Following
our meeting
on 16th
November
2004
regarding

REPORTABLE

[34] It would appear that the second applicant received this letter at approximately 13h00 on 13 December 2004. This letter was communicated to each member of the National Council from Pretoria. In paragraph 9 of the affidavit deposed to by the first respondent in Cape Town on 16 February 2005, the first respondent states that he took the decision to act in the matter he did after considering the views of Members of the Executive Council from the various provinces. The first respondent further states that he took the decision in Pretoria.

[35] It is quite clear on basis of the record that no decision[1] which adversely affects the rights of any one of the applicants having a direct, external legal effect was taken in Cape Town. Even if the first respondent proposed or contemplated making a decision at the time of the meeting held in Cape Town, the decision was finally made in Pretoria. It is thus clear, in my view, that the decision by the first respondent was taken in Pretoria and thus outside the jurisdiction of this Court. I am not persuaded by the proposition that because the decision taken by the first respondent commenced or flows from a meeting held in Cape Town constitutes a sufficient connecting factor to

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1 Decision, is defined as follows in terms of section 1of the Promotion of Administrative Justice Act:

"'d**ecision'** means any decision of an administrative nature made, proposed to be made or required to be made, as the case may be, under an empowering provision, including a decision relating to –

a) making, suspending, revoking ort reusing to make an order, award or determination;
b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
c) issuing , suspending, revoking, refusing to issue a licence, authority or other instrument;……."

establish jurisdiction.

ALLEGED SUBMISSION TO JURISDICTION

[36] The final point made by the applicants to counter the jurisdictional point is that even if it could be said that both the applicants and the respondents are *peregrini* of this Court, a point which the applicants do not concede both in their papers and submissions, the respondents have nonetheless consented to the jurisdiction of this Court. The applicants base this contention on the fact that the respondents did not raise jurisdiction as a defence in their answering affidavits to the applicants' application for urgent relief; that such consent is furthermore embodied in a court order dated 20 December 2004 by Desai J[2], obtained by agreement, setting out the further conduct of the matter including the filing of further processes including the amendment of the Notice of Motion in order to seek relief, by way of review, of the first respondent's decision to dissolve first applicant; that two further orders[3] were further obtained, by agreement, pertaining to the time table to be followed by the parties. The applicants thus argue the respondents' conduct in agreeing to the aforementioned orders and to the postponement of the matter, is capable of an inference that the respondents consented to the jurisdiction of this Court.

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2 The order by Desai J is contained at pages 184 to 187 of the record.

3 The further orders dated 19 January 2005 and 9 February 2005 per Foxcroft J and Hlophe JP respectively, are contained at pages 189 to 192 of the record.

APPLICABLE PRINCIPLES

[37] It can at this stage of the development of the law regarding the jurisdiction be said without hesitation that submission to a jurisdiction of a court can take two forms. These are that the parties may agree, either at the time of contracting with each other or when a dispute between them has arisen, to submit to the jurisdiction of the court. Alternatively, a defendant may, when sued in a court which would otherwise have no power over him, acquiesce in its jurisdiction[4]. In each case the *onus* will be on the party alleging submission to jurisdiction that the defendant has submitted or consented to jurisdiction either expressly or by conduct consistent only with acquiescence[5]. Innes CJ illustrates the principle thus in *Law v Rutherford*[6]:

> "The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances."

[38] There is no general rule on when the conduct of a party will amount to tacit submission to the jurisdiction of a court. If, in deciding whether or not a person has submitted to the court's jurisdiction, an inference may be fairly drawn either way, then the party who argues that there has been acquiescence with the court's jurisdiction must be held to have failed to discharge the *onus* cast on him[7]. The test to determine an intention to waiver is objective.

APPLICATION OF THE PRINCIPLES

4 Pollak on Jurisdiction: Second Edition by David Pistorius page 9.
5 Pollak *ibid.*
6 1924 AD 261 at 263.
7 The Law of South Africa: Volume II First Re-Issue page 369. See also *Du Preez v Phillip-King 1963(1) SA 801* (WLD) at 804.

[39] The review proceedings were preceded by an urgent application for an urgent relief[8]. In these proceedings the second applicant has advanced, as the basis of this Court having jurisdiction, the fact that the action complained of commenced in Cape Town. This allegation is not repeated in the founding affidavit in support of the review application. In paragraph [31] of this judgment I have made a finding that no decision which adversely affects the rights of any one of the applicants, having a direct external legal effect, was taken in Cape Town and accordingly found against this Court having jurisdiction.

[40] The papers in the application for urgent relief were issued on 15 December 2004. It is not clear on basis of the record as regards when and where service was effected on the first and second respondent. The second respondent's affidavit, in answer to some of the allegations in the founding affidavit for urgent relief, was deposed to in Pretoria on 17 December 2004. In paragraph 5 of his answering affidavit the second respondent states:

> "In the short time permitted to the respondents we are constrained to give the abridged answer below. Neither the first respondent nor I (the second respondent) have had the opportunity to discuss the matter in person with our legal representatives or to reply fully. Where any allegations made on behalf of the applicants are not specifically answered or dealt with, the omission should be construed as a denial."

[41] The record indicates that the matter first came before Van Zyl J on 15

8 The relief sought in the urgent application, amongst other things, was that the first respondent be restrained from purporting to dissolve first applicant.

December 2004. At that stage no answering affidavits had as yet been filed on behalf of any of the respondents. On 20 December 2004 Desai J granted an order postponing the matter to 28 January 2005. This was followed by the order granted by Foxcroft J postponing the matter to 3 March 2005 and a further order by Hlophe JP further postponing the matter to 8 March 2005. All these postponements were by agreement between the parties but obviously subject to the respondents consulting with their legal representatives with a view to filing full and informed affidavits as stated in paragraph 6 of the second respondent's affidavit deposed to on 17 December 2004.

[42] On 31 January 2005 the second applicant deposed a comprehensive affidavit in support of the review application. In this affidavit there is no further allegation made that this Court has jurisdiction to hear the review application nor any allegations that first and second respondents waived their rights to raise jurisdiction as a defence.

[43] It is submitted on behalf of the respondents that the first occasion available to the respondents to deal with the applicants' application fully was when they filed their opposing affidavits in the review proceedings on 16 February 2005. The second respondent, in answer to the second applicant's allegation in his founding affidavit that this Court has jurisdiction to hear the application for urgent relief, had this to say in paragraph 67 of his affidavit deposed to on 16 February 2005:

> "Ad Paragraph 9 thereof
>
> The allegeations are denied. The decision to act in terms of section 5(5) was taken in Pretoria and communicated from Pretoria."

[44] Thus, in his answering affidavit, the second respondent clearly placed

the allegation that this Court has jurisdiction, in dispute. In my view this is not the kind of conduct which could be said to be consistent with either waiver or acquiescence.

As has already been pointed out the matter came before me on 8 March 2005 and on the days which followed when jurisdiction and lack of authority to institute these proceedings on behalf of the first applicant was challenged.

[45] In these circumstances, I cannot, in the absence of any clear indication that the applicants have waived their rights to raise jurisdiction as a defence, or any clear indication that the respondents have submitted to the jurisdiction of this Court, find that the respondent have submitted to the jurisdiction of this Court. I am therefore unable to find that the respondents, from the time the urgent proceedings were instituted up to the stage of the launching the review proceedings, conducted themselves in a manner consistent with acquiescence.

[46] I thus cannot find, on basis of any of the contentions advanced by the applicants, either individually or cumulatively, that this Court either has jurisdiction to hear the application for urgent relief or for the judicial review of the decision by the first respondent. It is thus my considered view that the applicants have not succeeded to surmount the jurisdictional hurdle. In the light of the conclusion I have reached in regard to the jurisdictional point, it is not necessary for me to determine the rest of the other issues, significant as they are, raised by either of the parties.

[47] In the result I make the following order:
[47.1] The application is dismissed with costs which shall include costs consequent upon employment of two counsel;
[47.2] First and second applicant are ordered to pay the costs of these proceedings, jointly and severally, the one paying the other to be absolved.

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N J Yekiso, J