IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4247/2023

In the matter between:

DEMOCRATIC ALLIANCE	**Applicant**
And	
THE SPEAKER OF THE KNYSNA MUNICIPAL COUNCIL	**First Respondent**
THE EXECUTIVE MAYOR OF THE KNYSNA MUNICIPALITY	**Second Respondent**
THE MUNICIPAL MANAGER OF THE KNYSNA MUNICIPALITY	**Third Respondent**
OMBALI PHINEAS SABOLA	**Fourth Respondent**

WESTERN CAPE MINISTER, LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING — Fifth Respondent

MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS — Sixth Respondent

Case Number: 4441/2023

In the matter between:

WESTERN CAPE PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING — Applicant

and

THE KNYSNA MUNICIPALITY — First Respondent

THE SPEAKER OF THE KNYSNA MUNICIPAL COUNCIL — Second Respondent

THE MUNICIPAL MANAGER OF KNYSNA MUNICIPALITY — Third Respondent

OMBALI PHINEAS SEBOLA — Fourth Respondent

Dates of hearing: 18, 20 July 2023

Further affidavits filed in 4247/23: 1, 4 August 2023

Further written submissions in 4247/23: 4, 10, 11 and 16 August 2023[1]

Date of judgment: 10 May 2024

JUDGMENT

PANGARKER AJ

THE TWO APPLICATIONS

Introduction

1. The applicant, the Democratic Alliance (DA/applicant) seeks by way of an Amended Notice of Motion in case number 4247/23, the following relief:

> 1. *It is ordered that this application be dealt with as one of urgency and that the applicant's failure to comply with the Uniform Rules of Court and practice manual be condoned.*
> 2. *Declaring that the decision taken by the Knysna Municipal Council, dated 25 January 2023, appointing the Fourth Respondent as the Municipal Manager is null and void.*
> 3. *In the alternative to paragraph 2:*
>
> *3.1 Declaring that the decision taken by the Knysna Municipal Council, dated 25 January 2023, appointing the Fourth Respondent as the Municipal Manager is unlawful, unconstitutional, and invalid.*
>
> *3.2 Reviewing and setting aside the decision in paragraph 3.1.*
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> 4. *Declaring that the decision taken by the Knysna Municipal Council, on 14 February 2023, to remunerate the Fourth Respondent on the maximum scale (as determined by Notice No: 43122*

[1] Amended reserved judgment date is 16 August 2023. The explanation for delay in delivery of the judgment was communicated to the Acting Judge President.

of March 2020 on upper limits for Senior Managers) is declared unlawful, unconstitutional, and invalid.

5. *Reviewing and setting aside the decision in paragraph 4.*
6. *Declaring that all decisions taken by the Fourth Respondent, in his purported capacity as the Municipal Manager, including all contracts and all appointments, are declared unlawful, unconstitutional and invalid and are reviewed and set aside.*
7. *In the alternative to paragraph 6:*
   - *7.1 Declaring that all decisions taken by the Fourth Respondent, in his purported capacity as the Municipal Manager, including all contracts and all appointments, are declared unlawful, unconstitutional and invalid and are reviewed and set aside.*
   - *7.2 Suspending the order in paragraph 7.1 for a period of ten court days. During such period the First to Third Respondents, or other authorised officer, may apply to the High Court, on supplemented papers, for an order in terms of s 172(1)(b)(i) of the Constitution in respect of any specified decision of the Fourth Respondent in his purported capacity as Municipal Manager of the Knysna Municipality.*
8. *Any respondent, who opposes this application, is ordered to pay the applicant's costs, including the costs of two counsel.*
9. *Further and/or alternative relief.*

2. In case number 4441/2023, the Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning (MEC), sought in March 2023 by way of an urgent application, to declare the decision taken by the Knysna Municipal Council (the Council) on 25 January 2023 to appoint Ombali Phineas Sebola (Sebola) as it's municipal manager, null and void. In terms of an order granted on 17 April 2023 by Acting Judge President Goliath, the matters were set down for a joint hearing on 18 and 20 July 2023 respectively. The order also encapsulated a time-table for the delivery of the Rule 53 record, affidavits and heads of argument.

3. By the time the matters were heard, both had transformed to the extent that the issues and disputes, but for costs in case number 4441/2023, were constrained to the DA's application in 4247/2023. I therefore address this application first in the judgment. The aspect of costs in 4441/2023, and after discussion in chambers with counsel and their attorneys, was heard first.

4. The DA's application was riddled with interlocutory applications, which are considered below. Suffice to point out as an introduction that I granted certain orders in a striking out application and indicate the reasons for the order in the judgment.

5. After two full days of argument and in light of the aforementioned striking out application, the landscape of the DA's application was the following: the first to fourth respondents would deliver their further affidavits referred to in the striking out application, on 28 July 2023 and the applicant's legal representatives would inform me by 31 July 2023 if their client intended to file a further affidavit, whereafter judgment would be delivered in early August.

6. Counsel for the applicants in both matters requested that an order be granted that Sebola's appointment by the Council be declared null and void and that reasons for the order were to follow. Counsel for the respondents disagreed, requesting that the orders not be piecemeal, but composite, at the conclusion of my judgment. The motivations in respect of the requests by all the parties in both matters were fully canvassed and considered and given the numerous issues in the DA's application, I decided against granting a piecemeal order.

7. The DA launched its review and remedial relief application on 10 March 2023 and the MEC delivered his application for a declaratory order on 15 March 2023. In the DA's application, only the first to fourth respondents participate therein. Where the role players and parties are referred to without reference to their title, this is not intended to be disrespectful of them.

The parties

8. The respondents in 4247/2023 are the Speaker of the Knysna Municipal Council, the Executive Mayor and municipal manager of the Knysna Municipality who is cited in his administrative capacity and in his personal capacity, the MEC and the Minister for Co-

operative Governance and Traditional Affairs. The first to fourth respondents are simply referred to herein as the respondents. The Minister abides the decision of the Court.

9. In case number 4441/2023, the respondents are the Knysna Municipality, the Speaker of the Knysna Municipal Council and the Knysna municipal manager in his official and personal capacities. The only issue for determination is costs. There is an overlap of facts in these applications and several facts which are common cause, are set out below.

Summary of common cause facts

10. On 9 December 2021, the Knysna Municipality advertised the position of municipal manager, with a closing date for applications being 5 January 2022[2]. The position was re-advertised on 13 June 2022, with a closing date of 8 July 2022[3], but because time limits were not adhered to, the post was re-advertised further on 27 September 2022 with 10 October 2022 being the closing date[4].

11. Messrs Adonis, Smit and Sebola were shortlisted for the vacant post and the candidates underwent an assessment and interview process on 6 December 2022. The selection process and panel excluded the DA Chief Whip and other Chief Whips. Roy Steele and Associates[5] were appointed to attend to the screening and shortlisting of the candidates and subsequently compiled a selection report, which has loosely been called the *Steele report* during these proceedings[6].

12. The Steele report ranked the three candidates' performances on interviews and written assessments as follows:

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[2] SS3
[3] SS4
[4] SS5
[5] The reference during the hearing and in written submissions has been to *Steele consultants*, which is the description used interchangeably herein
[6] SS6

"DJ Adonis and Smit - Advanced
RK Smit - Advanced
OP Sebola - Needs development/Competent[7]*"*

13. The Steele report also ranked the three candidates on their knowledge and experience competencies. Once again in these categories, Smit and Adonis ranked as *"advanced"* in all the competencies, while Sebola ranked as *"Needs development as per written assessment/Minimum Competency Course completed*[8]. It is common cause that the Steele report did not contain the candidates' interview scores, but the evidence indicated that Sebola fared the best in the interview itself. That notwithstanding, the Steele report made the following findings at paragraphs 5.3 and 6 thereof:

*"**5.3 Findings***

5.3.1 The interview outcome is an inverse relationship with the assessment outcome. The assessment outcome showed that Mr DJ Adonis and Mr RK Smit feature as the most competent amongst the three candidates.

5.3.2 Mr Sebola for reasons unexplained made constrictive progress in completion of the case assessment. Financial management skills will require further development.

5.3.3 This may increase the risk of successful occupation of the post of Municipal Manager for Knysna Municipality. However, should the Selection Panel resolve to appoint Mr Sebola on grounds of transformation and representivity, it is strongly recommended that a strong executive management team be appointed to support him and/or support in a form of a mentorship."

6. Recommendations

It is recommended:

6.1 That the Selection Panel takes note of the content of the Selection Report;

6. 2 That the Selection Panel approves the recruitment and selection process, the Long list, Short List and Screening Report;

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[7] SS6, par 5.1
[8] SS6, par 5.2.1

6.3 *That either Mr DJ Adonis or Mr RK Smit be considered for appointment as Municipal Manager in the light of the restricted response to the case evaluation by Mr OP Sebola, or citing reasons readvertise the vacancy and/or indulge in a further recruitment process;*

6.4 *That the contract of employment and the all-inclusive remuneration package be negotiated and finalized by the Executive Mayor within the statutory limits and period allowed;*

6.5 *That it be noted that, within 14 days of Council Decision, a written report including all necessary documents be submitted to the MEC for local government regarding the appointment process and outcome;*

6.6 *That the Human Resources Department, as a matter of courtesy and legal requirement, inform the unsuccessful candidates formally of the outcome of the selection process, and thank them for their application and participation in the process."*

(my emphasis)

14. From the above extracts, it was apparent that Steele Consultants recommended to the Selection Panel that Adonis or Smit be appointed as municipal manager, pursuant to which the Selection Panel prepared its own report[9] to the Knysna Municipal Council. After meeting on 18 January 2023, the Selection Panel concluded that, in respect of knowledge and experience, *"all candidates met the threshold"* [10] with regard to the categories of higher education qualification, work related experience, core managerial and occupational competencies and supply chain management competencies. The Selection Panel's report also stated that it had considered a number of factors, including that Sebola scored the highest in the interview and it ultimately recommended that Sebola should be appointed for the position.

15. However, the Selection Panel's report was silent on the Steele Report's scoring of Sebola's competency assessment, and that either of the other two candidates, Smit or

[9] SS7
[10] SS7, p65

Adonis, were recommended for the post and Sebola was not. A third report, this time by the Executive Mayor, was prepared for the Knysna Municipal Council[11] and it stated that:

> *"The panel in their recommendation of Mr O.P. Sebola took into account a number of considerations, including the fact that Mr. Sebola performed the best and scored the highest points in the structured interview, transformation and representivity. The panel is further encouraged and, as advised by the consultant, further recommends that a strong executive management team be appointed to support the municipal manager."*
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> (my emphasis)

16. The Steele and Selection Panel reports were attached to the Executive Mayor's report and on 25 January 2023, the Knysna Municipal Council held a Special Council meeting. One of the items on the agenda was the appointment of the new municipal manager for Knysna[12]. Suffice to point out that the reports referred to earlier were provided to councillors on the day of the meeting. The agenda indicated that the Speaker ruled that the report on the appointment of municipal manager was to be moved for discussion *"in Committee"* and it indeed was.

17. The Minutes of the meeting reflected that there were various caucus breaks to discuss and consider the reports, with two proposals put forth[13]. One of the proposals, made by the DA's councillor Sharon Sabbagh (Sabbagh), who was also the deponent to the founding affidavit in case number 4247/23, was that the appointment be re-advertised due to material mistakes and irregularities with the interview and assessment process and a lack of information on the scoring of the three candidates.

18. Given the voting for the two proposals, the Speaker used his casting vote to support the Executive Mayor's proposal. It was thus resolved by a majority at the Special Municipal Council Meeting:

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[11] SS8
[12] SS9
[13] SS9, p79

"[a] *That Council takes note of the content of the Selection Committee report;*

[b] *That the recruitment and selection process as reflected in the Selection Committee Report, and consultant report be accepted;*

[c] *That Council takes note that Mr O P Sebola, who performed the best and scored the highest points during the structured interview is competent, for the appointment as a Municipal Manager;*

[d] *That Council appoints Mr O P Sebola as the Municipal Manager for a period of five (5) years on the basis of the findings and the consensus of the Selection Panel;*

[e] *That the Executive Mayor extends an offer of employment to Mr O P Sebola;*

[f] *That the fixed term contract of employment and the all-inclusive remuneration package and subsequent reviews be negotiated and finalized by the Executive Mayor within the statutory limits;*

[g] *That should Mr O P Sebola decline the offer or not sign an employment contract within one month of today's Council resolution, that the Executive Mayor submit a report for the consideration of the appointment of the second or third suitable candidate or the re-advertisement of the position of Municipal Manager;*

[h] *That the report on the appointment of Mr O P Sebola be provided to the MEC for Local Government in terms of Regulation 17(3)(b) of the Local Government: Municipal Systems Act, Act 32 of 2000 and Regulations;*

[i] *That the Human Resource, or a representative thereof, as a matter of courtesy, inform the unsuccessful candidates formally of the outcome, and thank them for their application and participation in the processes."*[14]

(my emphasis)

19. On 7 February 2023, the Executive Mayor informed the MEC of the Council's taken on 25 January 2023 to appoint Sebola as municipal manager, attaching various documents to the correspondence[15]. Sebola was consequently appointed as municipal manager of the Knysna Municipality and it seems undisputed that at a further Municipal Council meeting held on 14 February 2023, it was decided that he would be remunerated on a scale commensurate with the upper limit for senior managers.

[14] SS10,
[15] AB6 in case no 4441/2023

20. It is common cause that section 54A of the Local Government: Municipal Systems Act (the Act)[16], read with the Regulations to the Act, apply to the appointment of municipal managers and acting municipal managers. In lengthy correspondence dated 16 February 2023[17], Minde Schapiro and Smith Inc., the DA's legal representatives, informed the MEC[18] on the process of Sebola's appointment, his assessment as *"basic"* and *"needing development"*, and that the Executive Mayor had misrepresented that Sebola had scored the highest and performed the best out of the candidates. The correspondence indicated that Sebola's appointment violated the Act and Regulations and the MEC was requested to take appropriate steps in terms of the Act, which included an application for a declaratory order or any other legal action against the Municipal Council.

21. The MEC's correspondence to the Executive Mayor on 23 February 2023[19] made it very clear that evident from the judgment of ***Dilosotlhe v Mahikeng Local Municipality and Others[20],*** candidates falling within the *basic* range may be appointed as senior managers in rare situations but the competency framework did not allow for such a candidate to be appointed where other candidates were assessed as *competent* or better[21].

22. Significantly, the MEC's correspondence alerted the Executive Mayor to the fact that to prefer a candidate who was assessed as *"basic"* and *"needing development"* over competent candidates was irrational, regardless of how well the preferred candidate scored in the interview. Sebola's appointment was thus contrary to the Appointment Regulations, and in particular item 6.1 of the Competency Framework provided for in the Act, and was furthermore irrational. The MEC concluded that the decision to appoint Sebola as municipal manager was therefore null and void[22].

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[16] 32 of 2002
[17] SS11
[18] Fifth Respondent
[19] SS17
[20] Case no UM130/2020, an unreported judgment of the North West Division Mahikeng delivered by Gura J on 25 October 2021
[21] SS17, par. 6
[22] SS17, par 7

23. Notwithstanding the MEC's urgent and detailed correspondence, the Executive Mayor was undeterred about Sebola's appointment and the correctness thereof. He held the view that item 6.1 of the Competency Framework provided merely a benchmark for appointments and that Sebola was indeed competent. In support, the Executive Mayor attached a December 2022 assessment of Sebola, which holistically-speaking, assessed him as competent[23]. The latter reference was to the Gijima report, which is referred to in more detail later herein.

24. In the MEC's reply to Minde Schapiro and Smith, he confirmed receiving the report on the appointment, and noted that the report from the Council omitted certain documents and information necessary or prescribed by Regulation 17(4) and that these were requested from the Municipality. The MEC highlighted at paragraph 3 of his correspondence that it appeared that Sebola's appointment was not in accordance with the requirements of the appointment Regulations, and he had requested the Municipality to terminate the appointment, failing which he would act in terms of the legislation.

25. Further correspondence from the applicant's legal representatives on 3 March 2023 to the MEC[24] indicated that the time period for the Municipality to respond to the former's request had lapsed[25]. The applicant reiterated the urgency of the matter in that Sebola's appointment was unlawful and decisions he took were unlawful. The applicant's legal representatives impressed upon the MEC to act urgently, failing which the DA would approach the High Court on an urgent basis.

26. The MEC maintained in his correspondence of 6 March 2023[26] to the Executive Mayor that Sebola's appointment was null and void; that the Steele Report, and not the Gijima Report which was outsourced, was tabled for consideration by the Council on 25 January 2023, and in terms thereof, Sebola was not the best possible candidate for the position; that his appointment was irrational and that the Executive Mayor was required

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[23] See Gijima report, p136 - 145
[24] SS13
[25] The MEC gave the Municipality five days to remedy the appointment of Sebola
[26] AB11 in case no 4441/2023

to notify him by the next day, that the appointment was terminated, failing which steps would be taken to enforce compliance with the legislation.

27. The Executive Mayor's response to the MEC on 8 March 2023 was to request the authority which the MEC relied upon in his earlier correspondence and to indicate that the Municipality would seek legal opinion on the issue of the lawfulness of Sebola's appointment and other issues raised in their continuing correspondence but that he would keep the MEC informed of the way forward. He agreed with the MEC that the appointment must be done lawfully. On the same day, the MEC informed Minde Schapiro of the Executive Mayor's correspondence. Shortly thereafter, on 10 March 2023, the DA issued its application under the above case number, followed a few days later by the MEC's application under case number 4441/2023. Both applications seek to have the Knysna Municipal Council's decision to appoint Sebola as Knysna's municipal manager, invalidated.

28. Given the progression of the two applications, particularly the DA's application, the following further undisputed facts are that the Selection Panel comprised the Executive Mayor, Deputy Executive Mayor, two officials and two Union observers. Furthermore, the Gijima Report was a senior manager assessment report of Sebola in relation to the Thabazimbi Local Municipality. On 17 March 2023, the first to fourth respondents delivered their Notices of Opposition to the DA's application, and the first to third respondents similarly did so in the MEC's application. In April 2023, the Knysna Municipality submitted the Rule 53 record in the DA's application.

29. At the time that Goliath AJP granted an Order taken by agreement in both matters, all indications were that the respondents in the applications would oppose the relief sought. On 1 June 2023, Nandi Bulabula Incorporated, who represented the Municipal respondents in both applications, communicated the following to Minde Schapiro and Smith Inc. in respect of the DA's application:

"2. *Based on further consideration of the matter, our clients accept that the Council's impugned decision to appoint Mr Sebola as its Municipal Manager, taken on 25 January 2023, is flawed and falls to be set aside.*

3. *We accordingly propose that the parties approach the Acting Judge President with a draft order, by agreement, setting aside the impugned decision. In this regard we are further mandated to tender the DA's costs to date."*

(my emphasis)

30. Thus, on 1 June 2023, the Municipal respondents had admitted that Sebola's appointment was to be set aside. During the period 3 to 30 June 2023, the DA and the respondents engaged in settlement negotiations[27] and on 6 July 2023, the respondents delivered their explanatory affidavit, without a condonation application. Given the issues and submissions in the DA's matter, it is necessary to set out the content of the affidavits in some detail.

THE DA's APPLICATION: CASE NUMBER 4247/23

31. Sabbagh, the DA's elected representative and Chief Whip in the Knysna Municipality, was the deponent to the DA's main affidavits[28]. She contends that even if the Knysna Council's decision does not fall to be reviewed as an administrative action under the Promotion of Administrative Justice Act (PAJA)[29], it nonetheless constituted the exercise of a public power and would have to be substantively and procedurally rational, and lawful, under the principle of legality. The applicant's stance was that once the Court found that Sebola's appointment was null and void, the consequences thereof flow naturally from section 54A(3) of the Act, and thus the Court's power to impose a different remedy consequent upon such finding, was limited.

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[27] See record and Chronology of Events handed in by the DA's counsel during the proceedings
[28] The reference naturally excludes the confirmatory affidavits, and later affidavits by other individuals such as Mr Steele and Mr Peters
[29] 3 of 2000

32. Inasmuch as the applicant recognised that the Systems Act required the relevant MEC to check that the appointment of a municipal manager complies with section 54A of the Act, failing which, the Minister may take the steps contemplated in the section, the averment was made that the DA was not precluded from approaching the Court for relief.

33. Sabbagh stated that the standards set regarding the relevant competencies, qualifications, experience and knowledge as outlined in Annexures A and B to the Regulations referencing the appointment of a municipal manager, were to be met by the candidate applying for the post. The achievement levels for each competency was graded as *"superior", "advanced", "competent" and "basic"*. A *"basic"* range[30] scored by an individual was understood to mean that the candidate was deemed unsuitable for the senior manager role. The applicant stated that a candidate who rated *"basic"*, could not be appointed lawfully above the other two candidates who were rated as *"advanced"*.

34. The applicant raised four grounds of review. Firstly, that Sebola was not qualified for appointment as municipal manager for the following reasons: his core managerial and occupational competencies were graded as *"basic"*, he needed development in certain competency areas, made constrictive progress in case management completion and his financial management skills needed development. On behalf of the applicant, Sabbagh stated that these facts were contained in the Steele report, and the Selection Panel and Mayor's reports ignored same and Steele's recommendation that Sebola not be appointed for the post. Thus, the decision to then appoint Sebola, contrary to the requirements of the Systems Act, was reviewable under section 6 of PAJA and under the principle of legality.

35. The second ground of review was that the Knysna Council's decision to appoint Sebola was irrational and unreasonable given that Smit and Adonis were qualified and each scored an *"advanced"* rating. The motivation for this ground was that even though Sebola scored the highest in the interview, he rated *"basic"* in the competency test and was therefore unsuitable for the position. The applicant concluded that in view of this

[30] Item 6 of Annexure A to the Regulations

rating, his performance in the interview was irrelevant. Furthermore, the Selection Panel's motivation for recommending Sebola on the basis of transformation, equity and representivity, which the Mayor also endorsed, was irrational because under the competency test or assessment, Sebola rated *"basic"*.

36. According to the applicant, it was irrational to appoint an incompetent person when the other two candidates were competent and it was never explained why the appointment of either Smit or Adonis would not achieve the transformation, representivity and equity requirements. The Mayor's indication that strong managers could be appointed to assist Sebola was not in line with the Steele report's recommendation warning against Sebola's appointment.

37. The third ground of review was that the meeting of 25 January 2023 excluded the public, which was unlawful. In elaboration, Sabbagh stated that it was unreasonable to exclude the public from what was a vital decision. The applicant emphasised that openness and transparency were founding constitutional values and that there were consequences to closing meetings unlawfully to the public.

38. The final ground of review was that the Knysna Council acted with an ulterior purpose by excluding Chief Whips from the selection process. The applicant stated that despite the Steele report's findings, Sebola was the Council's choice. It attributed this selection to the suspicion that Sebola was willing to award tenders to undeserving persons and had a history of similar conduct. Hence, the applicant further questioned the rationale of the decision to appoint Sebola above any of the other two candidates who were assessed and interviewed.

39. Insofar as the suggested remedial action requested, an order was sought undoing each and every decision which Sebola took while acting as municipal manager from the inception of his appointment. The motivation for the latter relief was three-fold: firstly, Sabbagh stated that such relief was sanctioned by the Act in that an appointment contrary to the Regulationswas null and void. Her view was thus that Sebola's appointment was

unlawful, hence he was never the municipal manager for Knysna and it followed that he had no power to make any decisions.

40. According to the applicant the default consequence of declaring Sebola's appointment invalid, would be to undo the decisions he took as municipal manager, and here the applicant placed reliance upon section 8 of PAJA or section 172(1)(b) of the Constitution[31]. The third reason was that the applicant has concerned that Sebola *"is corrupt and will use his unlawful appointment as Municipal Manager for corrupt purposes"*[32]. In this regard, the applicant expressed a reasonable fear that Sebola would abuse his power, make improper appointments and irregularly award tenders.

41. In her supplementary founding affidavit, Sabbagh stated that the Rule 53 record did not contain all the documents or material required by the Regulations which must be submitted by a candidate when applying for a vacant post. At paragraph 16, she set out what these undisclosed documents were, which included, *inter alia,* details of any dismissal for misconduct. The absence of such documents amounted to non-compliance with the Regulations related to the selection process. Furthermore, the Fundudzi report and the competency assessments were also missing from the record provided. In light of the above, it was contended that the decision was reviewable under section 6(2) of PAJA and the principle of legality.

42. Sabbagh added that the Executive Mayor's reliance on the Gijima report[33] to support his view that Sebola was competent to be appointed as municipal manager when queried by the MEC in February 2023, amounted to impermissible, *ex post facto* justification for the invalid appointment. In a nutshell, the report related to Sebola's suitability for the same position in the Thabazimbi Local Municipality and was not part of the record, nor relied upon by the Selection Panel.

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[31] Act 108 of 1996
[32] Paragraph 117, p43
[33] SS18

43. At the conclusion of Sabbagh's supplementary founding affidavit, she stated that time had passed since Sebola's appointment and recognised that all his decisions may not be capable of being set aside without causing disruption to the Knysna Municipality. She pointed out that the applicant relied on the Fundudzi Report's existence, and not the truth of its content, to hold a view that there were unanswered questions regarding allegations of mismanagement against Sebola. To clarify, the Fundudzi report contained allegations against Sebola related to alleged mismanagement in another municipality.

The case for the Municipal respondents

44. The Speaker of the Knysna Municipal Council (the Speaker), deposed to an explanatory affidavit on behalf of the Municipal respondents. As the issue regarding the scale of Sebola's remuneration fell away, I do not intend to address the Speaker's responses on this aspect in the judgment.

45. The Speaker pointed out that initially the applications were opposed, but after consideration and consultation with legal representatives, *"the Municipality recognises that the Council's decision to appoint Mr Sebola cannot be sustained"*[34]. He explained that this Court could not merely accept an agreed order and would still have to satisfy itself that the terms of a proposed order were competent and proper. The intention was to file an explanatory affidavit setting out why the Municipality accepted that the decision to appoint Sebola was flawed and should be set aside. However, the agreement to a draft order was not intended as accepting all the applicant's allegations[35].

46. The respondents indicated that they did not accept the relief sought at paragraphs 6 and 7 of the Amended Notice of Motion, which they believed to be factually and legally unsound. This was a reference to an order seeking all Sebola's decisions to be set aside, and what may be referred to as a referral order. From the correspondence, it seemed that

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[34] Paragraph 18, p211
[35] See MS2

the parties at least agreed that paragraphs 4 and 5 of the Amended Notice of Motion would not be proceeded with and that the Municipality tendered the applicant's costs up to 3 June 2023.

47. The Speaker confirmed that the respondents' position was that even if the Council's decision was declared null and void, the Court still had the power in terms of section 172(1)(b) of the Constitution to grant a just and equitable remedy. The affidavit highlighted that the Steele report was not requested to make recommendations as to the best candidate for the municipal manager position and it was suggested that Steele may have exceeded his/their mandate.

48. The respondents stated that insofar as the screening process of candidates went, the reference checks on Sebola rendered positive feedback and the applicant did not question this. Furthermore, Sebola's previous employers were contacted, also yielding positive references and it is emphasised that allegations of alleged misconduct were insufficient to disqualify a candidate. Put differently, the Speaker held the view that a candidate must have been charged with *"misconduct of a qualifying nature"*[36] to potentially render that person disqualified from the process.

49. There was no dispute that Sebola had the appropriate qualifications for the position, was never dismissed for misconduct previously, had no criminal record and met the minimum competency requirements, as indicated in the Screening report. The Speaker accepted that the Council should have considered the Fundudzi report once it came to light, but disputed that Sebola was obliged to disclose it in terms of the Regulations as no disciplinary action was ever instituted against him nor was any pending at the time of his application for the post. Furthermore, he stated that Sebola was not in possession of the Fundudzi report which it was understood, was provided to National Treasury. The Speaker acknowledged that the Council accepted that the Fundudzi report, once its existence became known, was a relevant consideration for the Council.

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[36] Paragraph 47, p218

50. The Municipal respondents held the view that Sabbagh incorrectly interpreted the import of item 6.1 of Annexure A to the Regulations as meaning that if a candidate scored *"basic"*, he/she was unsuitable for a senior manager position. The respondents' view was that a *"basic"* scoring entailed that the candidate for the senior manager post, such as a municipal manager post, was deemed unsuitable[37]. As far as the respondents were concerned, item 6 of the Regulations explained that achievement levels were benchmarks for appointments, and not cast in stone.

51. The respondents thus said that the candidate who scored *"basic"* may be appointed provided caution was applied in appointing and promoting him/her. The Speaker accordingly disagreed that the strained construction which the applicant applied to Annexure A of the Regulations was an acceptable interpretation thereof[38]. Furthermore, the Steele and Selection Panel reports understood the provisions of item 6.1 regarding a *"basic"* scoring as not excluding such a candidate from being appointed where it was stated that:

> *"……. However, should the Selection Panel resolve to appoint Mr Sebola on grounds of transformation and representivity, it is strongly recommended that a strong executive management team be appointed to support him and/or support in a form of mentorship"*[39].

52. The respondents held the view that if interpreted correctly, item 6 allowed for the Selection Panel to proceed to recommend Sebola, notwithstanding the conclusion of the Steele report. Furthermore, they made the averment that there was no merit in the contention that Sebola was automatically disqualified because he rated *"basic"* for one of several metrics.

53. The Speaker indicated that the applicant's argument on transformation ignored other considerations such as gender, and he denies that the appointment was irrational. Ultimately, the respondents were of the view that the applicant's metric of measuring

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[37] Paragraph 67, p222
[38] In that it applies to promotions and not appointments
[39] Steele report, par 5.3.3

transformation was not the issue, but the question which arose, amongst others, was whether the Selection Panel's approach to transformation by considering the history of appointments for the position and representation, was lawful and rational, and it is advanced that it was.

54. Insofar as the applicant's criticism in its founding affidavit related to the Steele report, the Speaker disagreed that the report stated that Sebola was unsuitable for appointment, not a qualified candidate, unfit or incompetent. The respondents therefore did not accept the applicant's characterisation of Sebola *vis-a-vis* the Steele report. Interestingly, the respondents contend that the Steele report was a basis for invalidating Sebola's appointment as neither the Steele nor Selection Panel reports contained the actual outcomes of each process[40] upon which the scores for the candidates were derived. It follows, said the Speaker, that the Council thus did not have the candidates' actual results before it in respect of performance and assessment, meaning that the competency assessments were thus absent from the Rule 53 record as Steele did not provided the Knysna Municipality with the documents at the time.

55. The respondents' further issue with the Steele report was that there was a lack of explanation as to what was meant by *"needs development"* and the Municipal Council did not interrogate this at the time of considering the reports. In addition, the competency assessment process of the candidates (especially Sebola) was conducted by a Mr Peters (Peters), a colleague of Steele and the respondents were unaware of this at the time. As for Sebola, who also deposed to an affidavit, he disputed the accuracy of the Steele report insofar as his performance in the competency assessment was concerned[41].

56. According to the respondents, the Gijima assessment of Sebola, and thus the Gijima report which rated him as competent in an assessment for another Municipality, was relevant to Sebola's suitability as municipal manager for Knysna and should thus

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[40] That is, interview, written case study and psychometric test

[41] Sebola alleges that he commenced but did not complete the case study assessment, hence he disputed the reference in the Steele report to *"constrictive progress"*

have been placed before the Knysna Municipal Council. The Speaker stated that the latter report was available to the Mayor who erred when he failed to place the report before the Council as a relevant document to consider. The result thus was that the Council's decision was flawed. Added to that, the Speaker was also of the view that the Fundudzi report, which I refer to below, should also have been placed before the Council, accompanied by Sebola's answers thereto, and here too, an error occurred.

57. While the respondents question the applicant's reliance on the Fundudzi report, they leave it in the Court's hands as to whether annexing certain portions of the said report was legally permissible. To summarize, the Speaker indicated that the allegations against Sebola contained in the Fundudzi report were investigated by the Hawks who found insufficient evidence to pursue the matter further. Nonetheless, the Speaker stated that the Mayor's decision not to place the outcome of his interaction with the Hawks before the Counsel, though taken in good faith, was incorrect[42]. The Speaker accepted that such information should have been placed before the Council so as to decide for itself whether there were obstacles preventing Sebola's appointment.

58. The upshot of these circumstances was that the Municipal respondents admitted that not all relevant information was placed before the Council at the time it deliberated the appointment of the municipal manager. On the issue of exclusion of the public and media to the Council's meeting of 25 January 2023, it was contended that the fact that the meeting was held *in committee* was not unusual when it came to the appointment of senior managers, including a municipal manager. The respondents explained that no one was refused admission into the meeting and certainly, the Speaker denied refusing anyone admission to the meeting.

59. In respect of the last ground of review, the *"ulterior purpose"* suggested by the applicant, the Speaker indicated that the applicant did not allege that there was a Council resolution actually taken on 29 November 2021 to the effect that Whips must attend selection panel meetings. He furthermore stated that the reference to the confirmation by

[42] This interaction related to the content of the Fundudzi report

Melanie Paulsen (Paulsen) in the founding affidavit amounted to inadmissible hearsay evidence[43]. In conclusion on this point, the Speaker stated that the composition of the Selection Panel complied with Regulation 12 in that no party Whips were invited. Furthermore, the applicant's suggestion that the exclusion of party Whips amounted to an ulterior motive was unsubstantiated.

60. The Municipal respondents made it clear that Sabbagh's allegations and speculation in respect of Sebola were scandalous and vexatious and should thus be struck out. The Speaker held the view that her unsubstantiated allegations made against the Council and Sebola were made recklessly, to alarm and to poison the mind of the Court[44]. Furthermore, it was stated that what Sebola did subsequent to his appointment was not relevant to the lawfulness of the processes which lead to his initial appointment.

61. The next aspect was a consideration of the appropriate consequential relief suggested and requested by the applicant. It was common cause that the applicant had forgone the relief sought at paragraphs 4 and 5 of the Amended Notice of Motion. Insofar as consequential relief is concerned, the Speaker indicated was that the default position where a Court invalidated a decision made by a public official body in review proceedings, was that the matter was remitted to that body or official for re-consideration. In circumstances where the applicant had not requested any specific relief as to how the Council must deal with the existing processes to appoint a municipal manager, that would be left to the Municipal Council to determine.

62. In essence, the applicant sought an order that all the decisions made by Sebola since his appointment should be declared invalid, alternatively, the onus was on the Municipality to indicate which decisions ought to be saved. The complaint by the respondents was that there was no reference to specific decisions which were alleged to be contentious, nor was there an indication as to which of Sebola's decisions were to be saved and why. The Municipality refused the applicant's invitation to decide upon which

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[43] Record, page 245
[44] Page 248, par 182

decisions should be saved as it held the view that the application for this relief had *"gaping holes"*[45] . Furthermore, the respondents' views were that the relief sought at paragraphs 6 and 7 of the Amended Notice of Motion was inappropriate because the fact that Sebola's appointment would be set aside did not automatically invalidate the decisions he made which are/were self-standing administrative decisions in terms of PAJA.

63. The respondents' view was that the applicant was not the correct party seeking the consequential relief and that Sebola's decisions stand as valid. The Speaker points put that Sebola's decisions affect persons who were not before the Court, and would include, for example, members of staff and third parties who were awarded tenders or concluded contracts with the Municipality. The Speaker disagreed is that the relief was incompetent because these parties would need to be joined in the proceedings where an order setting aside Sebola's decisions as invalid, was sought.

64. The Speaker, with reference to section 172 (1) of the Constitution read with section 8(1) of PAJA, stated the Court had a discretion to strike down a decision and this must be based on justice and equity relevant to the circumstances of the decision. The applicant sought a sweeping finding by the Court, which then ignored the consideration of justice and equity and in circumstances where the Court had no information regarding such decisions. On behalf of the respondents, the Speaker submitted that in those circumstances an injustice would be perpetrated were the Court to accede to the applicant's request.

65. The respondents do not agree with the DA's interpretation of section 54 A(3) of the Systems Act. The applicant was of the view that Sebola's unlawful appointment was null and void and hence, he was unauthorized to have made decisions, with the result that it rendered these decisions unlawful, automatically. The Municipality contended that if this interpretation of the section were to be followed, it would be unconstitutional as it would deprive the Court of its powers in terms of section 172(1) of the Constitution read with section 8 thereof, to determine when decisions should be set aside.

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[45] Record, p251

66. In conclusion, the respondents accepted that Sebola's appointment must thus be set-aside and that the applicant was entitled to its costs until 3 June 2023. The respondents' stance remained that the relief sought in paragraphs 6 and 7 of the Amended Notice of Motion could not be granted and was without basis. Lastly, in respect of the further costs subsequent to 3 June 2023, the respondents stated that they were entitled to their costs because of the applicant's attitude in persisting in seeking the relief and also sought costs of preparation of the explanatory affidavit which was necessitated by the applicant's approach to the matter. Costs were requested on an attorney and client scale as a result of the gratuitous insults levelled against Sebola and the Council as well as the applicant's stubborn insistence on pursuing the additional relief which, the respondents stated, was inappropriate.

67. In Sebola's affidavit, he explained the interview and assessment processes, which he underwent for the municipal manager post. Suffice to set out that once he became aware that he was actually undergoing a written assessment, he stopped and objected for the following reasons: he was the only candidate who underwent a written assessment while the other two candidates relied on reports from previous assessments; he did not complete the written assessment as the result of the assessment categories could be obtained from the Gijima report. Sebola points out that the Steele report was misleading as it did not disclose his objection and the reason for halting the written assessment, hence it was materially flawed.

68. Sebola attended the Gijima competency assessment on 20 December 2022 in which it was determined that he was competent to hold the position of a senior manager and he advised the chairperson of the Selection Panel that the assessment results may be procured directly from Gijima and expected the Council would consider the report when it met on 25 January 2023 to consider the appointment. Insofar as the Fundudzi report was concerned, Sebola stated that the Hawks considered the allegations contained therein but he was neither provided with nor placed in possession of the report and did not know that at the time, he was the subject of an investigation.

69. Aligning himself with the Speaker's view, Sebola considered Sabbagh's allegations against him as being speculative and without merit, and requested that the averments against him be struck out. He furthermore highlighted the fact that the applicant failed to indicate which tenders he allegedly awarded unlawfully and provided no information on this allegation. Sebola stated that he was compelled to accept the position taken by the Municipality in relation to his appointment as set out in the explanatory affidavit.

70. The Executive Mayor who also provided an affidavit, stated that his failure to place the Gijima report before the Council was an oversight or human error and apologized for this. He confirmed receipt of the report but was of the view that the Steele report was sufficient as its findings did not hamper Sebola's chances for appointment. He also dismissed Sabbagh's speculative claims as to why Sebola was appointed.

The DA's reply

71. In her replying affidavit, Sabbagh took issue that the explanatory affidavit was filed late. She stated that it was irrelevant whether Sebola's appointment would have served transformation because he was not qualified for the appointment and not appointable above the other candidates. Furthermore, she pointed out that the respondents' submissions about Sebola's sterling performance as municipal manager were impermissible as these were attempts to justify his appointment at all costs.

72. Sabbagh addressed the applicant's views that Sebola was ineligible for appointment and cautioned that the respondents were not to sneak in additional review grounds which would be prejudicial to the applicant and could affect the just and equitable remedy. The Court was asked to disregard these allegations and decide the case on the applicant's grounds of review[46]. Sabbagh made the point that the respondents never

[46] For purposes of findings made in the matter, I do not set out the applicant's statements in their replying affidavit regarding self-review

raised concerns about the assessment processes conducted by Steele and Associates prior to the application and the applicant discovered that the Municipality and its attorneys had never contacted them to address Sebola's complaints about/regarding Steele and Peters.

73. On the issue of a remedy, Sabbagh articulated the applicant's fear that were the respondents' versions to be accepted on the remedy aspect, it would open the door to Sebola's re-appointment. It became clear that the versions of Steele and Peters were set out in affidavits to counter what Sebola complained of in relation to the assessment process. The applicant emphasized that Sebola's assessment was fair and in line with Steele's agreement with the Municipality. However, the applicant was of the view that the Municipality appointed Sebola for ulterior purposes[47].

74. With regard to the striking out application, Sabbagh apologized and stated that she withdrew statements made in paragraphs 109, 119, 117 and 124 of her earlier affidavit regarding allegations of wrongdoing by Sebola[48]. Notwithstanding the apology offered, however, she then went ahead to indicate that what was contained in the Fundudzi report was cause for concern because according to her (and/or the applicant), if the findings were correct, then it would be *"reasonable to fear that Mr. Sebola would engage in similar conduct in Knysna"*[49].

75. Sabbagh stated that she did not know of the outcome of the Fundudzi investigation by the Hawks, stated that for purposes of the application, she accepted that the Hawks investigated the allegations in the report and chose not to pursue it, but then did, in my view, an about turn: she stated that the fact that the Hawks decided not to pursue Sebola was not conclusive proof of his innocence. She complained that Sebola had not addressed nor answered the allegations in the Fundudzi report and then concluded that

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[47] Briefly, one of the aspects raised was the fact that Sebola had complained to Phillips during the assessment process and this differs from Steele and Peters' version. The applicant's view was that the complaint about the competency was a new ground of review which should be disaliowed.

[48] Page 288

[49] Paragraph 32.2, p 288

there was thus no basis on which the Court nor the Council could conclude whether the findings in the report were justified or not. According to her, these aspects then do not render him ineligible for appointment but it was an important part of the factual matrix in determining why he was appointed and what the remedy should be.

76. On the issue of the remedies available, more specifically that the Municipality would have to identify decisions taken by Sebola as requested in the Amended Notice of Motion, the suggestion was that the respondents misunderstand the relief. The applicant maintained that the consequence of setting aside Sebola's appointment was that all decisions were invalid and that the question was whether to temper the invalidity by preserving the decisions which he took and for that, no joinder of third parties was necessary. According to the applicant, it had demonstrated that Sebola was compromised and here again, there was a reference to the Fundudzi allegations.

77. Thus, the applicant's view was that the Fundudzi allegations cast a shadow over Sebola's suitability for office and that a remedy must be granted which protected the residents of Knysna. Insofar as which official should accept the responsibility to identify decisions which should stand, the applicant indicated that it had no preference as to who decided on that aspect and simply stated that it cannot be that the Speaker, Mayor and any acting municipal manager cannot perform such function.

78. Peters' affidavit was attached to the replying affidavit and dealt in quite some detail with the assessment of Sebola. He stated that correspondence was sent to Sebola indicating that he would undergo both a competency assessment as well as an interview. In this regard, the deponent referred to annexure GP2, which was not attached to the affidavit. Peters' version differed from Sebola's in that he stated that the nature and assessment were explained and Sebola at no stage expressed any surprise. No complaint was made to Phillips of the human resources department and had there been such a complaint, he would have been advised of it. There was also no indication given that Sebola refused to complete the assessment.

79. Furthermore, Peters confirmed that there was nothing unusual about being required to complete the written assessment and interview on the same day and that that there was nothing unfair about the other candidates' only being interviewed. Mr Steele (Steele), a human resources practitioner and member of Roy Steele and Associates, confirmed in his affidavit that he made it clear to the Municipality that he would be represented by Peters who was employed by his firm as a human resources consultant, that Peters was more than qualified to conduct the competency assessment and interview process and that he (Peters) would be primarily responsible for managing the appointment process. Steele was not present for the actual assessments nor interviews, but confirmed that Sebola was required to undertake a written assessment and interview.

The DA's standing

80. While the applicant came in for some criticism for jumping the gun by approaching the Court for relief, it submitted that it was not precluded by legislation from doing so. The common cause fact was that the correspondence indicated that the applicant's legal representatives communicated with the MEC in February 2023 regarding the issues pertaining to the Council's appointment of Sebola[50].

81. It was evident from the facts that the applicant's legal representatives informed the MEC that the time period for the respondents' compliance had lapsed[51]. Furthermore, all indications were that after the Executive Mayor's correspondence to the MEC, in which he denied irregularities in Sebola's appointment, the MEC indicated that counsel was being briefed and I understand this to mean that he was on the verge of approaching the Court under the auspices of section 54A, as elaborated above. The MEC informed Minde Schapiro of these steps on 8 March 2023[52], and on 10 March 2023, a few days prior to

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[50] SS11

[51] Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs; Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs [2020] ZASCA 153 par 15

[52] Ss14

the MEC's delivery of his application, the applicant approached the Court seeking relief against the various respondents under the banner of a PAJA or legality review.

82. I accept that section 54A sets out a very specific procedure for the appointment of a municipal and acting municipal manager. In ***Notyawa v Makana Municipality and Others*** [53], with reference to section 54A(9) of the Act, the Constitutional Court stated that:

> *"It is apparent that Parliament has entrusted the MEC to monitor compliance with the Systems Act. But where the MEC fails to perform this function, the Minister may intervene and perform the function herself*[54]*."*

83. Section 54A(8) contemplates the action which the MEC must take within a prescribed time period in order to enforce compliance by a Municipal Council, which action includes an application to Court for a declarator on the validity of the appointment or *"any other legal action against the municipal council"*[55]. It is thus apparent that the MEC and the Minister are the enforcers of the substantive and procedural requirements of the Systems Act in relation to the appointment of a municipal and acting municipal manager. Counsel for the parties in this application are *ad idem* on this aspect, but whilst the respondents question the applicants' standing in approaching the Court, the applicant argued that section 54A did not preclude anyone else approaching a Court for relief.

84. Given the course which this application took, the issue regarding the applicant's standing became a secondary issue during the hearing, relegated to the side-lines, but picked up when the respondents wished to drive home the fact that the applicant should not have approached the Court for the relief as per the Amended Notice of Motion. I must note, however, that the respondents did not seek a dismissal of the application on the basis that the applicant lacked standing by virtue of the provisions of section 54A, nor was the Court requested to rule on this aspect first insofar as it being, for example, a point *in limine*.

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[53] [2019] ZACC 43 par 8
[54] Footnote 8 omitted from judgment but the reference is to section 54A(9) of the Systems Act
[55] See section 54A(8)

85. To add, the respondents' counsel's heads of argument addressed the question of the applicant's standing mainly insofar as the just and equitable relief aspect, but the truth of it was that the issue was not pursued with any vigour during argument. Notwithstanding such approach, there was merit in the respondents' argument that this was the MEC's call insofar as enforcement of section 54A is concerned.

86. The question which arises, though, is whether the applicant is precluded from bringing the application because of the supervisory role of the MEC, and failing him, the Minister, in terms of the legislative provisions catered for in section 54A. I was referred to authorities such as ***Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs***[56]***, Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning v Central Karoo District Municipality and Others***[57] and ***Notyawa***[58] as support for the view that the MEC was the functionary to supervise compliance with section 54A in respect of the appointment of (in this case) municipal managers, and that another person/party cannot challenge the decision to appoint a municipal manager.

87. However, the applicant stated that it approached the Court either in terms of PAJA or the principle of legality, and on the basis that it was a political party which had an interest to ensure that *"public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld"* [59], as stated in ***Democratic Alliance v The Acting National Director of Public Prosecutions***[60]. I understand this and the oral submissions to mean that the applicant approached the Court as an own-interest litigant but also as a political party with an interest in the matter, mindful of section 195 (1) of the Constitution. Section 195(1) addresses the basic values and principles governing public

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[56] Full citation is Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs [2020] ZASCA 153
[57] [2023] ZAWCHC 66
[58] Supra
[59] Paragraph 44 of the judgment
[60] [2012] ZASCA 15 para 43-44

administration, which must be underscored by democratic values which, *inter alia,* included a high standard of professional ethics, accountability and transparency[61].

88. From the facts of this matter, and the MEC's application, it is accepted that the Knysna Municipal Council exercised public administrative power when it decided to appoint Sebola and it must therefore be held accountable for the exercise of such power. I have had regard to the authorities referred to above and note that none specifically address the issue of standing in the context of a person/party whoh approaches the Court as an own-interest litigant or a political party under the section 195 banner, in respect of a challenge to the appointment of a municipal manager. The question of standing thus requires further discussion.

89. In ***Merfaong City Local Municipality v SA Municipal Workers Union and Another***[62], the Labour Appeal Court (LAC) considered legal standing of the respondents, a registered trade union and an employee and resident of the relevant municipality, who were the applicants in the Labour Court in an application for review of the municipal manager's appointment. In summary, on the question of standing to bring the review application, the LAC held as follows:

> *"[65] Section 54A of the Systems Act does not expressly deal with standing, nor does it preclude, or oust the standing of persons/entities, or groups, whose interests are directly affected by the appointment. However, sections 54A(8) and (9), arguably, imply, that the appointment of a municipal manager is subject to confirmation by the MEC and the Minister, or implies remedies which such individuals or groups may be obliged to pursue before approaching the court. In this regard, the fact that the appropriate steps that have to be taken by the MEC, (and failing him or her, the Minister), does not have to result in litigation, is informative.*
>
> *[66] The provisions of sections 54A(8) and (9) are measures that also have as their purpose the prevention, or limitation, of a proliferation of litigation, or multiple litigation, or unnecessary litigation, with its attendant consequences, least of which, is the delay that ensues with all of its ramifications. The provisions also seem to maintain and retain the hierarchical responsibility for*

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[61] Section 195(1)(a), (f), (g) Constitution. See also Recycling and Economic Development Initiative of South Africa NPC v Tubestone (Pty) Ltd [2021] ZAWCHC 270 par 40

[62] (2016) 37 ILJ 1857 (LAC)

appointments to be made in compliance with the Systems Act. Even if the employees have an interest in who their manager is, it is not their function or duty to "hire or fire" the manager. The same may be said about ratepayers or residents of the area served by the municipality. That duty still rests with the employer. In the case of an employment of a municipal manager, in terms of the Systems Act, the responsibility for the appointment is shared between the Municipal Council (the employer), the MEC for Local Government and the National Minister responsible for local government.

[67] In keeping with the established precedent, where an internal remedy has not been pursued before a party approaches a court, a case would have to be made out in that regard, which may also be a factor, not only in determining whether the court should exercise its jurisdiction in the particular case, but also in determining whether the litigant has sufficient interest to be accorded standing, in light of all the other relevant circumstances in the particular matter. Each case will have to be determined on its own facts or merits."

(my emphasis)

90. In ***Merafong,*** the Minister for Co-operative Governance and Traditional Affairs was not joined in the application and the LAC held that in circumstances where correspondence indicated that the MEC sat back and failed to act in terms of section 54A(8), the respondents should have brought the appointment issue to the Minister's attention but had not. A remedy was available to the trade union and resident but they had failed to act. In my view, ***Merafong*** supports the view that whether the litigant - other than the MEC and Minister- has sufficient interest to be granted standing, depends upon the circumstances, facts and merits of a case.[63]

91. In addressing the question of the applicant's standing, I also consider ***Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others***[64], where the Constitutional Court discussed the position of the own-interest litigant at length; the requirements for establishment of whether such a party has standing in a constitutional issue and the

[63] Paragraph 67
[64] [2012] ZACC 28

applicable authorities[65]. It is apparent from ***Giant Concerts*** that the own-interest litigant must show that its rights or interests are/were directly affected by the impugned decision and the interests must be real and not merely hypothetical or academic[66]. Standing, in this context, is interpreted broadly unlike the common law concept of standing[67].

92. Returning to this applicant, the argument was that it had not shown that any of its rights or interests were affected by the decision of the Council to appoint Sebola. The appointment of Sebola, merely on the facts as set out in the application, certainly do not indicate that the DA was directly affected by the appointment nor does it show that the appointment affected its rights.

93. The enquiry, however, does not end there because every matter involving the issue of standing of an own-interest litigant in a constitutional issue, must be considered within the context of the facts and merits of the case. There is no doubt that this matter involves what may be described as a constitutional issue. In my view, the applicant made it clear that it approached the Court as a political party on the basis and motivation to ensure that the exercise of public power met constitutional and legal standards. Without repeating the merits as set out above, the applicant has a Chief Whip and Ward Councillor in the Knysna Municipal Council, and it goes without saying that residents and persons within the Municipality would be affected by the Council's decision in appointing Sebola as the municipal manager.

94. As a political party represented within Knysna, it can surely not be said that the applicant had no interest in the Council's decision to appoint Sebola. The proper exercise of public power by the Knysna Municipal Council, in this instance, must surely be viewed as an interest of the applicant, and in my view, such interest was neither hypothetical nor academic at the time the application was launched. In fairness, even if the applicant's

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[65] Paragraphs 29 - 51
[66] Paragraph 41.3; see also Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others [2003] ZACC 10 para 25, 28
[67] Paragraphs 37 - 41

standing was questionable on the directly-affected rights basis, it warrants mentioning that Cameron J in ***Giant Concerts***[68] emphasised the following:

> "[33] *The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.*
>
> [34] *Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings".*[69] *To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."*
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> (my emphasis)

95. Having regard to Cameron J's findings referred to above, it then becomes apparent that the question of standing, in certain circumstances, should be considered with reference to the interests of justice or the public interest and that a Court should be cautious to conclude a matter on standing alone where greater concerns existed. I hold

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[68] Paragraphs 33 and 34 – footnotes are excluded

[69] Footnote included in reference: Supreme Court of Appeal judgment above n 1 at para 14, quoting Wade and Forsyth *Administrative Law* 9r ed (Oxford University Press, New York 2004) at 281, as approved in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 28.

the view that notwithstanding the fact that the applicant is or was not directly affected by Sebola's appointment, it nevertheless established that it had an interest, at least, in the fact that the appointment was made, whether there was a correct exercise of public power in making such appointment and the procedural correctness of the appointment.

96. In addition, this is a matter where the parties largely agreed on at least the main relief – the setting aside of the appointment – and this is a consideration I take into account as well. While the applicant's standing may not be on all fours with what is required when regard is had to ***Giant Concerts***, the fact that standing in the context of a constitutional issue must be interpreted broadly, leads me to find that the applicant has shown sufficient interest in the impugned decision to warrant bringing this application.

97. I emphasise that my decision on standing is not based on whether the DA, as applicant, is the right person or party seeking the right remedy or remedies in its application. The issue of remedies sought in the Amended Notice of Motion[70] is addressed later herein. In the circumstances, adopting a broad approach, my finding is that the applicant has standing as an own-interest litigant, being a political party as described above.

The condonation applications

98. There were two condonation applications before me: the DA's application for the late filing of its heads of argument which were due on 27 June 2023, and the Municipal respondents' application for the late filing of the explanatory affidavit in contravention of the Goliath AJP order. Counsel for the applicant argued the applicant's case on the merits and left the question of condonation in the Court's hands. Neither party had sought an order dismissing the application or opposition on the basis of a failure to make out a case for condonation. The facts relevant to the condonation applications overlap somewhat and I summarise these facts below.

[70] Specifically, paragraphs 6 and 7 of Amended Notice of Motion

99. After the application was served, the Municipal respondents gave notice of their intention to oppose it. The Goliath AJP order set out timelines for compliance by the respective parties for the delivery of the Rule 53 record, the applicant's supplementary founding affidavit, the respondents' answering affidavit, as well as a counter application and/or interlocutory applications. The applicant's replying affidavit was due by 13 June 2023 and its heads s of argument by 27 June 2023. The respondents' heads of argument were to be delivered by 4 July 2023[71].

100. The applicant's supplementary founding affidavit was filed in accordance with the order. It was common cause that the respondents did not file their explanatory affidavit by 23 May 2023 but instead requested a seven-day grace period to do so until 30 May. The explanation tendered was simply that the affidavit had not yet been finalised. The applicant refused the requested extension on the basis that it was prejudiced by the delay and non-compliance with the order[72]. All indications were that a condonation application was imminent, however, the explanatory affidavit was not filed by 30 May, the date requested to submit it. On 1 June 2023, the respondents conceded in writing that the Knysna Council's decision to appoint Sebola was flawed and should be set aside[73].

101. In the same correspondence, the respondents made it clear that any agreement to a draft order setting aside the Council's decision should not be viewed as an acceptance of all the allegations in the application nor all the grounds of review raised[74]. Furthermore, the respondents made it clear that they took issue with the relief sought in paragraphs 6 and 7 of the Amended Notice of Motion.

102. The DA's explanation for delay in filing its heads of argument was based on the fact that without sight of the respondents' explanatory affidavit, it could not at the time agree not to pursue the relief that Sebola's decisions taken as municipal manager, be invalidated. In other words, without sight of the explanatory affidavit, the applicant was

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[71] I have not set out all the timelines in the Order
[72] See EJ2
[73] EJ4
[74] EJ4, par 4

not in a position to assess on what basis or upon which review grounds, the respondents agreed that Sebola's appointment was unlawful and should be reviewed. Similarly, it could not assess the status of its further relief in seeking an order that all his decisions were to be set aside.

103. A draft order was provided to the respondents but not agreed to because of the opposing views held as to whether Sebola's appointment was to be set aside as opposed to a declaration that the Council's decision was null and void[75]. Ms Jonker (Jonker) for the DA proposed to Ms Bulabula (Bulabula) for the respondents, that the latter set out their view on Sebola's appointment and the applicant's further relief. On 14 June 2023, Bulabula informed Jonker that their lead counsel had found himself overcommitted in other matters, hence the delay in filing the explanatory affidavit.

104. Much of the sequence of events and correspondence described above, was duplicated in the respondents' condonation application which is supported by Bulabula's affidavit confirming that senior counsel was only able to settle the draft affidavit on 14 June 2023, subsequent to which it had to be sent to the respondents for consideration. The further explanation for the delay in delivery of the affidavit was that Bulabula was required to traverse the affidavit with the Speaker in person and had submitted an unsigned copy thereof on 23 June 2023, which fact the applicant confirmed. Furthermore, Bulabula had fallen ill[76] and had a pressing family matter on the eve of having to travel to Knysna to secure the signature and commissioning of the affidavits.

105. Subsequently, having considered the unsigned affidavit and the concession that Sebola's appointment be set aside, the applicant's stance was to attempt to settle the matter. Bulabula explained that given the demand to respond by 30 June 2023, she was unable to co-ordinate the representatives as well as senior and junior counsel, but it seemed that there was communication between the DA's counsel and the respondents' junior counsel. The result was that settlement discussions ensued including counter-

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[75] See EJ5
[76] The facts indicate that

proposals made to the applicant, to which there was no response. On 3 July 2023, to the respondents' surprise, the applicant delivered its heads of argument and informed that the counter-proposal was rejected.

106. Jonker's explanation for the two-day limit to respond to the applicant's *"without prejudice"* settlement offer was that if it was rejected, and given the looming hearing dates, the applicant was required to file its condonation application and heads of argument timeously. Jonker's letter of 30 June 2023[77] then put the respondents to terms in that it indicated that the applicant would proceed with its relief as per the amended Notice of Motion and that a punitive costs order would be sought. Bulabula explained that after arranging a meeting with the Speaker, his affidavit was delivered on 6 July 2023, and that the dilemma and challenges regarding the delay were unavoidable.

107. Having regard to these explanations, I am of the view that a pragmatic approach be adopted. Certainly, the parties were ready to proceed on the main issues in dispute on the hearing dates and neither emphasised that the application and opposition (or explanatory affidavit) be dismissed on the basis of a failure to provide a sufficiently full explanation for condonation. In my view therefore, to dismiss either the application or the opposition to the remedies sought on the basis of an unsatisfactory or insufficient explanation for the delay would not only be short-sighted but it would have the effect of not resolving the issues between the parties even though they agree that the Council's appointment of Sebola was invalid. Furthermore, it would also elevate form above substance and may result in additional and unnecessary litigation, potentially at the cost of the Knysna residents.

108. Having considered the affidavits and the explanations provided by the applicant and the respondents, I find both explanations to be sufficiently full and reasonable and find that the interests of justice warrant the granting of condonation to both parties[78]. Insofar as costs are concerned, this is addressed later in the judgment.

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[77] EJ10

[78] Menziwa v Ndokwana and Others [2023] ZAWCHC 294 par 3-4

The respondents' striking out applications

109. The first to fourth respondents brought a striking out application referred to paragraphs 26 and 27 and the last sentence of paragraph 28.1 of Sabbagh's replying affidavit and paragraphs 10 to 29 of Peters' affidavit[79].

110. Having considered the application and submissions, during the hearing I granted orders striking out paragraph 26 of Sabbagh's replying affidavit because the content thereof contained scandalous and vexatious matter. Sabbagh's statement that the respondents' conduct does not equate with the conduct of State organs interested in assisting the Court, but rather that of wanting to defend Sebola with the aim of ensuring that the Court granted a remedy which would allow him to be re-appointed, was also purely speculative. There was simply no foundation for such an assertion.

111. I also struck out the last sentence of paragraph 28.1 of Sabbagh's replying affidavit on the basis of it being scandalous and vexatious, as it alleged, without a factual basis, that the appointment of Sebola was for an ulterior purpose. Paragraph 27 of the affidavit addressed in detail the versions of Steele and Peters, who filed affidavits dealing with Sebola's assessment and interview. The request that it be struck in its entirety was based on the fact that it constituted new matter in reply, presented in support of new consequential relief not contained in the Notice of Motion. My finding was not to strike out paragraph 27 and I granted the respondents leave to file a further affidavit should they wish to do so, but limited only to those aspects raised in paragraph 27 of Sabbagh's replying affidavit[80].

112. A similar order was granted in respect of paragraphs 10 to 29 of Peters' affidavit, which I found not to constitute new matter in reply. The respondents were thus constrained to address only paragraphs 10 to 29 of the Peters' affidavit. The opportunity to address these paragraphs was further motivated by the averment and argument that

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[79] The respondents only proceeded with paragraphs 2.2 to 2.4, and 3 of the striking out application
[80] Counsel had applied for a postponement in respect of the opportunity to address these paragraphs

the Peters affidavit was filed a day before the hearing, thus not giving the respondents an opportunity to address it.

113. The first to fourth respondents' striking out application dated 18 July 2023 repeated what was sought in the first striking out application[81] with a slight variation[82]. The Notice referred to various paragraphs in Sabbagh's founding affidavit, which I summarise below:

113.1 The second and third sentences of paragraph 18 amounted to inadmissible hearsay evidence in relation to certain utterances which Paulsen, the legal manager for the Knysna Municipality, allegedly stated regarding Chief Whips. Absent a confirmatory affidavit by Paulsen, these sentences are struck out.

113.2 In the second to fourth sentences of paragraph 109, Sabbagh accused Sebola of unlawfully awarding tenders *"to people who do not deserve them"*[83]. The rest of the paragraph continued in similar vein. Having regard to the submissions, I agree that these allegations, all unfounded when regard is had to the papers filed, constitute scandalous and vexatious allegations against Sebola and are thus struck out.

113.3 Paragraph 117, starting with *"there are real reasons"* and ending with *"for corrupt purposes"* alleged that Sebola was corrupt and that he would use his appointment for corrupt purposes. The statement is surely scandalous and vexatious, hence the first sentence of paragraph 117 is thus also struck out.

113.4 The last sentence of paragraph 117 referring to an executive

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[81] The Notice to Strike Out is undated - Record, p204-206
[82] The reference to paragraphs relate to those paragraphs and words or phrases sought to be struck out – so as to not overburden the judgment, short summaries are provided
[83] Par 109, page 41

summary of the Fundudzi Report , as well as paragraph 118 and the Fundudzi report itself[84] were sought to be struck out on the basis that the *"applicant scandalously seeks to rely on a document which it obtained extra legally and which amounts to inadmissible hearsay evidence."*[85] In my view, the applicant indeed obtained the Fundudzi report extra legally and it amounts to inadmissible hearsay evidence, which would prejudice Sebola. The reliance on the report was motivated to cast Sebola in an unfavourable and unflattering light, and the allegations within the paragraph are indeed scandalous. Thus, the last sentence of paragraph 117, paragraph 118 and SS16 (the Fundudzi report), are struck out. Their retention would certainly be prejudicial to the respondents[86].

113.5 Paragraphs 119 and 124 of Sabbagh's founding affidavit are struck out as they contained scandalous and vexatious allegations, in that it was alleged that Sebola would act unlawfully and irregularly.

113.6 Paragraph 5.5 of Sabbagh's replying affidavit is not struck out. The fact of the matter is that Sebola's appointment was indeed unlawful hence the content of this paragraph, wherein Sabbagh made a statement regarding the unlawfulness of his appointment, cannot be considered as scandalous and vexatious matter.

114. In summary, the respondents are largely successful in their striking out applications, though a duplication of applications was not, in my view, necessary. Thus any costs to be awarded would only be in respect of the 18 July 2023 application, which in any event deals with the bulk of the matter sought to be struck out.

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[84] SS16
[85] P236
[86] See Erasmus Superior Court Practice, 2nd Edition, Rule 6(15) at D1-92, Service 20, 2022

115. There is a further aspect which bears mentioning. Sabbagh, after mentioning the Fundudzi report and having made the allegations of impropriety, alleged unlawful conduct and irregular award of tenders by Sebola, amongst others, then withdrew these allegations and statements in her later affidavit and apologized for her utterances. To be clear, had matters ended there, it would probably not have been necessary to embark on a consideration of the various paragraphs to which the objections were raised.

116. Unfortunately, and as can be seen from Sabbagh's affidavits, the apology and withdrawal of her statements were short-lived. I say this because I note that from paragraph 32.3 and onward of her replying affidavit[87], that notwithstanding her earlier apology and withdrawal, she nonetheless forged ahead and embarked on what resembled justification for still questioning Sebola's integrity, honesty and *bona fides* in his capacity as municipal manager for Knysna. The only impression to gain is that the apology was hollow and the apparent withdrawal of her statements which were sought to be struck out, was not genuine.

117. Considered holistically, I thus had to make further findings on the striking out application in respect of the paragraphs referred to in Sabbagh's replying affidavit. I have already mentioned that leave was granted to file a further affidavit dealing with a limited aspect, but as will be seen later, this was not the case as the parties then embarked on placing further aspects before me which were either not contained in the earlier papers and/or not addressed during the hearing.

118. As a matter of completeness, it warrants mentioning that the respondents had filed a conditional application for postponement to address the averments which Sabbagh and Peters made regarding the interview and assessment process. Given the orders granted in the striking out application at the hearing, and leave being granted to file a further affidavit but limited to the latter aspects, there was thus no need to deal with the conditional application for postponement.

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[87] Record, p289

Null and void or setting aside?

119. An issue arose, albeit obliquely, as to whether the Councils' decision to appoint Sebola was null and void, or whether it should be set aside. Paragraph 2 of the Amended Notice of Motion sought to declare that the Councils' decision of 25 January 2023 in appointing Sebola as municipal manager, was null and void. The respondents agreed that the decision be set aside and as indicated above, were prepared to reach an agreement to this effect, however, they were disinclined to agree to the terms *"null and void"* and rather preferred the term *"set(ting) aside"*.

120. The respondents' explanatory affidavit[88] indicated that the reason why the applicant sought relief in this form, contrary to the parties' agreement, was that it wished of the Court to rule that all Sebola's decisions subsequent to his appointment, were invalid. The applicant's replying affidavit did not address this averment specifically.

121. While this aspect may seem to be a moot point, it is nonetheless appropriate to address it herein, at least for the sake of clarity. Section 54A(3) of the Act states that:

> *"**54A Appointment of municipal managers and acting municipal managers***
>
> *(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –*
>
> *(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or*
>
> *(b) the appointment was otherwise made in contravention of this Act."*[89]

122. From the above, it is evident that the relevant legislation uses the term *"null and void"*. The question therefore arises whether the disagreement between the parties as to which term would be appropriate in a finding and order of Court, is one of semantics or has some substance? The respondents' argument was that nothing turns on the

[88] Para 28-31, Record, p214
[89] My emphasis

distinction even though, as is apparent above, they raised the point in their affidavit and heads of argument.

123. In ***Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape***[90], Yacoob J, with reference to a discussion on the principle of legality and consequences of declaring an administrative act unlawful, stated at paragraph 45 of the aforesaid judgment that:

> *"After a judgment setting this administrative decision aside has been given, the administrative decision is certainly regarded as having been void ab initio"*[91].

124. Having regard to the submissions on this issue and the above *dicta,* I am inclined to agree with the respondents' counsel that the reference to *"null and void"* in section 54A(3) read with section 54A(8), would be no different than an order of the Court setting aside an appointment by a public authority. Put another way, once the Court finds that the appointment was unlawful, it is thus null and void in the language of section 54A(3) and the effect of such appointment would be that it has no legal force and resultantly, must be set aside. To the extent that there was a debate on this aspect, the above discussion and findings clarify the slight disagreement between the parties.

Is the Court required to rule on all the grounds of review?

125. One of the main issues on which I wished to be addressed during the hearing was whether the Court was expected to make findings on all the applicant's grounds for review which it sought. This was a hotly-debated issue, and having regard to the authorities and submissions, not a simple one. On the one hand, the applicant argued that the Court

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[90] [2008] ZACC 4

[91] I have not included the entire paragraph 45 of *Mjongi.* The finding by Yacoob J in this paragraph follows the learned Judges' consideration in paragraph 44 of *Mjongi supra* about a discussion by Professor L Baxter in his book Baxter Administrative Law (Juta, Cape Town 1984) at p 355 where the author addresses the retrospectivity of unlawful administrative actions and the finding of the Full Court on the question of nullity being a consequence of the principle of legality

should make a finding on the Sebola assessment issue with reference to the requirements in Regulation 6(1) read with Regulation 8(1) of the Act. That approach notwithstanding, counsel for the applicant nonetheless agreed with his opponent for the respondents that the Court should approach the question and the matter from the perspective of judicial minimalism in that it should not make decisions which are not needed to be made.

126. Aside from judicial minimalism, the respondents argued that the Court should adopt a common cause perspective and not consider the disputed Steele report in respect of the assessment issue nor the ulterior purpose ground. The argument emphasised that findings need not be made on these aspects and on what was meant by the *"basic range"* in achievement levels of candidates in terms of the Regulations to the Act[92]. The respondents' further submitted that the applicant sought findings by the Court on all its grounds of review rather than on the agreed basis/bases as set out in the correspondence and affidavits in the application.

127. Needless to say, I required of the applicant's counsel particularly to convince me that it was indeed necessary to consider and make findings on all his client's grounds, when the reality of the matter was that the parties were *ad idem* that there were procedural irregularities in the appointment process and that the Council were not in possession of all the documents which it should have had, leading up to its decision to appoint Sebola. I was referred to a few authorities which I consider in the discussion below.

128. In ***Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others***[93], the Court *a quo* was confronted with the meaning and effect of a settlement agreement and the effect of making it an order of Court. While the detail of the dispute in that matter is not relevant for our purposes, the Constitutional Court in ***Airports Company***[94] criticized the submissions and parties' reliance on ***Eke v Parsons***[95] to suit their respective views and arguments. I raise ***Airports Company*** because it is evident from correspondence

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[92] See Annexure A to Regulations of the Act, Table 5, Competency Descriptions
[93] 2019 (5) SA 1 (CC)
[94] See para [61] and [62]
[95] [2015] ZACC 30

exchanged prior to the application, that the respondents reminded the applicant that even though they accepted and agreed that the Councils' decision to appoint Sebola was flawed and had to be set aside, and they considered the proposal to approach the Acting Judge President with a draft order to set the order aside by agreement, they (the respondents) nevertheless realized and appreciated, with reference to ***Airports Company,*** that in the circumstances of the matter, it was not merely a case of presenting and obtaining an order by agreement.

129. The evidence from the affidavits indicated that the applicant agreed to the proposed order by agreement and duly accepted that regard must be had to ***Airports Company***, which in essence required of Courts not to simply accept an order by agreement as the Court still had to satisfy itself that the terms of the order were *"competent and proper"*[96] . In view hereof, it was clear that even though the parties had agreed in June 2023 that the impugned decision was to be set aside, the matter could not simply be resolved by obtaining an order by agreement from the High Court.

130. It was evident that the respondents had not agreed to all the grounds of review raised nor all the allegations levelled against them. The respondents accepted and admitted that not all the information and documents necessary for consideration by the Council were before it during the appointment process. They submitted that on this basis alone, the appointment process was flawed and the appointment fell to be set aside. The question then arose whether all the grounds of review were required to be considered and ruled upon.

131. The applicant's argument was that findings should be made at least on the first two grounds of review, dealing with Sebola's assessment and *"basic"* rating for the position of municipal manager. According to the submissions, the apparent refusal to admit the public to the meeting of 25 January 2023 and the ulterior purpose/motive ground were relegated as not being as important to the applicant. The applicant favoured a finding, and in fact insisted during the hearing, that this Court was to make a finding on Sebola's

[96] Par 59 Airports Company supra; Para 25, 26 Eke v Parsons supra

assessment and the assessment process, and that his *"basic"* rating had excluded him from appointment to the municipal manager post.

132. To answer the question posed earlier, it must firstly be remembered that the common ground between the parties was that the process and appointment was flawed because not all the documents needed for such decision were before the Council at the relevant time, thus rendering the process and Sebola's appointment contrary to section 54A and the Regulations in the Act. The effect thereof would be that the appointment was invalid and unlawful and was null and void.

133. In certain cases, it would certainly be appropriate to consider and determine all the grounds of review which an applicant raised in its application. This would be particularly so when one took into account the costs for parties in approaching another Court to traverse issues which should have been addressed by the High Court but were not[97].

134. The point is that unlike the ***Premier, Gauteng*** matter which I reference in a footnote below**,** in this matter the parties were *ad idem* that the appointment was to be set aside because the decision taken by the Municipal Council was invalid. The distinction is important because the main order would be premised not only on a finding but also on an agreement that the Council's decision was invalid and null and void. I thus hold the view that it is therefore unnecessary for the disposal of the case and finalization of the application, to make determinations on all the grounds of review and/or on the assessment process and whether Sebola, who scored *"basic"*, was eligible for appointment as a municipal manager.

135. Further on the aspect of what is to be decided for a proper disposal of a case, I

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[97] Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others 2022 (1) SA 16 (CC) para 220-221, which dealt with a direct appeal of an order granted by the High Court

refer to Ngcobo CJ's findings at paragraph 82 in ***Albutt v Centre for the Study of Violence and Reconciliation and Others***[98]:

> *"[82] Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case. It may well be said that the President is anxious to know whether the exercise of the power to grant pardon constitutes administrative action and whether PAJA applies to applications for pardon. The anxiety of the President should adequately be addressed by what I have said above, namely, that the High Court erred in reaching these questions."*
>
> (my emphasis)

136. The opening sentence of paragraph [82] of ***Albutt*** is emphasized because this Court may not lose sight of what it was called upon to decide in circumstances where the parties had agreed that the process of appointment was flawed and there were documents which should have been brought to the attention of the Municipal Council when considering its decision, but were not. Furthermore, more recently in ***Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and Others***[99], a unanimous decision of the Constitutional Court, that Court remarked at the commencement of its judgment that:

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[98] 2010 (3) SA 293 (CC)
[99] [2023] ZACC 19

"Despite the magnitude of the questions and the allure of grappling with them, the decision we reach highlights the fact that at times the imperative of judicial avoidance does and must carry the day[100]".

137. Madlanga J writing for the Constitutional Court in ***Bliss Brands*** referenced the *dicta* of Ngcobo CJ in ***Albutt[101].*** Thus, from the above findings in these judgments, it is evident that in certain circumstances and matters, judicial avoidance and sound judicial policy should dictate a Court's approach. Having regard to the authorities cited and the parties' submissions, I am therefore of the view that I should only determine that which is necessary to be determined for the proper disposal of this application. In my view, it follows that what is necessary to be determined is whether the agreed ground of review is a competent and proper basis for holding that the Council's decision to appoint Sebola as the Knysna municipal manager, was null and void.

138. Anything more than the above determination, in the specific circumstances where the parties are *ad idem* that the process of appointment was flawed and the appointment decision was unlawful and invalid, would fly in the face of what the Constitutional Court described as *"judicial avoidance"*. Furthermore, from a practical and logical perspective, having to make decisions on all the grounds of review would also be superfluous or unnecessary, because a decision on one ground/basis which leads to a conclusion that the appointment was invalid, would be sufficient to result in an order and declaration that the appointment was null and void.

139. The respondents' counsel argued that the applicant persisted with a finding on the assessment issue because Sebola was not the preferred candidate and that the motivation for such persistence was purely political grandstanding. I decline to be drawn into such a debate as it is neither necessary nor relevant to the outcome and the relief sought.

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[100] Paragraph [1] of the judgment
[101] See paragraph [1] of Bliss Brands supra

140. Ultimately, all that is required to be determined is whether the agreed ground of review was competent and proper for the administrative decision to be found to be null and void, as referred to in section 54A(3). It is not necessary for a proper disposal of the application, that each and every ground of review is to be ruled upon.

The agreed/undisputed basis for setting aside the Municipal Council's decision

141. It is common cause that the Selection Panel and Mayor recommended Sebola's appointment based on their belief and understanding of the Steele report. Clearly, their understanding was incorrect. It is furthermore apparent that the candidates' *curricula vitae* were not before the Municipal Council for its consideration, nor did it receive the weighted scores allocated to the candidates during the assessment of their competency for the position of municipal manager[102]. With reference to the Steele report, it was clear that the Council did not have before it any information related to the candidates *"leading competencies"* and *"core competencies"*[103].

142. Furthermore, clause 6 of Annexure A to the Regulations sets out the achievement levels standard and provides that a candidate falling within the basic range was deemed unsuitable for the role of municipal manager and that caution should be applied in promoting and appointing such individual. Yet, the Council neither queried nor sought clarity on the *"needs development/competent"* competency categorization which the Steele report allocated to Sebola. I say this because it is evident when one has regard to the legislation and its Regulations, that the competency categorization referred to by Steele and Associates - *"needs development/competent"*- is not catered for in clause 6 of Annexure A. To add, the competency categorization which Steele attributed to Sebola in consequence of his assessment thus did not accord with the designated achievement level in the Regulations, but the Council sought no clarity on this.

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[102] Regulation 16 requires a competency assessment
[103] SS6, Steele report, par 5.1

143. Furthermore, a competency assessment of Sebola in the form of the Gijima report, accredited by COGTA, was conducted at the end of 2022[104]. Overall the Gijima Assessment People[105] found Sebola to be competent for the position of municipal manager for Thabazimbi Local Municipality, slightly more than a month prior to the Council's meeting on 25 January 2023. From the applicant's papers, it was apparent that the applicant expanded or extended its grounds of review in respect of the principle of legality to include the Municipal Council's failure to consider relevant information related to Sebola and/or the appointment of a suitable candidate[106]. Secondly, from the Executive Mayor's correspondence to the MEC, dated 28 February 2023[107], it was evident that the latter sought to rely on the Gijima assessment as justification and support for Sebola's appointment as competent for the post as municipal manager.

144. The reference to the Gijima report was significant in that, while correspondence subsequent to Sebola's appointment point to the fact that the Executive Mayor relied on the report to justify Sebola's suitability for the post, this report did not form part of the Rule 53 record and was not relied upon by the Selection Panel and Mayor in the selection process. Accordingly, the Executive Mayor's reliance on the Gijima report was unjustified and *ex post facto*. If the report was to be relied upon, it should have been part of the documents in the selection process and thus part of the Rule 53 record.

145. There is a further factor to consider. Regulation 11 dictates the requirements in respect of documents which an applicant for senior manager post must submit in his/her application[108]. On perusal of the Rule 53 record, it is so that it is devoid of the candidates' academic qualifications, contactable references, registration with a professional body, full details of dismissal for misconduct and details of any disciplinary actions pending, instituted or finalized against a candidate. The absence of these documents lead me to conclude that they were not before the Council at the relevant time and it follows that for

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[104] SS18 to supplementary founding affidavit
[105] The entity which compiled the Gijima report
[106] Record, p123
[107] SS18
[108] Regulation 11(4)

purposes of the appointment of a municipal manager, Regulation 11 was not complied with.

146. In its supplementary affidavit, the applicant stated that the Fundudzi report was also not before the Selection Panel and the Municipal Council during the appointment process. For the reasons set out earlier in the judgment, I struck out the Fundudzi report but the relevance of referring to it again is that it goes to the common cause fact that the parties both state that the report should have been brought to the Council's attention. To elaborate: the Executive Mayor explained that the allegations made in the Fundudzi report first came to the Mayor's attention a few days prior to 25 January 2023[109]. While Sabbagh and the applicant distance themselves from the truthfulness or otherwise of the content of the Fundudzi report, the argument was that the report should have been brought to the Municipal Council's attention prior to it making its decision on the vacant municipal manager post.

147. Having regard to Sebola's version, it indeed seemed that the allegations of corruption and dishonesty levelled against him in the Fundudzi report were addressed by the Hawks and eventually came to naught. The Executive Mayor's version that Sebola was *not* facing a pending or finalized disciplinary action instituted by a previous employer, in my view, was indeed correct and was tellingly not disputed by the applicant. Thus, Sebola therefore did not fall foul of Regulation 11(4)(e) and had no duty to provide or disclose the Fundudzi Report or its existence, to the Council. The evidence indicated that Sebola's version that he was not aware of the existence of the report and did not have possession of it at the time[110], was supported by that of the Executive Mayor, and it was not taken issue with by the applicant.

148. Whatever the debate may be around the Fundudzi report, its content and effect (if any), the fact of the matter was that it was prepared for National Treasury. For the

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[109] This was the date on which the Municipal Council made its decision which forms the subject matter of the DA's application

[110] Prior to the decision of 25 January 2023

purposes of this application, it mattered not whether the compilers of the report provided it to Sebola's erstwhile employer, Modimolle-Mookgophong Local Municipality or not. As can be seen above, the applicant's reliance on a contravention of Regulation 11(4)(e) was misplaced.

149. The significance of what is stated and found in the preceding paragraphs is that the respondents accepted and conceded that the failure or oversight to place the Fundudzi report before the Council[111], was a procedural flaw in the appointment process. The indication was that the respondents and the Council agreed with the applicant that the mere existence of the Fundudzi report was a consideration which the Council ought to have applied its mind to once it was known that such report was prepared and existed. In the circumstances, it is thus fair to conclude that the Council was none the wiser about the report at the time it considered the appointment for municipal manager.

150. Having regard to the above discussion, it is then clear that the process of appointment was riddled by one or more procedural flaw and that certain documents which were supposed to have been before the Council, were not, prior to the final appointment decision being made. In view of these findings, and the submissions by the parties, it is thus evident that the Municipal Council's decision to appoint Sebola did not comply in certain respects with section 54A and the Regulations in the Act. In view of this finding, my further finding therefore is that section 54A(3)(b) applies in that Sebola's appointment was "*otherwise made in contravention of this Act*"[112].

151. I reiterate my view that, in light of these findings, I need not consider all the other grounds of review raised in the Amended Notice of Motion. In the event of any doubt, there is a further reason for holding this view, and it finds its support in section 54A(3) itself. The section prescribes in peremptory language, that a decision to appoint a municipal manager is null and void in the event of either of the circumstances set out in

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[111] From the facts, I would presume the reference is to the Mayor's failure to place the Fundudzi report before the Council

[112] Section 54A(3)(b)

sub-section (a) ***or*** those in sub-section (b), occurring. To be clear, if the appointed person did not have the prescribed skills, expertise, competencies or qualifications, then the decision to appoint him/her was null and void, ***or***, if the appointment was made in contravention of the Act, then too, it was null and void.

152. Bearing this in mind, it is therefore not required that the grounds in section 54A(3)(a) and (b) must be present for a declaration of invalidity to occur, nor that sub-section (a) will always have to be present before a null and void finding may be made. The null and void finding is made in circumstances where either a section 54A(3)(a) or (b) situation occurred. I have found, and it was agreed, that procedural flaws or errors existed in the appointment process and there was thus a consequential contravention of the Act and its Regulations as referred to above, having regard to section 54A(3)(b). Thus, the argument by the respondents on this aspect was correct. In the circumstances, the decision taken by the Knysna Municipal Council on 25 January 2023, appointing Sebola as municipal manager, is declared null and void.

153. Counsel for the DA, in respect of the procedurally flawed process adopted by the Municipal Council, submitted that the Council acted contrary to sections 6(2)(b), 6(2)(e)(iii), 6(2)(e)(vi) and 6(2)(f)(i) of PAJA. In view of my findings above, I would agree that sections 6(2)(b) and 6(2)(e)(iii) were contravened only to the extent that the Fundudzi Report was not before it for consideration and should have been. As I do not address nor make findings on the other grounds raised in the applicant's papers, because it is not necessary to do so, I am thus not in a position to make findings on the other sections referred to in section 6(2) of PAJA. Lastly, it is noted that in its main heads of argument, the applicant's counsel indeed stated that any of the grounds of review would suffice[113].

Just and equitable remedy

154. This section deals with paragraphs 6 and 7 of the Amended Notice of Motion and the relief sought therein. To summarise, paragraph 6 sought a declaration that all

[113] Applicant's main heads of argument, page 22

Sebola's decisions as municipal manager, including all contracts and appointments were to be declared unlawful, unconstitutional and invalid, and were reviewed and set aside. In its alternative relief at paragraph 7, the applicant sought an order suspending the order granted in terms of paragraph 6 for 10 days so that the first to third respondents may approach the Court on supplemented papers for an order in terms of section 172(1)(b) of the Constitution.

155. From paragraph 77 in the applicant's main heads of argument, and its submissions during the hearing, it then became apparent that what was actually requested differed from what is contained at paragraphs 6 and 7 of the Amended Notice of Motion. The Court was asked, insofar as a remedy was concerned, to follow the dictum in ***Phalatse and Another v Speaker of the City of Johannesburg and Others***[114]. Counsel for the applicant argued that ***Phalatse*** emphasized a corrective principle in that *"the invalid exercise of public power should be reversed or corrected"*[115]. It was submitted that as in ***Phalatse,*** the municipal respondents in this matter had a duty to assist the Court in determining the effect of setting aside Sebola's decisions and I was thus urged to adopt a similar approach which may be seen as just and equitable under section 172(1)(b) of the Constitution.

156. The further submissions were that once a declaration of invalidity was made in respect of an impugned decision, the decisions flowing from the invalid exercise of public power should be set aside – this is the default position[116]. It was argued that the onus rested with the respondents to justify why there should be a departure from such default position. The applicant's stance was that full retrospective invalidity of the impugned decision should be granted, but notwithstanding what was sought in the application, the applicant requested in its main heads of argument, that the Court deviates from the Amended Notice of Motion and grants an order which is just and equitable.

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[114] [2022] ZAGPJHC 105

[115] Phalatse supra, par 86 and see the authorities cited at footnote 20 of the judgment

[116] See Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC) par 56 – the default position in terms of a PAJA review

157. The reasoning and motivation for such deviation from the default position, and the Amended Notice of Motion, was that such order would avoid disruption to public administration, potential unfairness to third parties and the preservation of validity of decisions taken by unlawfully/invalidly appointed persons. The request was that were this Court to grant a blanket order, which would set aside all Sebola's decisions since his appointment, the effect of the order would be to prejudice the residents of Knysna.

158. Turning to ***Phalatse:*** all decisions taken by the Mayor of the City of Johannesburg were declared unlawful, unconstitutional and invalid and were reviewed and set aside[117]. Keightley J granted a further order suspending the default order for 10 days and allowed the City Manager or authorised person to apply to the High Court on supplemented papers for an order in terms of section 172 (1)(b) of the Constitution in respect of the Executive Mayor's specified decisions. Having regard to the submissions, in its most basic form, counsel's request in his heads of argument was that paragraph 6 of the Amended Notice of Motion not be granted[118], but that the alternative relief as set out in paragraph 7, which seemed to be in line with the ***Phalatse*** orders, be granted.

159. Having regard to the submissions, I consider that the default position was that the second act(s), that is, Sebola's decisions as municipal manager, were invalid because the legal basis for its performance was non-existent[119]. However, a distinction must be drawn between the first impugned decision by the Council, sought to be declared null and void, and the second act, being Sebola's decisions taken as municipal manager. Once that differentiation is made, in my view, the enquiry would then be whether the performance of the second decision(s) depended upon the first decision for its validity.

160. To answer the question, I refer to ***Motala v Master, North Gauteng High Court***[120] which I find to be of assistance. The appellant sought a review of the Master's decision

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[117] Phalatse Order, par 11
[118] This was the prayer that all Sebola's decisions were invalid and were to be set aside
[119] Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA) par 13
[120] 2019 (6) SA 68 (SCA)

to remove him as joint liquidator of a certain group of liquidators and also a review of the Master's decision to remove him from the panel of approved liquidators and trustees. The argument was that the Master's decision to remove the appellant from the panel flowed from or was dependent upon the earlier decision to remove him as joint liquidator. The Supreme Court of Appeal (SCA) did not accept the argument and held that while both decisions were administrative decisions, the later decision was due to the appellant's changed circumstances and not due to nor dependent upon the validity of the first decision[121].

161. In referring to ***Motala,*** it would be remiss not to refer to ***Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others***[122]***.*** The Court in ***Motala*** effectively reconfirmed the principle enunciated in ***Seale,*** that if the first administrative act was set aside, the second administrative act that depended on the first act for its validity, was invalid as the legal foundation for its performance was non-existent[123].

162. In ***Corruption Watch NPC and Others v President of the Republic of South Africa and Others***[124], the Constitutional Court had the following to say about the declaration of invalidity of an administrative action:

> *"[32] What may lead some readers of what I have paraphrased from Oudekraal astray is reading it in isolation. Later Oudekraal makes it clear that where a consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act, the consequential act would be valid only for so long as the earlier act had not been set aside.[125] In Seale Cloete JA for a unanimous Court put this beyond question. He held:*
>
> > *"Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in Oudekraal Estates (Pty) Ltd v City of Cape Town which*

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[121] Motala supra, par 94
[122] Supra – see footnote 117 above for full citation
[123] Seale supra, par 13 and Headnote (p43). Seale references Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) par 31-33 wherein this principle was enunciated
[124] [2018] ZACC 23 para 32-34 – certain references in footnotes are omitted in this judgment
[125] *Oudekraal* above at para 31 (n30 deleted)

adopted the analysis by Christopher Forsyth of why an act which is invalid may nevertheless have valid consequences and concluded:

'Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.'

. . .

[T]he reliance by counsel on the decision in Oudekraal, [is] misplaced. As appears from the italicised part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in Oudekraal suggest that the analysis was relevant to that latter decision." (Footnote omitted.)

[33] The Supreme Court of Appeal then concluded that "it is clear from Oudekraal . . . that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent".(footnote omitted)

[34] In Kirland this Court accepted what was decided in Seale. Writing for the majority, Cameron had this to say:

"In Seale . . . the Court, applying Oudekraal, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. . . . [T]he Court rightly rejected an argument, in misconceived reliance on Oudekraal, that the later (second) act could remain valid despite the setting aside of the first." (footnote omitted)

(my emphasis)

163. The respondents take no issue with the authorities but they have referred me to and requested that I adopt the approach by the Full Bench of this Division in ***Mgoqi v City of Cape Town and Another***[126]. Briefly, Dr Mgoqi presided over a meeting of the

[126] 2006 (4) SA 355 (C)

municipal council in circumstances where his contract had already expired[127] and the Court found that there was a mistaken impression that he was empowered to chair the meeting (when he was not). The Court stated that:

> *"He was, to all intents and purposes, the ostensible, de facto municipal manager and was carrying out his duties and obligations as such"*[128].

164. The submission was that the Constitutional Court authorities which the applicant referred to, did not oust the approach adopted in ***Mgoqi,*** so that the appointment of Sebola be set aside with prospective (as opposed to retrospective) effect only and in that way, his decisions taken prior to the declaration of invalidity, should remain unaffected. Breaking this down to its basics, the applicant still wanted an order that the declaration of invalidity in relation to Sebola's decisions should be retrospective, but that such order be suspended with a view that parties may approach the Court in terms of section 172(1) of the Constitution for a just and equitable order and that some decisions be preserved.

165. I agree with the respondents that the decisions taken by Sebola, even unlawfully appointed, were made in the capacity as municipal manager, as in ***Mgoqi.*** From the facts, it was accepted that the issue of a lack of candidates' information and the failure to place documents and reports before the Council were only realised after the appointment was made. At that stage, Sebola was already making decisions, such as granting tenders, approving leave to administrative employees, chairing meetings, appointing staff and the like. He was serving a public power and function, possibly unaware that his appointment was invalid and not in compliance with section 54A of the Act, due to (at the very least) procedural flaws in the appointment and non-compliance with the legislation.

166. The decisions he made in such capacity, were not, in my view, dependent for their legal validity and enforcement on the validity of his appointment as municipal manager.

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[127] Par 126
[128] Mgoqi supra, par 126

Sebola had, as counsel for the respondents stated in his submissions and with reference to ***Mgoqi***, at least *"colourable authority"*. In my view, it would certainly cause administrative chaos, inconvenience, potential hardship and more were all his decisions to be declared invalid and set aside. Furthermore, consideration must also be given to third parties who may have been awarded contracts as part of the Knysna municipality's administration, so to blindly set these decisions aside, would or could have far reaching effect. Added to that, affected persons or parties are not before the Court.

167. Returning to the request by the applicant that I follow ***Phalatse*** and grant an order along similar lines, I point out that ***Phalatse's*** circumstances and those which arise in this matter were markedly different. In that matter, the learned Judge had to deal with an urgent review as to whether the decisions and conduct of the Speaker of the City of Johannesburg in the motion of no confidence procedure which led to the axing of the then Executive Mayor of the City, were lawful. Keightley J considered various impugned decisions and then determined the remedy in the context of section 171 and 172 of the Constitution[129]. The orders granted were peculiar and specific to the circumstances and findings in that matter and I agree with the respondents' counsel that when reading ***Phalatse,*** it becomes evident that the orders granted could be implemented, in that decisions could be identified by the City Manager for purposes of seeking a just and equitable order[130] .

168. In this matter, the landscape is different. By the time the matter was argued, Sebola was already the municipal manager for more than six months and the parties had attempted settlement and agreed on the main issue that the decision to appoint him, was flawed and should be set aside or be declared null and void. To declare all Sebola's decisions null and void as a result of his unlawful appointment would, in my view, neither be just nor equitable. I am of the view that the circumstances of each case would be a

[129] The impugned decisions were reviewed in terms of the principle of legality – see paragraphs 85 and 86 of the Phalatse judgment
[130] Phalatse, par 12

more than relevant consideration before ordering a blanket setting aside of Sebola's decisions as municipal manager.

169. In any event, to set aside all Sebola's decisions from the inception of his appointment, would have far reaching consequences, the effect of which could cause chaos, potential prejudice and uncertainty in respect of agreements and decisions involving third parties, interrupt service delivery and the functioning of the Knysna Municipality. Furthermore, third parties, whether individuals, institutions or juristic persons, who were parties to agreements which Sebola concluded in his official capacity and who may be affected by an order of this Court, were not before it.

170. The applicant's submission on this issue was that the absence of third parties (before the Court) was not a bar to the remedial relief sought, and it was in the nature of an order *in rem* that third parties were affected. It was furthermore suggested during the hearing that the applicant had no objection to a joinder of any third party and/or such party approaching the Court to indicate that a decision taken by Sebola should be set aside.

171. While I appreciate that third parties may be affected in such a public administration issue, the third party would be entitled to approach the Court in terms of PAJA at least, but should be duly apprised of the issues and have time to properly consider his/her/its stance, rather than be thrown into the deep end and joined in a dispute between the applicant and the Knysna municipal respondents.

172. Ultimately, the applicant sought an order which suspends the declaration of invalidity and sets aside Sebola's orders for a specified period until the first to third respondents approached the Court in further proceedings, on duly supplemented papers, for an order in terms of section 172 (1)(b) of the Constitution. This relief presents its own problems. In my view, counsel for the respondents correctly argued that the decision-making functions and powers of an Executive Mayor as in ***Phalatse*** differ from those of a municipal manager. The latter is responsible for the day to day operation and running of the Municipality and makes daily decisions such as in-house leave approvals of

municipal staff, authorising salary payments, deciding appeals in terms of section 62(4) of the Act and more[131].

173. Having regard to paragraph 7.2 of the Amended Notice of Motion, I wish to emphasise that no decisions which would be the subject of an application to Court for a section 172(1)(b) order were identified. To blame the respondents for their failure to identify such decisions and thus not assist the Court was also not helpful. The fact of the matter was that neither the Executive Mayor nor the Speaker hold the functions of a municipal manager and cannot therefore take upon themselves the role and function of the municipal manager as they are Councillors.

174. The applicant's relief at paragraph 7.2 would in effect be a 10-day period for the Speaker and Executive Mayor or other authorised person to audit the work and decisions made by Sebola during his tenure as municipal manager and thus approach the Court for a just and equitable order on supplemented papers. How this is to happen, and which decisions were/are to be earmarked for further litigation and consideration, was a question left open by the applicant.

175. The further issue with such remedial order as per paragraph 7.2 is that in granting such relief, it would be tantamount to allowing the applicant to be granted an order which the MEC had not sought in his application under case number 4441/23. I have already made a finding that the applicant has standing to bring this application and I do not traverse that terrain again. However, I need to emphasise that the relief the applicant sought in paragraph 7 would, in my view, make inroads into the MEC's role as supervising authority in terms of section 54A. Hence, I agree with the respondents' argument that the applicant's relief would be far-reaching and may create a situation where the supervisory role vested in the MEC in terms of legislation, was usurped or infringed[132]. Ultimately, the

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[131] Section 62(4) is the authority which enables the municipal manager to hear appeals in certain circumstances – see Part 3 of the Act

[132] Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs; Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs [2020] ZASCA 153 par 71

applicant as an own interest litigant has not shown that any of Sebola's decisions adversely affected its rights or had an external legal effect[133] on its rights, and would not be entitled to the relief it seeks in paragraph 7.2.

176. I was also referred by the applicant's counsel to an unreported judgment of the North West Division of the High Court, Mahikeng, namely ***Dilotsothle v Mahikeng Local Municipality***[134], in support of the submission that the orders granted in the latter judgment were appropriate to follow as the facts were similar to this matter. That may be so, but significantly Gura J made findings on the assessment of the municipal manager as basic, which I have not done for the reasons already stated. Order 3 at the conclusion of ***Dilotsothle*** remits the matter back to the Mahikeng Local Municipal Council to reconsider the appointment of the municipal manager on the basis of the Selection Panel's report. From my understanding of this order, the relevant Council was also ordered to reconsider the posts as advertised based on the competency assessments reports of each candidate at the time.

177. With respect, I decline to follow the ***Dilotsothle*** order for the following reasons: while Sebola also rated *"basic"* according to the Steele report, I made no finding regarding the correctness or otherwise of the assessment at the time, and/or the correctness of the Steele report, because the matter was decided on the common cause or agreed ground of review. Secondly, it was evident from the facts of this case that huge disputes revolve around the Steele report, its correctness and competence, and that is not an avenue which this Court traversed because it was unnecessary to do so. Thirdly, Sebola himself raised issues regarding his assessment and realised that his treatment differed from the other candidates. To refer the matter back to the Knysna Municipal Council at a stage where the competency assessment reports were provided to the Selection Panel and expect the Selection Panel to then make a decision, has its own problems because of the missing documentation and the failure to consider the Fundudzi Report.

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[133] "Administrative action", section 1, PAJA ; see also Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 SCA par 21

[134] Case number UM130/2020, Gura J, delivered on 25 October 2021j

178. Thus, while I fully appreciate the appropriateness of the remittal order in ***Dilotsothle*** to the facts and circumstances in that matter, the same approach would neither be competent nor practical in the circumstances and disputes in this matter. I thus determine that a remittal to the Council with an order that the Selection Panel reconsiders the competency assessments of the three candidates would be inappropriate.

179. Furthermore, to refer the matter back to the Municipal Council to re-start the process as from the Steele report, would make no sense because the parties raised concerns about the Steele report in the sense of its reliability and correctness. Furthermore, to exclude Sebola from applying again should he wish, would certainly not be fair, whatever the applicant's views were about him. Whether the other two candidates were/are available or not is also not a yardstick to determine a suitable order. Having regard to the submissions, and the further submissions and affidavits, the most sensible order to grant would be an order that the advertisement process begins afresh. Any other order, given the dispute about the Steele report, would not be just nor equitable. The remedy should be just that: a remedy and not a cause for further, unnecessary litigation.

The further affidavits and written submissions filed after the hearing

180. I do not intend to spend much time on this aspect. I set out the time line in respect of the further affidavits and multitude of further written submissions by counsel. On the first day of hearing, leave was granted to the respondents to file affidavits only in respect of a response to paragraph 27 of Sabbagh's replying affidavit and paragraphs 10 to 29 of Peters' affidavit. All these paragraphs dealt with Sebola's actual interview and assessment process. It became apparent from the affidavits of Phillips, the HR Manager of the Knysna Municipality that there was a dispute on the papers as to how the interview and assessment occurred, but interestingly, the affidavit then attacks Peters' qualification to conduct the assessment.

181. In short, the allegation was made that Peters was neither competent nor qualified to assess the candidates. The reason for such statement and accusation were not pertinent to the eventual outcome of the matter, but it was at this stage where, in my view, the matter became clouded. Not only was the Steele report attacked in the answering affidavit, but the competency and authority of Peters, considered as someone who was outsourced by Steele, was questioned.

182. The further supporting affidavits of the Speaker and the chairperson of the Municipal Council set out and support Phillips' contention that Peters and Steele, as a service provider, were not authorised to conduct the assessment and Steele was not a lawfully accredited service provider in terms of the COGTA directive[135] and thus the entire process was flawed from start to finish. At paragraph 24 of the Speaker's affidavit, the latter then sought an order to declare the appointment of Steele Consultants to be invalid and unlawful. An already convoluted matter then became even more problematic when the applicant's further affidavits of 3 August were filed.

183. The respondents' supplementary submissions of 10 August comprise 55 pages. Large parts thereof addressed matters already argued and the rest dealt with the law and competency of a collateral challenge, untenable claims by Jonker in her further affidavit, and the binding nature of the COGTA directive. The theme throughout was that the applicant's belated request that the matter be remitted to the Council to reconsider the Steele assessment and thereafter make a new appointment, should not be entertained.

184. In summary, the submissions by the respondents' were that, but for the applicant's about-turn in its first set of heads of argument – that the Court should issue directions that the Municipal Council reconsiders the appointment process to just after the Steele assessment process - the propriety of the Steele process was not in issue as it was irrelevant to the setting aside of the appointment decision. The respondents had accepted that the decision was to be set aside and that the matter would be remitted to the Council.

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[135] See paragraphs 8-23 of the Speaker's affidavit filed 1 August 2023, and Annexure MS1 thereto

185. It was further submitted and reiterated that there was no need for the Court to determine the applicant's new consequential relief[136] as it was raised in heads of argument. The further submissions were along the line that if the Court were to grant new consequential relief, it would effectively be accepting that the Steele process was beyond reproach and not flawed, which the respondents submitted, it was. Criticism was levelled at the applicant's about-turn, which forced the respondents to approach the matter as it did and raise a collateral challenge, which according to ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others***[137], a Court has no discretion to allow or disallow: in other words, the respondents may bring the challenge at any stage.

186. The affidavits shortly, and the applicant's submissions of 10 August 2023, contend that the respondents could not seek a declaration of invalidity in respect of Steele's appointment in an affidavit as they were supposed to launch a collateral challenge for such relief. Issues of lateness and a lack of condonation were also raised, and furthermore, that the affidavits go beyond the very limited issue which the Court had allowed pursuant to the striking out application.

187. The respondents proceeded to file further supplementary heads on 16 August 2023. It set out why it was not necessary for the Court to make findings on the assessment by Steele, but if it did, then a remittal order based on the correctness of the Steele assessment and process, would deprive the Council of determining whether that process was indeed adequate. The argument went that if the Court were to delve into the applicant's further new consequential relief – the remission to Council at a stage just after the Steele assessment report – then the Court had no discretion but to consider the collateral challenge, being the appointment of Steele.

188. From the papers, it was evident that there were flaws in the process and if not a dispute, then the affidavits indicated that there was certainly a difference in how Peters' experienced Sebola's interview and assessment, and how Sebola did. My firm view

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[136] In other words, a remission to the Knysna Municipal Council as per Dilotsothle
[137] 2004 (6) SA 222 (SCA) par 26

remains that there was simply no need to traverse this issue and I say so because my main finding is based on a common cause review ground and not on the Sebola assessment issue. It is evident, therefore, that any remedial order, which I have discussed above, cannot be based on the correctness or otherwise of the Steele assessment. The mere fact that these issues were raised, albeit it subsequent to the hearing, raised questions as to the reliability of the assessment process and report. Given the findings which I have already made, I remain convinced that there is no need to make a finding that the assessment and interview were correctly conducted or not.

189. In my view, the submissions of counsel for the respondents are correct. To order a referral and hamstrung the Council where it must accept the Steele report, notwithstanding issues raised on affidavit, would not be correct, nor equitable. In view of the orders I grant based on my earlier findings, there is no reason to address nor determine any collateral challenge and make a finding whether Steele and Peters were lawfully appointed to conduct the assessment and interview process, or not. The parties blamed each other but ultimately, both sides were guilty of traversing unnecessary avenues in this matter. Accordingly, I remain unconvinced that the orders which I intend granting and the findings made above, should be reconsidered in light of the various further affidavits and multiple heads of argument filed subsequent to 20 July 2023.

Costs

190. The respondents tendered to pay the applicant's costs from the launching of the application to 3 June 2023. The applicant motivated its submission for a personal costs order against each of the first to fourth respondents because, according to the applicant, they conducted themselves in a grossly negligent manner and the residents of Knysna should not foot the bill for their conduct in the litigation. The further motivation was that the respondents did not comply with the section 54A duty even though correspondence had warned them of the problem with the appointment. It was further submitted that if the Court was not inclined to agree on the remedy sought by the applicant, then it should

invoke the ***Biowatch*** principle[138]. This principle states that the general rule is not to award costs against unsuccessful parties when they litigate against the State in a matter of constitutional importance[139].

191. Aside from the delays and the condonation issues which I made findings on above, the matter was actually resolved in the sense that agreement was reached that the Council's decision was null and void and was to be set aside. This matter, with respect, was a case of the applicant shifting the goal posts insofar as the remedy was concerned, and later, the respondents going beyond what the Court allowed when it granted orders in the first striking out application. The fact that the applicant did not wait for the MEC to act as he was mandated to do in terms of section 54A, set this ball rolling, which ultimately snowballed into something larger than simply the determination of a competent and proper order and remedies to set aside the impugned decision of the Council. Yet, my view remains that the "jumping the gun" ahead of the MEC should not be held against the applicant, which approached the Court on its own standing.

192. Insofar as condonation is concerned, the explanations in this matter were accepted and each party should pay its own costs. The respondents were largely successful in their striking out application and should be awarded the costs attendant on that application. The new or changed consequential relief eventually had a knock on effect in that it led to the respondents' collateral challenge raised after the hearing, but which I indicated above, was unnecessary to determine. All in all, I am not convinced that any punitive costs order in this application is warranted upon the respondents who were entitled to place before the Court, their explanatory affidavit, and the affidavit and correspondence made it clear that they did not agree with all the review grounds and allegations made against Sebola.

193. Furthermore, Sebola cannot be blamed for the unlawful appointment as he did not appoint himself, and to order him to pay costs in these circumstances would, in my view,

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[138] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14 para 56-59
[139] Biowatch, par 56; Lawyers for Human Rights v Minister in the Presidency and Others [2016] ZACC 45 para 15-18

be unjust. The way the application progressed and was litigated, from both sides, and the outcome, do not justify the invocation of the ***Biowatch*** principle. The main order is ultimately one which was agreed upon, albeit that the parties differed on whether all or some of the review grounds were to be determined. The main aspect when it comes to costs, in my view, is that on the issue of setting aside Sebola's orders and the further remedial relief seeking remission to the Council, the respondents' arguments prevailed.

194. Putting aside the other aspects which made the matter more convoluted than was necessary, the respondents were largely successful and but for the specific costs orders mentioned above and the tender up to 3 June 2023, there is no cogent reason why the applicant should not be ordered to pay the respondents' costs subsequent to that date. Lastly, while I had given thought to an order that each party pays his/its own costs (subsequent to 3 June 2023), ultimately I cannot lose sight of the fact that on the Sebola decisions and remedial orders, the respondents are successful, hence the exercise of my discretion insofar as costs are concerned, is in their favour.

195. Recently, Uniform Rule 67A dealing with a party and party award of costs was inserted by Government Notice R4477 in Government Gazette 50272 and took effect on 12 April 2024. Subsequent to the amendment of the Rules, ON 22 April 2024, Wilson J delivered a judgment on Rule 67A in ***Mashavha v Enaex Africa (Pty) Ltd***[140]. As the amendment came into effect after the matter was argued and ***Mashavha*** was delivered very recently, I am of the view that the parties should be afforded an opportunity to make brief submissions on whether the amended Rule 67A applies to any costs order(s) I intend to make in this application, and furthermore, the scale thereof with reference to Rule 67A(3) read with sub-rule (9). Counsel will be afforded 10 days from date of judgment to provide a brief Note on Rule 67A and the scale of costs.

[140] Gauteng Local Division, Johannesburg,, case number 2022-18404, delivered on 22 April 2024

THE MEC'S APPLICATION – CASE NUMBER 4441/2023

Costs

196. The only issue to determine is that of costs, and as an opening remark, the order granted in the DA's application is not necessarily duplicated in the MEC's application for the reasons set out below. The MEC sought an order declaring the decision of the Knysna Municipal Council null and void, and in the further orders, in the event of any opposition, an order of costs was sought. I have already set out the chronology of events and the correspondence between the MEC and Executive Mayor, alerting the latter on 23 February 2023, of the basic rating of Sebola and that his appointment was made in contravention of the Regulations to the Act[141].

197. As was seen, the Executive Mayor's response was to not only disagree that Sebola was not competent, but to rely on the Gijima report's finding after the fact to support his views that Sebola was, in his view, competent and had the necessary competencies for the post[142]. The explanatory affidavit which was also in parts, an opposing affidavit, was also filed after the MEC's heads of argument were filed in the matter. Insofar as case number 4441/2023 was concerned, the Speaker recognised that the MEC acted in terms of his powers under section 54A(8), read with section 54A(3).

198. I already addressed and ruled on condonation in the other application above but in this matter, the explanation differed and must be considered for what it is. In the MEC's application, the reason for the delay in filing the respondents' affidavit, contributes to my finding on costs. The explanation for the delay was that because of the DA's application, the compilation of the explanatory affidavit in the MEC's matter was overlooked.[143] The submission was that despite the MEC's warnings, the Executive Mayor forged ahead and

[141] AB9
[142] AB10
[143] Record, par 33, p236

in an explanatory affidavit, the Municipality and other respondents actually opposed the application and only conceded the unlawfulness thereof on 3 June 2023.

199. The MEC argued that he was forced to launch this application given the stance of the respondents, and despite warnings that the Sebola appointment was invalid. The further submissions were that the Court should grant a costs order and approach the matter similarly as in the ***Central Karoo District***[144] judgment. In that matter, Gamble J found that the Municipality had acted in a *"somewhat cavalier manner"*[145] by failing to respond to the MEC's correspondence, filing an affidavit contrary to the timetable, raising points *in limine* and then abandoning it, and advancing a case which lacked merit. The Court found that in the circumstances where the application was opposed, it was just and equitable to grant a costs order[146].

200. The MEC's further argument, with reference to judgments such as ***MEC Kwa-Zulu Natal for Local Government, Housing and Traditional Affairs v Yengwa and Others***[147], was that State entities should avoid litigation against each other and should endeavour to co-operate and make every reasonable effort to resolve their disputes before resorting to litigation. Counsel for the MEC argued that the litigation in this matter was mainly because of the stance of the Executive Mayor. Furthermore, that the Municipality derived its funds mainly from the rates and service charges of the Knysna residents, and the Province obtained its funds from the National Revenue Fund and was also a front-line provider.

201. The respondents' averment was that the costs sought by the MEC was inappropriate as this was a dispute between two spheres of government and thus a costs order will simply result in a situation where public money then flows from the Municipality to the Province. The further submission was that the Municipality was reasonable by accepting that the Council's decision was unlawful. The respondents blame the DA, which

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144 Supra
145 Central Karoo District, supra, para 36; see also para37-38
146 Supra, par 36
147 [2010] ZASCA 31 par 14

is the applicant in 4247/2023, for (them) being in Court, and submitted that the MEC made an election to come to Court, while the Municipality acted reasonably by making the concession of an unlawful appointment.

202. The submission was that should the Court grant a costs order, it should only be up to 1 June 2023, when the Municipality accepted that the decision was unlawful. I am asked to not place too much emphasis on the Notice of Opposition as the application was not opposed. In other words, the order proposed by the respondents' counsel was that each party paid his/its own costs or that costs be limited to 1 June 2023. In reply, counsel for the MEC made a good point that there was no tender of costs up to 1 June 2023 and that had the explanatory affidavit been filed earlier, the issue of costs would not have arisen.

203. Having regard to the submissions, the important aspect to note is that this application's costs issue does not relate to the DA's matter. In other words, the costs order granted in that matter, would not necessarily follow in the MEC's application purely because the main relief was the same and both applicants' sought the impugned decision to be set aside or declared null and void. I also highlight the fact that the respondents' affidavit in this matter was not a replica or duplicate of that filed in the other application.

204. From ***SANRAL v City of Cape Town***[148]***,*** it is evident that the Municipality's funds do not derive from the National Revenue Fund, but from rates and service charges imposed on the residents of that municipality. It is also not unusual nor a blanket rule that one organ of State cannot be ordered to pay the costs of the other, and the Gamble J order in ***Central Karoo District*** is one such example. In this particular matter, it was easy to blame the applicant in 4247/2023 in order to escape the responsibility and liability of costs, but the truth of it is that the applicant in that matter brought the application on its own steam and under the auspices of an own-interest litigant.

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[148] 2017 (1) SA 468 (SCA) par 111

205. The MEC was bound to act in terms of section 54A(8) given the Executive Mayor's denial of any unlawfulness in the Sebola appointment even when the MEC's correspondence set out the issues in detail. Still, the Executive Mayor was unmoved and persisted with the stance that the appointment was lawful and that Sebola had met the requirements of the Regulations. In my view, had the DA's application not occurred, this application would either have been opposed or the concession would have been made after the fact. As it is, I am inclined to agree with the MEC that the Executive Mayor's conduct lead to the MEC acting in his supervisory capacity to approach the Courts in terms of section 54A. The concession regarding invalidity only came almost four months after the Executive Mayor was alerted to the invalidity in correspondence[149].

206. While I agree with most of the MEC's submissions, I differ that this was an opposed application. This was an unopposed application where the unlawfulness was conceded and confirmed in the explanatory affidavit of the Speaker. In my view, this conduct after the horse had bolted, persuades me to limit the costs order I intend to grant. While I align myself with the Gamble J findings, the difference in this matter is the fact that the Executive Mayor did respond to the MEC's correspondence and the respondents accepted on 1 June 2023 that the decision was unlawful and was to be declared unlawful. As things turned out, their arguments regarding the setting aside of decisions and remedies, albeit that it was not part of this application, proved to be successful in the other application.

207. The remaining aspect relates to the ***Mashavha*** judgment and the amended Rule 67A and I afford counsel in this matter the same opportunity as indicated in the DA's application, to provide a note within 10 days of the order regarding the applicability or otherwise of Rule 67A and the appropriate scale of costs.

208. In the result, the following Orders are granted:

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[149] SS17

ORDER IN CASE NUMBER 4247/2023

1. The applicant is granted condonation for the late filing of its Heads of Argument.

2. The first to fourth respondents are granted condonation for the late delivery of their explanatory affidavit.

3. The first to fourth respondents' application to strike out, dated 18 July 2023 is granted to the extent set out in the judgment. The applicant is ordered to pay the costs of the striking out application.

4. It is declared that the decision taken by the Knysna Municipal Council on 25 January 2023, appointing Mr O P Sebola (fourth respondent) as municipal manager, is null and void.

5. The appointment of Mr O P Sebola in consequence of the Knysna Municipal Council's decision as referred to in the preceding paragraph, is set aside.

6. The Orders granted in paragraphs 4 and 5 above shall have prospective effect only and thus not affect the validity of decisions made/taken by the fourth respondent in his capacity as municipal manager from the date of his appointment to the date of this Order. For the sake of clarity, this Order does not affect the rights of any person/party who wishes to challenge a decision, contract and/or appointment made or taken by the fourth respondent in his capacity as municipal manager on grounds other than the invalidity of his appointment.

7. The matter of the appointment of a municipal manager is remitted to the Knysna Municipal Council which is directed to start the advertisement process afresh.

8. The first to third respondents are ordered to pay the costs of the applicant, jointly and severally, from the date of the launching of its application to 3 June 2023, which shall include costs of two counsel where so employed.

9. The applicant is ordered to pay the costs of the first to fourth respondents from 4 June 2023 to date of this Order, and such costs shall include costs of three counsel where so employed.

10. Counsel for the applicant and for the first to fourth respondents are required to provide a brief Note on the scale of costs in terms of Uniform Rule 67A, read with Rule 69, within 10 (ten) days of date of this Order (Court days).

ORDER IN CASE NUMBER 4441/2023

1. It is declared that the decision taken by the Knysna Municipal Council on 25 January 2023, appointing Mr O P Sebola (fourth respondent) as municipal manager, is null and void.

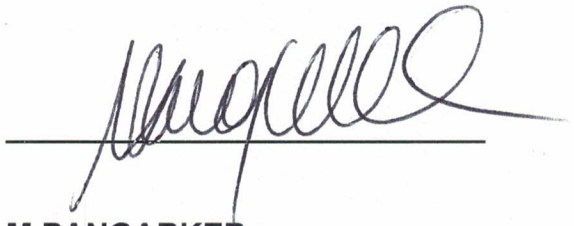
2. The appointment of Mr O P Sebola in consequence of the Knysna Municipal Council's decision as referred to in the preceding paragraph, is set aside.

3. The Orders granted in paragraphs 1 and 2 above shall have prospective effect only and thus not affect the validity of decisions made/taken by the fourth respondent in his capacity as municipal manager from the date of his appointment to the date of this Order. For the sake of clarity, this Order does not affect the rights of any person/party who wishes to challenge a decision, contract and/or appointment made or taken by the fourth respondent in his capacity as municipal manager on grounds other than the invalidity of his appointment.

4. The matter of the appointment of a municipal manager is remitted to the Knysna Municipal Council which is directed to start the advertisement process afresh.

5. The first to third respondents are ordered to pay the applicant's costs, jointly and severally, up to 1 June 2023, the one paying the other to be absolved. No costs order is granted against the fourth respondent in his personal capacity. Costs subsequent to 2 June 2023, shall be on the basis that each party pays his own costs.

6. Counsel for the applicant and for the respondents are required to provide a brief Note on the scale of costs in terms of Uniform Rule 67A, read with Rule 69, within 10 (ten) days of date of this Order (Court days).



M PANGARKER
ACTING JUDGE OF THE HIGH COURT

Appearances in case number 4247/23

For applicant: **M BISHOP**
O MOTLHASEDI
Instructed by: Minde Schapiro and Smith Inc.

For first to fourth respondents: D BORGSTROM SC
M TSELE
K NGQATA

Instructed by: **Nandi Bulabula Inc.**

Appearances in case number 4441/23

For applicant: H DE WAAL SC
Instructed by State Attorney, Cape Town

For Respondents: Appearances as in 4247/23