she invited councillors to a special council meeting to be held on 6 November 2014 at the request of a contrived majority of councillors; she unlawfully convened the meeting of 6 November 2014 and she appointed the 40th respondent as acting municipal manager without any statutory authority to do so.

[64] Counsel for the MEC, Mr Mokhari SC, pretended to be utterly perplexed about the basis upon which it is alleged that the MEC had been in contempt of the order. His perplexity is curious. The order is unambiguous. The MEC had been interdicted from interfering in the affairs of the municipality. Despite the order she blatantly continued to interfere in the most high-handed manner. Mr Mokhari argued that the proceedings before Tuchten J had nothing whatsoever to do with the current litigation. This submission is patently wrong. The actions taken by the MEC as set out above are part and parcel of the strategy to have the 2nd applicant removed from office.

THE CASE OF THE RESPONDENTS

[65] The first respondent, the MEC, and the 3rd to 40th respondents opposed the application.

[66] The MEC stated in her answering affidavit that her response was limited to the relief that impacted on herself or on the appointment of the 40th respondent, Selepe, whom she had appointed as Acting Municipal Manager.

[67] The respondents did not put up a version of the events prior to the meeting of 6 November 2014. Their point of departure is that the meetings of 6 November and 4

December 2014 had been properly constituted and that all the resolutions adopted were lawful. They made no attempt to justify any of their actions deposed to by the 2nd applicant.

[68] The respondents raised two technical defences, namely that the same issues and relief sought are the subject matter of other pending litigation (*lis pendens*); and that the 2nd applicant has no *locus standi* to bring the application.

LIS PENDENS

[69] The MEC contends that the applicants had, in previous proceedings which have not been withdrawn, challenged the lawfulness of the meeting of 6 November 2014. The 3rd to 40th respondents support this submission. The respondents gave no details of these alleged proceedings and the applicants are therefore unable to deal with the submission, except to deny it. The 2nd applicant says that if the respondents have the proceedings under case number 82129/2014 in mind, the facts and issues in that case were different in that it was an application for an order declaring the meeting unlawful. In any event, he says that the application has indeed been withdrawn. In the absence of an opposing version, I must accept that the application has been withdrawn. The defence of *lis pendens* therefore has no merit.

LOCUS STANDI

[70] The second defence is that the 2nd applicant has no *locus standi* to bring the review application. The first basis for this challenge is that he had been suspended on 4 December 2014 and dismissed on 31 March 2015. The second basis is that he,

the 2nd applicant, brings the application not in the public interest or on behalf of a group or class of people, but in his personal interests.

[71] I shall first deal with the second basis. The applicant need not bring the application in the public interest or on behalf of a group or class of people. In convening the meeting the MEC purported to exercise a public power or public function in terms of legislation. In terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), this constitutes administrative action. In terms of s 6(1) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

[72] The fact that the 2nd applicant may have been suspended and ultimately dismissed depends on the lawfulness of the meetings of 6 November and 4 December 2014. If they were unlawful, then the resolutions or decisions to suspend him are similarly unlawful and stand to be reviewed and set aside.

[73] The 1st respondent dealt seriatim with the prayers set out in Part B of the Notice of Motion. Her answer in each instance is simply that all her actions had been lawful. She completely ignores all the allegations and submissions of the applicants.

CONCLUSION

[74] The applicants have made a compelling case for relief. Counsel for the applicants handed up a draft order. I am, however, not prepared to make certain orders contained therein orders of court. The outcome of this application is to restore the situation that pertained before 6 November 2014. The old legitimate council is at liberty to repudiate the decisions made by P.P. Selepe; to withdraw appointments

made by the purported council; to appoint any other service providers; and to reinstate dismissed employees.

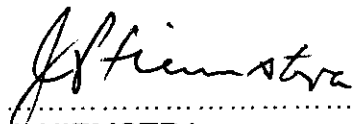
I therefore make an order in the following terms:

1. The first respondent is declared to be in contempt of the order granted by His Lordship Mr Justice Tuchten under case number 35248/2014 on 17 June 2014.
2. The first respondent is incarcerated for a period of 60 days.
3. The order contained in paragraph 2 above is suspended for a period of five years on condition that the first respondent does not unlawfully interfere with the affairs of the Mogalakwena Local Municipality during the period of suspension. This order applies to any successor to the MEC.
4. The 2nd applicant is reinstated as the municipal manager of the Mogalakwena Local Municipality.
5. The meeting held on 6 November 2014 is declared unlawful.
6. All decisions taken and resolutions adopted at the meeting of 6 November 2014 are declared unlawful and are set aside. These resolutions are the following:
 - 6.1 The election of Maphuti Rahab Lebelo as speaker of the council;
 - 6.2 The election of a new Executive Committee of the council;
 - 6.3 The election of Tlhalefi Andries Mashamaite as Mayor;
 - 6.4 The decision to place the 2nd applicant on special leave;

- 6.5 The appointment of a forensic audit firm to conduct investigations in respect of two reports by KPMG and reports by the Auditor-General;
 - 6.6 The decision to immediately withdraw all cases relating to the 23 expelled, or suspended, councillors and the Municipal Manager in the name of the Municipality;
 - 6.7 The decision to withdraw the mandates of all legal firms appointed by the 2nd applicant;
 - 6.8 The decision to terminate the services of all security companies;
 - 6.9 The decision to grant the purported Executive Committee the authority to determine where security needed to be deployed;
 - 6.10 The decision to grant all powers of running the Mogalakwena Local Municipality to the purported Executive Committee.
7. All decisions taken and resolutions adopted at the meeting of 4 December 2014 are declared unlawful and are set aside. These resolutions are the following:
- 7.1 The election of Lesibana David Langa (4th respondent) as Chief Whip of the council;
 - 7.2 The election of the following councillors as full-time councillors of the Mogalakwena Local Municipality:
 - 7.2.1 Tlhalefi Andries Mashamaite (3rd respondent);
 - 7.2.2 M.R. Lebelo (7th respondent);
 - 7.2.3 N.S. Montane (5th respondent);
 - 7.2.4 R.A. Matsemela (31st respondent);
 - 7.2.5 M.A. Tsebe (6th respondent);
 - 7.2.6 S.M. Hlako (listed as S. Tlhaku in the heading) (9th respondent).

8. Costs:

- 8.1 The first respondent is ordered to pay the costs of the application in respect of her contempt of court on a scale as between an attorney and client;
- 8.2 The first and third to 40th respondents are ordered to pay the costs of this application, excluding the costs of the contempt application against the first respondent, jointly and severally, the one paying, the others to be absolved;
- 8.3 The above costs include the costs reserved on 23 December 2014.
- 8.4 The cost order includes the costs occasioned by the employment of two counsel in respect of the hearing on 2 and 3 February 2016.



J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	3 February 2016
Date of judgment:	22 March 2016 1/4/2016
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