IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No.: 23/2021
Reportable: YES/NO
Of interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS: FREE STATE[1]	Applicant
and	
THE MALUTI-A-PHOFUNG LOCAL MUNICIPALITY	First Respondent
MR. FUTHULI PATRIC MOTHAMAHA	Second Respondent
MS. MATHOLASE JEMENA MAZINYO	Third Respondent
COUNCIL OF THE MALUTI-A-PHOFUNG LOCAL MUNICIPALITY[2]	Fourth Respondent

[1] "The MEC".

Coram: Molitsoane, J *et* Opperman, J

Judgment by: Opperman, J

Date of hearing: 28 February 2022

Order: 28 April 2022

Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 28 April 2022. The date and time for hand-down is deemed to be 28 April 2022 at 15h00.

Summary: Review of appointments of Municipal Manager and manager directly accountable to the Municipal Manager whilst Municipality under Administration and Intervention in terms of section 139(5) of the Constitution of the Republic of South Africa, 1996 and section 139 of the Local Government: Municipal Finance Management Act, 56 of 2003; and in contravention of Resolutions taken by the Municipal Council.

JUDGMENT

INTRODUCTION & OVERARCHING LEGAL FRAMEWORK

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[2] "The Council".

[1] The applicant approached the court to review and to declare upon the alleged unlawful appointment of the second and third respondents on alleged unlawfully increased remuneration packages and the resultant unlawful drawing of the salaries.[3]

[2] The golden thread that runs through the case is the public's interest as decreed in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The focus is on local governments.

[3] Local government is the sphere of government closest to the people. These organs of state and its officials[4] are the sentinels of basic human rights such as electricity delivery, water for household use, sewage and sanitation, storm water systems, refuse removal, fire-fighting services and municipal health services.

[4] Their duty to manage the budget and monies of the Municipality with the utmost integrity and honour is supreme.

[5] If the conduct of the Municipality, the Municipal Manager, a manager(s) directly accountable to the Municipal Manager and the Municipal Council does not comply with their legislatively imposed obligations; they must be called to order.

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3 Heads of Argument for the Applicant paragraphs 1 & 2.

4 The parties more specifically are:

1. The applicant is the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs: Free State and appointed in terms of the Constitution of the Republic of South Africa, 1996. Mr. Mokete Victor Duma, the Head of the Department of Co-operative Governance and Traditional Affairs: Free State represented the applicant at all times in the case.
2. The first respondent is the Maluti-A-Phofung Local Municipality, an organ of the State established in terms of section 155(1) of the Constitution read with section 12 of the Local Government: Municipal Structures Act, 1998. The Municipality was a Category 4 and not a Category 6 Municipality at the time of the salary allocations. This to have been due to non-compliance with legislation to submit audit reports.
3. The second respondent is Futhuli Patrick Mothamaha, a major male and the current municipal manager of the first respondent.
4. The third respondent is Matholase Jemena Mazinyo, a major female and the current chief financial officer of the first respondent.
5. The fourth respondent is the Council of Maluti-A-Phofung Local Municipality, a municipal council as contemplated in section 18 (read with section 22) of the Local Government: Municipal Structures Act, 117 of 1998.

[6] *The uniqueness of this case is that the purview in law lies in the application of section 139(5)[5] of the Constitution and section 139[6] of the Local Government: Municipal*

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[5] Section 139(5) of the Constitution.

If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-
  (i) is to be prepared in accordance with national legislation; and
  (ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-
  (i) appoint an administrator until a newly elected Municipal Council has been declared elected; and
  (ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

[6] 139 Mandatory provincial interventions arising from financial crises

(1) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly-
  (a) request the Municipal Financial Recovery Service-
    (i) to determine the reasons for the crisis in its financial affairs;
    (ii) to assess the municipality's financial state;
    (iii) to prepare an appropriate recovery plan for the municipality;
    (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
    (v) to submit to the MEC for finance in the province-
      (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
      (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and
      consult the mayor of the municipality to obtain the municipality's co-operation in
      implementing the recovery plan, including the approval of a budget and legislative
      measures giving effect to the recovery plan.

(2) The MEC for finance in the province must submit a copy of any request in terms of subsection (1) (a) and of any determination and assessment received in terms of subsection (1) (a) (v) (aa) to -
  (a) the municipality;
  (b) the Cabinet member responsible for local government; and
  (c) the Minister.

(3) An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared

Finance Management Act, 56 of 2003 in that the Municipality was effectively placed under Administration by Mandatory Intervention. The Intervention restricted the Municipality in the exercise of its authority. The Intervention confirmed an Order of the Free State Provincial Division of the High Court.[7]

[7] The authority of the Administrator, in introduction, provides context. *Inter alia,* in "The Terms of Reference for the Joint Intervention Team at Maluti-A-Phofung Local Municipality", signed by the Member of the Executive Council for Co-operative Governance and Traditional Affairs on 10 February 2018:[8]

1. To assume all executive obligations in terms of the Constitution or any other legislation except for legislative obligations listed in section 160(2)[9] of the Constitution;
2. to facilitate and ensure that all vacant positions/post of senior managers are filled;
3. to focus particularly on curbing the ballooning salary costs while improving performance;
4. to ensure compliance with "The Terms of Reference for the Joint Team at Maluti-A-Phofung Local Municipality". Paragraph 4 is material *in casu*:

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for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.
[Date of commencement of s. 139: 1 July 2005.]

7 "FA4" at pages 53 to 63.

8 Pages 183 to 193.

9 160 Internal procedures
(1) A Municipal Council-
(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
(b) must elect its chairperson;
[Date of commencement of para. (b): 30 June 1997.]
(c) may elect an executive committee and other committees, subject to national legislation; and
(d) may employ personnel that are necessary for the effective performance of its functions.
(2) The following functions may not be delegated by a Municipal Council:
(a) The passing of by-laws;
(b) the approval of budgets;
(c) the imposition of rates and other taxes, levies and duties; and
(d) the raising of loans.

4.1 The Administrator *assumes all executive obligations/functions* of the Municipality as contained and conferred to by the Constitution or any National or Provincial Legislation. (Accentuation added)

4.2 The Acting/Municipal Manager and his/her Administration, *must report to the Administrator, and any administrative decision taken by the said officials must be approved by the Administrator.* (Accentuation added)

4.3 The Municipal Council and all its organs, including such structures as the Mayoral Committee and the Municipal Public Accounts Committee (MPAC) must obligatorily continue to function within the legislative framework and parameters of the Intervention and Municipal Financial Recovery Plan, *and the decisions and resolutions thereof must all be ratified and approved by the Administrator before implementation.* (Accentuation added)

4.4. Except for the legislative obligations enlisted in section 160(2) of the Constitution, the Municipal Council, when exercising its constitutional and legislative obligations, *must request approval for its decision from the Administrator before the implementation of any such resolution.* (Accentuation added)

[8] Only the Administrator had the authority to contract on behalf of the Municipality with the second and third respondents. Part of the relief sought is a declaration of the Court that the contracts proposed by the applicant at "FA5(a)" and "FA5(b)" must be enforced. The parties thereto to be in accordance with the Intervention as correctly stated in "FA5(a)" and "FA5(b)".[10]

[9] The incident, scenario and the relationship between the parties *in casu* is the exercise of public power that affects the citizens of the Municipality. The Doctrine of

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[10] FIXED TERM EMPLOYMENT CONTRACTS ENTERED INTO BY AND BETWEEN MALUTI-A-PHOFUNG LOCAL MUNICIPALITY ("The Employer"), Represented by Halcon Amos Goliath, in his capacity as the Administrator and Mr. Futhuli Patrick Mothamaha ("The Employee"), Ms. Matholase Jemena Mazinyo ("The Employee").

Legality finds application. Hoexter[11] stated it to be: “Primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts.” The then Chief Justice Mogoeng Mogoeng, on 25 July 2013, explained it to be: “The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the constitution.”[12] I will return to the Rule of Law and the Doctrine of Legality later.

[10] Section 152 of the Constitution declares the objects or minimum standards Hoexter referred to; and of local government that is the subject *in casu*:

(1) The objects of local government are-

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

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11 Hoexter, Cora --- "The Principle of Legality in South African Administrative Law" [2004] MqLawJl 8; (2004) 4 Maquarie Law Journal 165 165 at VI BACK TO BASICS: A LESSON FROM THE RULE OF LAW footnote 102 in the text. Also see “The principle of legality and the requirements of lawfulness and procedural rationality, Law Society of South Africa v President of the RSA 2019 (3) SA 30 (CC)”, by Warren Freedman, Nkosinathi Mzolo, Published Online: 11 Nov 2021, https://hdl.handle.net/10520/ejc-obiter_v42_n2_a12 and “Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law” by Lauren Kohn, 2013, https://journals.co.za/doi/abs/10.10520/EJC153153.

12 TRANSCRIPT: CHIEF JUSTICE MOGOENG ON THE RULE OF LAW IN SOUTH AFRICA, The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards, https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

[11] Section 153 of the Constitution affirms the developmental duties of municipalities.

> A municipality must-
>
> (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
>
> (b) participate in national and provincial development programmes.

[12] The preamble of the Local Government: Municipal Structures Act, 117 of 1998 proclaims democracy and good governance of the people of the Republic of South Africa on local government level:

> WHEREAS the Constitution establishes local government as a distinctive sphere of government, interdependent, and interrelated with national and provincial spheres of government;
>
> WHEREAS there is agreement on the fundamental importance of local government to democracy, development and nation-building in our country;
>
> WHEREAS past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which our people continue to live and work;
>
> WHEREAS there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a

safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives;

WHEREAS municipalities across our country have been involved in a protracted, difficult and challenging transition process in which great strides have been made in democratising local government; and

WHEREAS municipalities now need to embark on the final phase in the local government transition process to be transformed in line with the vision of democratic and developmental local government;

[13] Section 19 of the same Statute[13] states that:

19 Municipal objectives

(1) A municipal council must strive within its capacity to achieve the objectives set out in section 152 of the Constitution.

(2) A municipal council must annually review-

(a) the needs of the community;

(b) its priorities to meet those needs;

(c) its processes for involving the community;

(d) its organisational and delivery mechanisms for meeting the needs of the community; and

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13 Local Government: Municipal Structures Act, 117 of 1998.

(e) its overall performance in achieving the objectives referred to in subsection (1).

(3) A municipal council must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers.

[14] It is trite that the applicant is responsible for co-ordination, monitoring and support of municipalities in each province. This is by virtue of sections 154[14] and 155[15]

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[14] The Constitution: 154. Municipalities in co-operative government. -
(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

[15] The Constitution: 155. Establishment of municipalities
(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
(a) provide for the monitoring and support of local government in the province; and
(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

44. National legislative authority. —
(1) The national legislative authority as vested in Parliament—
(a) confers on the National Assembly the power—
(i) to amend the Constitution;
(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
(b) confers on the National Council of Provinces the power—
(i) to participate in amending the Constitution in accordance with section 74;
(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

of the Constitution. The supervisory role of the provincial government includes the duty to prevent and rectify any unlawful conduct on the part of municipalities. As such the applicant is duty bound to approach the Court to rectify any unlawful conduct when such conduct comes to its knowledge. The applicant is the executive authority of the Free State Provincial Government whose mandate it is to; *inter alia,* ensure compliance with sections 154 and 155 of the Constitution. The *locus standi* of the applicant is in dispute. This brings me to the issues of the case.

THE ISSUES & THE RESULTANT STRUCTURE OF THIS JUDGEMENT

[15] The applicant's case is based on four pillars:[16]

1. The applicant has appropriate *locus* to institute legal proceedings against the first respondent and is not non-suited by the provisions of the Intergovernmental Relations Framework Act, 2005.
2. The resolution adopted by the first respondent's council was unambiguous that the appointments of the second and third respondents, was subject to the current upper limits, which upper limits are prescribed in the Regulations.
3. The administrator had correctly made an offer of remuneration packages to the second and third respondents, which factored the variables prescribed by the Regulations.

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(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.
(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.
(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

[16] Applicant's Practice Note at page 3 as drafted by Advocate N Snellenburg SC dated 23 November 2021.

4. Consequently, the remuneration packages above what (sic) was authorised by the council resolution, is unlawful, irregular and must be declared as such.

[16] Counsel for the first, second, third and fourth respondents maintained that:[17]

1. The application suffers from endemic deficiencies. The Doctrine of Legality is inapplicable as a ground for review. Consequently, the review and declaratory relief are sought out of time.
2. Even if the Doctrine of Legality finds application, it has not been shown that any of the respondents acted outside the ambit of what was permitted by the enabling legislation. As no case for arbitrary and irrational decision - making has been made, there simply is - respectfully - no case.
3. The case made is a bad one. The MEC's case is doomed to failure. The respondents argue that the relief sought is incompetent in terms of the Local Government Municipal Systems Act and the fact that the MEC did not follow the procedure set out in Rule 53. The delay was unreasonable and the record not called for.
4. They take issue with the fact that the employment agreement is a contract and the relationship between the disputing parties is horizontal. It does not form part of the public law.

[17] The issue of joinder was raised in the opposing affidavits but it seems to have fell by the wayside. Advocate Grobler SC, for the respondents, remarked that the fourth respondent was cited incorrectly: "Much was made of this in the Opposing Affidavit, and the council obviously does not have standing independent of the Municipality. But the point is neither here nor there."[18]

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17 First, Second, Third and Fourth Respondents' Heads of Argument as drafted by Advocate S Grobler SC dated 25 November 2021.

18 Page 2 of the Heads of Argument 1st, 2nd and 4th Respondents in footnote 1.

[18] The answer of the applicant to the aspect is that the second and third respondents neither raised a point of non-joinder or misjoinder. The applicant deny that the Council cannot be joined in proceedings and submit that the objection does not take the respondents' case further. The third respondent confirmed that the first and fourth respondents are unitary. The applicant specifically deny that the application was drafted with a "lack of care" due to this.

[19] The issues of joinder and lack of care will, in light of the above, be disregarded. It obviously does not play any part in the dispute anymore.

[20] The respondents acknowledged the standing of the MEC to bring a matter that concerns the appointment of a Municipal Manager to Court, but complained about the unreasonable delay to do so:

> 10.4 Section 56(5)[19] for instance, obligates the MEC to act within 14 days of becoming aware of any appointment that is made in contravention of the Act. *This includes a declaratory order from a competent court.* (Accentuation added)
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> 10.5 Of course this is nowhere near an approximation of compliance with this section. The MEC also does not explain why it took months on end to launch

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[19] Section 56(5) referred to in the Local Government: Municipal Systems Act, 32 of 2000.
"56(5) If a person is appointed to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council." This Act has been updated to Government Gazette 45305 dated 11 October, 2021.
THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT NO. 32 OF 2000, [ASSENTED TO 14 NOVEMBER, 2000], [DATE OF COMMENCEMENT: 1 MARCH, 2001], GENERAL NOTE: The Local Government: Municipal Systems Amendment Act, No. 7 of 2011 was declared invalid by the Constitutional Court on 9 March 2017 (see South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs 2017 (5) BCLR 641 (CC)) and the declaration of invalidity was suspended for a period of 24 months to allow the Legislature an opportunity to correct the procedural defect of a failure to comply with section 76 of the Constitution in its enactment. This affected section 54A.

this proceeding – under circumstances where it is repeatedly stated that the Act had been contravened.[20]

[21] The applicant explained the delay in detail.[21]

1. The applicant wanted to afford the respondents adequate opportunity to remedy the situation. This was to no avail.
2. The Administrators' duties in the first respondent were marked by having to immediately become acquainted with the administration and exercising of his duties in what could only be termed as an inhospitable environment. Mr. Goliath's tenure - of just under three months - was not without challenges, obstacles and unfortunately resistance by many officials in the first respondent.
3. To make matters worse, the appointment of Mr. Goliath coincided with the Level 5 National Covid Lockdown. This caused havoc in the pursuit of action against the respondents.
4. For example, on 22 April 2020, the Administrator was summoned to the office of the Executive Mayor for a meeting regarding the status of the first respondent. The first respondent was functioning at a limited capacity of only essential services' staff being permitted to work as a result of the National Lockdown which commenced at midnight on Thursday 26 March 2020. The gist of the meeting however was soon revealed to be discontent that the Administrator had signatory powers regarding the first respondent's bank account.
5. After the meeting, and on the same day, the Administrator was forcefully and unlawfully ejected from and denied access to the offices of the first respondent by private security personnel. It was done on instructions of the speaker and the chief whip who were present at the meeting with the Executive Mayor.
6. The Administrator informed the applicant and the Head of Department of the event and requested intervention. Discussions ensued to resolve the matter

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20 Page 115.
21 Pages 36 to 39.

and only on 28 May 2020 was the Administrator advised of the steps to take to resolve the situation.

7. The Administrator was released from his duties towards the end of June 2020. From the evidence it may be construed that he was literally ostracised by the respondents for doing his work with diligence and honour. This in contravention of a clear Court Order and the section 139 - Intervention.

8. July and August 2020 were characterised by the intermittent closures of the applicant's department's offices in response to positive cases of Covid.

9. During September 2020, there was some form of stability in that the normal operations were restored and offices started full scale operations, albeit with intermittent disruptions due to Covid related issues.

10. The alleged second and third respondents' malfeasance is of a continuous nature. The second and third respondents are persisting in drawing the alleged unlawful amounts as salaries. The alleged unlawful conduct persisted notwithstanding numerous interventions and cautions.

11. The applicant had to approach the Court; this to be a last resort and remedial step.

12. On 5 January 2021 a Notice of Motion was issued and an urgent application lodged. The matter was struck from the roll for want of urgency.

13. The third respondent gave Notice of Intention to Oppose on 11 February 2021 and filed her Opposing Affidavit on 17 February 2021.

14. The second respondent only filed his Opposing Affidavit on 18 June 2021.

15. The matter was returned to the roll, on 7 October 2021, but postponed to 2 December 2021. It was realised that the case demanded a sitting of two judges and the matter was postponed to 28 February 2022.

16. In the meanwhile, the applicant's Replying Affidavit to the first, second and fourth respondents was filed on 25 November 2021.

[22] The delay in the case is understandable in the prevailing circumstances. The animosity of the respondents and their obstructive behaviour during the period of the

section 139 - Intervention was unacceptable. They should have contributed to a solution in the interest of the democracy of the country for which people sacrificed their lives.

[23] The applicant should have done more to obtain justice and expedite the litigation.

[24] The prejudice lies in the words of the applicant's representative at paragraph 109 on page 38 of the record:

> Unmeasurable is the issue of public confidence in public institutions. The decline in public confidence constitutes an important tenet of democracy which must not be countenanced.

[25] In *Lethoko and Another v Minister of Defence and Others* 2021 (2) SACR 661 (FB) I observed that:

> The history of this matter shows beyond any doubt that the cause of the repulsive delay from 2006 to 2021 in the finalisation of this case lies at the door of the Presiding Officers, the applicants and the first respondent. They brought the administration of justice into disrepute and they could have done much better to serve their duty to ensure expeditious finalisation of the case. The charges against the applicants are serious. It was committed against their employer and the theft was blatantly committed in relation to the property of the taxpayer and law-abiding citizens of the country. The evidence against the applicants is strong. On the other hand, the applicants are represented by sturdy and experienced Counsel; they face no trial prejudice. Prejudice on other levels such as training and promotion opportunities can be addressed on other points of law. It is high time for the matter to go on trial and for justice to take its course. A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals may not cause the Rule of Law to fail the country.

[26] The same is true in this case. The allegations against the respondents are serious and the conduct of all the parties by dragging their feet in bringing the matter to Court are bringing the administration of justice into disrepute. All the parties were represented throughout the events by institutions and individuals with knowledge and experience of literally, amongst the highest calibre, in the country. To reiterate and in the sphere of the abhorrent general waning and declining of our local governments due to greed and ineffectiveness: A healthy democracy and the protection of the citizen in general, demand that cases of this nature be tried and concluded. The inappropriate management of cases by individuals may not cause the Rule of Law to fail the country.

[27] In light of the above this Court is, constitutionally so, duty - bound to allow the matter on the roll and excuse the delay.

[28] The judgment will address the issues in the following order:

1. The evaluation of the conduct of the respondents in the circumstances of the case through the common cause factual circumstances. Were the contracts they entered into legal on the facts and prevailing legal framework?
2. The relationship between the applicant and the second and third respondents. The employment contract: Is the contract between the disputing parties a horizontal relationship? Does it not resort under Labour Law?
3. The Doctrine of Legality as a ground for review.
4. The *locus standi* of the applicant and the application of the provisions of the Intergovernmental Relations Framework Act, 2005.

THE EVALUATION OF THE CONDUCT OF THE RESPONDENTS IN THE CIRCUMSTANCES OF THE CASE THAT ARE COMMON CAUSE

THE CONTRACTS

[29] The Municipality had by 2018, for a substantial period, been suffering a financial crisis and was in serious and persistent breach of its obligations to provide basic services or meet its financial commitments.

[30] The residents of Maluti-A-Phofung suffered severely. Basic services that form the essence of their non-negotiable human rights such as water, electricity and infrastructure, were affected.

[31] It is common cause and a matter of public record that the Municipality as governed by the Municipal Council were involved in numerous litigious matters in our courts.

[32] On 22 October 2018 the Municipality's failure and inability to meet its obligations due to mismanagement came to a head with a settlement agreement made an Order of Court in cases 1453/2018 and 1923/2018[22] that served in the Free State Division of the High Court.

[33] The record of a Cabinet Decision at a Cabinet Meeting of the Provincial Government on 19 June 2018 inveterate the Court Order.[23] The Municipality was effectively placed under Administration by Mandatory Intervention in terms of section 139(5) of the Constitution and section 139 of the Local Government: Municipal Finance Management Act, 56 of 2003.

[34] Mr. Amos Goliath was appointed as Administrator on 25 March 2020 and with effect from 1 April 2020 for the last period of the duration of the Intervention.[24] He succeeded one Mr. Blakes Mosley-Lefatola. While under Administration the Administrator and his Deputy were both at the same time in office. Therefore, when the first Administrator vacated his office, his Deputy succeeded him in Administrator capacity and automatically. There was not any suspension of the Intervention and the

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22 "FA4" Pages 53 to 63.
23 "FA7" at pages 85 to 87.
24 Page 52 and page 26 at paragraph 48.

Deputy automatically assumed the authority of the Administrator; immediately and in the interim.

[35] The second and third respondents were appointed as the Municipal Manager and the Chief Financial Officer of the Maluti-A-Phofung Local Municipality; they are, *ex officio*, the very officials that have wide-ranging and detailed knowledge of the legality of appointments, salaries and the law and issues relevant thereto.

[36] *It is a fact beyond any doubt, undisputed by all the parties, that they were appointed and contracted with, without the knowledge, involvement or ratification of the Administrator. This is illegal and ultra vires the Intervention.*

[37] I quote from the Replying Affidavit[25] of the applicant as confirmed by both the Administrators.[26] This was in the reply to the affidavit of the third respondent and the evidence will show that it is true for both the second and third respondents.

> 57. Mr. Goliath advised me that he was never made aware of the contract the third respondent concluded with the second respondent.
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> 58. As a result, he was unaware of the remuneration offered to the third respondent. He became aware of the remuneration discrepancy for the first time when he was preparing the salary run documentation.
>
> 59. *The Court will note that the contract which the Administrator was unaware of, was concluded overnight on 26 March 2020 and the third respondent commenced her duties the next day on 27 March 2020. All of this was done without the involvement of the Administrator.* (Accentuation added)

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25 Pages 176 to 177.
26 Annexures “RA5(1)” and “RA5(2)” at pages 203 to 208.

60. I reiterate that Mr. Goliath was all along part of the administrator team. He was serving as Deputy Administrator and was always privy to the administration of the first respondent.

61. Mr. Goliath succeeded the Administrator, Mr. Blakes Mosley-Lefatola.

62. Consistent with the Administrator terms of reference, when Mr. Lefatola vacated his office and Mr. Goliath took over the Administrator office, his predecessor advised him to continue with and finalise the appointment of the staff including the appointment of the third respondent. There was never a vacuum left. I attach hereto the confirmatory affidavits of both Messrs Lefatola and Goliath marked Annexure RA 5(1) and (2).

[38] In support of the above is the fact that Mr. Lefatola, signed the 26 March 2020 – Municipal Council Resolutions, that allowed the appointment of the second and third respondents; *only on 14 April 2020*. The then Acting Municipal Manager, one Mr. T.F. Mopeloa, signed the said Resolutions on *7 April 2020*.

[39] Thus, at the time (apparently between 26 and 30 March 2020)[27] when the contracts of employment were entered into by the Municipality as represented by the then Executive Mayor and the second respondent; and the second respondent with the third respondent; the Resolutions were not signed and carried no authority. To add insult to injury; it will be shown later that the salaries on which the second and third respondents were appointed, were not in accordance with the Resolutions.

[40] The contracting was done when the parties to the contract were under the impression that there was not an Administrator in office. This was in the few days between when the Resolutions by the Municipal Council were passed on 26 March 2020, and the time the Deputy Administrator took over as Administrator on 1 April 2020.

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[27] The documents that were made available to the Court by the third respondent are signed but not dated. See the letter of appointment dated 30 March 2020 “OP2” at page 132 and the Performance Agreement at page 133 “OP3” as well as the Performance Plan “OP4” at page 153.

[41] It must be understood that the Administrator did not at the time "usurp" the functions of the Municipal Council but in terms of the powers and functions of the Administrator; he had to exercise oversight over the administration, including ratification of all decisions of the Municipal Council (fourth respondent), executive committees, committees and the Municipal Manager.[28]

[42] The contention of the second respondent in his affidavit at paragraph 8.12 is wrong in many ways when he stated that the Administrator had sought to "ratify" the decision by the Executive Mayor to appoint him and on the upper-level salary; and that lawfully the Administrator could not have been tasked to ratify any decision of the Municipal Council.

[43] *The obvious consequence of the fact that the contracts as a whole are unlawful, is that any salary or remuneration contracted will also be ultra vires and must be set aside.*

[44] The anarchy of the conduct in issue and the manner in which the contracts were executed caused the matter to, according to the third respondent, be referred to "the Hawks and the National Prosecuting Authority to investigate the incident." She also had to address the Parliamentary Portfolio Committee of the Free State Provincial Government on their conduct.[29] Both the second and third respondents refused to accept the error of their ways.

[45] As said, the second respondent denies any conduct *ultra vires* the Intervention or illegality of the employment contract and the consequential salaries. It is also the case of the third respondent. The atmosphere of the second respondent's case is that:

> There simply is no basis for the relief the MEC seeks. Indeed, it would seem as if the MEC has resorted to grandstanding in the election year. I have been advised that the court need not come to a determining finding on this aspect

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28 Paragraph 57.2 on page 29 of the record.
29 Page 128 at paragraph 28.1.2.

and I refrain – for this reason only – to tender any further evidence on my inference.[30]

[46] Added to the above is the unacceptable conduct of the Executive Mayor that summoned the Administrator to his office on 22 April 2020. The gist of the meeting was to be the discontent that the Administrator had signatory powers regarding the first respondent's bank account. After the meeting, and on the same day, the Administrator was forcefully and unlawfully ejected from and denied access to the offices of the first respondent by private security personnel. This confirms the continued anarchy that I referred to above.[31]

[47] The representative of the applicant, Mr. Dume,[32] went on to sketch some incidences that occurred in the background of the case. He referred to the fact that the second respondent volunteered a Confirmatory Affidavit to the applicant as he admitted that the relief sought had to be granted. This was during a telephonic conversation with Mr. Duma. He, inexplicably, did not file his affidavit to confirm the application of the applicant and went on to oppose it.

[48] The second and third respondents stated at a Portfolio Committee sitting on 25 August 2020, chaired by Ms. Faith Muthambi, where their employment contracts were the subject of discussion, that they would apply to Mr. Duma to ratify their contracts. They did not do so. They realised the error of their conduct but continued to carry on with the illegal contracts.

THE SALARIES

[49] It was ruled that the contracts were *per se ultra vires* the prevailing law. This includes the salaries contracted. The applicant applied for a declaration on the legal correctness of the salaries.

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30 Page 217 at paragraph 6.6.
31 Page 37 at paragraph 96.
32 Pages 234 to 242.

[50] On what appears to be 30 March 2020 the second respondent contracted with the then Executive Mayor for a salary of R1 987 402.00; the *maximum level* package for a Category 6 Municipality, without the involvement of the Administrator.

[51] Directly hereafter the second respondent contracted, without the knowledge and involvement of the Administrator, with the third respondent for a salary of R1 596 747.00.[33] This is the maximum level package for a Category 6 Municipality.

[52] The agreements were apparently in terms of Regulation 42023, GN 1224 dated 8 November 2018.

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[33] Page 132.

8. The upper limits of the annual total remuneration packages payable to managers directly accountable to municipal managers are as follows:

MUNICIPAL CATEGORISATION	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,055,005	R 2,601,272	R 3,147,538
9	R 1,763,574	R 2,204,466	R 2,645,361
8	R 1,522,577	R 1,868,192	R 2,213,808
7	R 1,317,315	R 1,596,747	R 1,876,176
6	R 1,156,263	R 1,376,505	R 1,596,747
5	R 1,026,342	R 1,207,460	R 1,388,579
4	R 932,548	R 1,078,089	R 1,223,632
3	R 857,571	R 980,082	R 1,102,590
2	R 811,416	R 911,704	R 1,011,991
1	R 781,460	R 868,290	R 955,118

[53] To have been a legitimately recognised salary it had to comply with the following:[34]

1. The Administrator had to establish or ratify the salaries.
2. It is legislatively decreed that the law within the section 139-Intevention read with the applicable Regulations promulgated in terms of section 72(1)(g) of the Local Government: Municipal Systems Act, 2000, had to be applied.
3. The 26 March 2020 - Municipal Council Resolutions must receive due regard and be complied with and under the obligations of the Intervention.
4. The Job Advertisement had to be regarded.
5. The MEC of Co-operative Governance and Traditional Affairs had to condone the

7. The upper limits of the annual total remuneration packages payable to municipal manager are as follows:

MUNICIPAL CATEGOR ISATION	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,568,755	R 3,251,589	R 3,934,423
9	R 2,204,466	R 2,755,584	R 3,306,702
8	R 1,903,222	R 2,335,240	R 2,767,260
7	R 1,646,643	R 1,995,931	R 2,345,220
6	R 1,424,447	R 1,705,924	R 1,987,402
5	R 1,242,678	R 1,470,625	R 1,698,573
4	R 1,129,229	R 1,313,058	R 1,496,887
3	R 1,038,509	R 1,193,690	R 1,348,869
2	R 988,264	R 1,110,409	R 1,232,554
1	R 951,779	R 1,057,532	R 1,163,285

Annual total remuneration packages of managers directly accountable to municipal

salaries after having been properly informed thereof.

AD 1: The fact that the Municipality was under Administration

[54] It is common knowledge by now that the salaries contracted between the Municipality with the second and third respondent was during the section 139 – Intervention period. The Intervention was for the period from October 2018 until June 2020.[35] The Municipality, as first respondent, had no authority or leeway to contract the impugned salaries. On this factor alone the salaries are *ultra vires*.

[55] Differently put; any conduct of the Municipality and its officials had to be ratified by the Administrator. Moreover, the Municipality must inform the MEC for Local Governance in the province of the outcome of the process of the filling of the position of the Municipal Manager. This was also stated in the 26 March – Resolutions and not complied with.

[56] The lack of a date(s) on the documents filed by the third respondent and the neglect of the second respondent to file any of the relevant contracts and documents are worrisome. The Court was not privy to the contracts with the second and third respondent and information as to who were the signatories thereto. The only information available on the contract[36] of the second respondent is in the affidavit of the second respondent itself:[37]

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35 Page 26 and paragraph 54 on page 27.

36 The Local Government: Municipal Systems Act 32 of 2000 in section 57 regulates the employment contracts for municipal managers and managers directly accountable to municipal managers.

(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only-
  (a) in terms of a written employment contract with the municipality complying with the provisions of this section; and
  (b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) *(b)* must-
  (a) (i) be concluded within 60 days after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, failing

which the appointment lapses: Provided that, upon good cause shown by such person to the satisfaction of the municipality, the appointment shall not lapse; and

(ii) be concluded annually, thereafter, within one month after the beginning of each financial year of the municipality;

[Para. *(a)* substituted by s. 6 (1) *(a)* of Act 7 of 2011 (wef 5 July 2011).]

(b) in the case of the municipal manager, be entered into with the municipality as represented by the mayor or executive mayor, as the case may be; and

(c) in the case of a manager directly accountable to the municipal manager, be entered into with the municipal manager.

(3) The employment contract referred to in subsection (1) *(a)* must-

(a) include details of duties, remuneration, benefits and other terms and conditions of employment as agreed, to by the parties, subject to consistency with-

(i) this Act;

(ii) any regulations as may be prescribed that are applicable to municipal managers or managers directly accountable to municipal managers; and

(iii) any applicable labour legislation; and

(b) be signed by both parties before the commencement of service.

[Sub-s. (3) substituted by s. 6 (1) *(b)* of Act 7 of 2011 (wef 5 July 2011).]

(3A) Any regulations that relate to the duties, remuneration, benefits and other terms and conditions of employment of municipal managers or managers directly accountable to municipal managers, must be regarded as forming part of an employment contract referred to in subsection (1) *(a)*.

[Sub-s. (3A) inserted by s. 6 (1) *(c)* of Act 7 of 2011 (wef 5 July 2011).]

(4) The performance agreement referred to in subsection (1) *(b)* must include-

(a) performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met; and

(b) .....

[Para. *(b)* deleted by s. 6 (1) *(d)* of Act 7 of 2011 (wef 5 July 2011).]

(c) the consequences of substandard performance.

(4A) The provisions of the Municipal Finance Management Act conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager.

[Sub-s. (4A) inserted by s. 8 of Act 44 of 2003 (wef 1 August 2004).]

(4B) Bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council concerned.

[Sub-s. (4B) inserted by s. 8 of Act 44 of 2003 (wef 1 August 2004).]

(4C) Any regulations that relate to standards and procedures for evaluating performance of municipal managers or managers directly accountable to municipal managers, and intervals for evaluation, must be regarded as forming part of a performance agreement referred to in subsection (1) *(b)*.

[Sub-s. (4C) inserted by s. 6 (1) *(e)* of Act 7 of 2011 (wef 5 July 2011).]

(5) The performance objectives and targets referred to in subsection (4) *(a)* must be practical, measurable and based on the key performance indicators set out from time to time in the municipality's integrated development plan.

(6) The employment contract for a municipal manager must-

(a) be for a fixed term of employment up to a maximum of five years, not exceeding a period

8.1 I concluded a Contract of employment with the Municipality. I did so with the Executive Mayor – as legislation to which the MEC refers dictate.

8.2 This all came about because the Municipal Council had resolved in March 2020 that I be appointed after the interview process contemplated in the legislative dispensation.

8.3 Equally, my salary notch is determined by the minister for Local Government. In terms of section 72(1)(g) of the Systems Act, the Minister determined the limits of total remuneration packages payable to the Municipal Managers and managers directly accountable to the Municipal Managers.

8.4 The initial offer that was made to me (and which I accepted) fell within the parameters of what the regulations dictate. I do not understand the MEC to content the contrary.

[57] Both parties must have realised the error of their ways when the Administrator directed appointment letters to them on 8 April 2020. This included the contracts referred to as "FA5(a)" and "FA5(b)" that the applicant now wants to be enforced. The second and third respondents refused to sign the contracts presented by the Administrator. Both parties were informed by letters of the irregularity of their conduct on 22 April 2020.[38]

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ending one year after the election of the next council of the municipality;
[Para. (a) substituted by s. 12 of Act 19 of 2008 (wef 13 October 2008).]

(b) include a provision for cancellation of the contract, in the case of non-compliance with the employment contract or, where applicable, the performance agreement;

(c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and

(d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.

(7) .....

37 Pages 218 to 219.

38 Pages 91 to 93. Unfortunately, page 4 of the documents has not been filed in the papers.

AD 2: The law

[58] The crucial element of the Intervention was for the Administrator to focus particularly on curbing the ballooning salary costs while improving performance. The remuneration package is in terms of the fact that the Municipality was under Administration and in the discretion of the Administrator. He explained how he executed the discretion and he cannot be faulted on it. He complied with the law and circumstances that prevailed. The determination of the salaries by the Administrator cannot be criticized as *ultra vires*, unfair or irregular.[39]

[59] Section 72(1)(g) of the Local Government: Municipal Systems Act, 2000 (the Systems Act) read with the Regulations in Government Gazette No. 42023 published on 8 November 2018 ("the Regulations") were apparently applied when the salaries of the second and third respondent were established.

[60] However, Regulation 132 published in Government Gazette 43122 dated 20 March 2020, is applicable to this case. Section 14 states that:

This Notice is called the upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers and takes effect from *1 July 2019. The Notice replaces Government Gazette No. 42023 of 8 November 2018.* (Accentuation added)

[61] It is common cause that Maluti-A-Phofung was a Category 4 and not Category 6 Municipality at the time it was placed under Administration. It defaulted on submitting its audited financial statements for the financial years 2016/2017, 2017/2018 and 2018/2019.[40] Section 13 of the 2020 - Regulation, that deals with the transitional provisions of municipalities decrees that:

Transitional provisions

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39 See the Heads of Argument of the Applicant at paragraphs 4 to 25.

40 Applicants' Heads of Argument at paragraph 16 with reference to page 169 at paragraph 24.

13.(1) This Notice does not affect the existing employment contract of a municipal manager or a manager directly accountable to municipal manager appointed before 1 July 2014.

(2) A municipality that does not have any municipal income is a category 1 municipality.

(3) If a municipality has no audited financial statements for 2017/18 financial year by the date of publication of this Notice, the audited financial statements for 2016/17 financial year will mutatis mutandis apply.

(4) A municipal council may, in exceptional circumstances and good cause shown, and after consultation with the MEC for local government, apply in writing to the Minister to waive any of the prescribed requirements as set out in this Notice. The Minister will consider each application on merit, based on circumstances and motivation provided by municipalities.

(a) Municipal managers:

TRANSLATION KEY						
MUNICIPAL CATEGORISATION	2018/2019			2019/2020		
	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,568,755	R 3,251,589	R 3,934,423	R 2,568,755	R 3,251,589	R 3,934,423
9	R 2,204,466	R 2,755,584	R 3,306,702	R 2,204,466	R 2,755,584	R 3,306,702
8	R 1,903,222	R 2,335,240	R 2,767,260	R 1,903,222	R 2,335,240	R 2,767,260
7	R 1,646,643	R 1,995,931	R 2,345,220	R 1,646,643	R 1,995,931	R 2,345,220
6	R 1,424,447	R 1,705,924	R 1,987,402	R 1,464,332	R 1,705,924	R 1,987,402
5	R 1,242,678	R 1,470,625	R 1,698,573	R 1,277,473	R 1,511,803	R 1,698,573
4	R 1,129,229	R 1,313,058	R 1,496,887	R 1,160,847	R 1,349,824	R 1,538,800
3	R 1,038,509	R 1,193,690	R 1,348,869	R 1,067,587	R 1,227,113	R 1,386,637
2	R 988,264	R 1,110,409	R 1,232,554	R 1 030,759	R 1,141,500	R 1,267, 066
1	R 951,779	R 1,057,532	R 1,163,285	R 992,705	R 1,087,143	R 1,195,857

(b) Managers directly accountable to municipal managers:

TRANSLATION KEY						
MUNICIPAL CATEGORISATION	2018/2019			2019/2020		
	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,055,005	R 2,601,272	R 3,147,538	R 2,055,005	R 2,601,272	R 3,147,538
9	R 1,763,574	R 2,204,466	R 2,645,361	R 1,763,574	R 2,204,466	R 2,645,361
8	R 1,522,577	R 1,868,192	R 2,213,808	R 1,522,577	R 1,868,192	R 2,213,808
7	R 1,317,315	R 1,596,747	R 1,876,176	R 1,354,200	R 1,596,747	R 1,876,176
6	R 1,156,263	R 1,376,505	R 1,596,747	R 1,188,638	R 1,415,047	R 1,596,747
5	R 1,026,342	R 1,207,460	R 1,388,579	R 1,055,080	R 1,241,269	R 1,427,459
4	R 932,548	R 1,078,089	R 1,223,632	R 972,648	R 1,108,275	R 1,257,894
3	R 857,571	R 980,082	R 1,102,590	R 894,447	R 1,022,226	R 1,133,463
2	R 811,416	R 911,704	R 1,011,991	R 846,307	R 950,907	R 1,040,327
1	R 781,460	R 868,290	R 955,118	R 815,063	R905,626	R 996,188

[62] These are the salaries in issue on the November 2018 - Regulations:

The second respondent

Salary appointed on: R1 987 402.00

Salary fixed by the Administrator with due regard to the advertisement, the Resolution and qualifications of the candidate; compromising to a Category 6 Municipality: R1 424 447.00

Salary supposed to have been fixed on the Category 4 classification of the Municipality: R1 129 229.00

The third respondent

Salary appointed on: R1 596 747.00

Salary fixed by the Administrator with due regard to the advertisement, the Resolution and qualifications of the candidate; compromising to a Category 6 Municipality: R1 156 263.00

Salary supposed to have been fixed on the Category 4 classification of the Municipality: R932 548.00

[63] The same salaries on the March 2020 - Regulations will be:

The second respondent

Salary appointed on: R1 987 402.00

Salary fixed by the Administrator with due regard to the advertisement, the Resolution and qualifications of the candidate; compromising to a Category 6 Municipality: R1 464 332.00

Salary supposed to have been fixed on the Category 4 classification of the Municipality: R1 160 847.00

The third respondent

Salary appointed on: R1 596 747.00

Salary fixed by the Administrator with due regard to the advertisement, the Resolution and qualifications of the candidate; compromising to a Category 6 Municipality: R1 188 638.00

Salary supposed to have been fixed on the Category 4 classification of the

Municipality: R972 648.00

Annual total remuneration packages of municipal managers

7. The upper limits of the annual total remuneration packages payable to municipal manager are as follows:

MUNICIPAL CATEGORISATION	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,568,755	R 3,251,589	R 3,934,423
9	R 2,204,466	R 2,755,584	R 3,306,702
8	R 1,903,222	R 2,335,240	R 2,767,260
7	R 1,646,643	R 1,995,931	R 2,345,220
6	R 1,464,332	R 1,705,924	R 1,987,402
5	R 1,277,473	R 1,511,803	R 1,698,573
4	R 1,160,847	R 1,349,824	R 1,538,800
3	R 1,067,587	R 1,227,113	R 1,386,637
2	R 1 030,759	R 1,141,500	R 1,267, 066
1	R 992,705	R 1,087,143	R 1,195,857

8. The upper limits of the annual total remuneration packages payable to managers directly accountable to municipal managers are as follows:

MUNICIPAL CATEGORISATION	TOTAL REMUNERATION PACKAGE (MINIMUM)	TOTAL REMUNERATION PACKAGE (MIDPOINT)	TOTAL REMUNERATION PACKAGE (MAXIMUM)
10	R 2,055,005	R 2,601,272	R 3,147,538
9	R 1,763,574	R 2,204,466	R 2,645,361
8	R 1,522,577	R 1,868,192	R 2,213,808
7	R 1,354,200	R 1,596,747	R 1,876,176
6	R 1,188,638	R 1,415,047	R 1,596,747
5	R 1,055,080	R 1,241,269	R 1,427,459
4	R 972,648	R 1,108,275	R 1,257,894
3	R 894,447	R 1,022,226	R 1,133,463
2	R 846,307	R 950,907	R 1,040,327
1	R 815,063	R905,626	R 996,188

[64] Section 9 of the Regulations states:

Offer of remuneration on appointment

9.(1) The offer of remuneration on appointment to a senior manager will be determined by the competences, qualifications, experience and knowledge of the candidate considered for appointment.

(2) A municipal council must apply the criteria as set out below to determine the offer of remuneration on appointment:

TOTAL REMUNERATION PACKAGE	CRITERIA
MINIMUM	• Relevant qualification. • Applicable to persons who have the relevant 5 years' experience as provided in the Regulations. • Applicable to persons who have acquired competent achievement level as measured against the competency framework.
MIDPOINT	• Relevant qualification. • Applicable to persons who have 5 to 10 years' experience as provided in the Regulations. • Applicable to persons who have acquired advanced competency achievement level as measured against the competency framework.
MAXIMUM	• Relevant qualification. • Applicable to persons who have more than 10 years' experience as provided in the Regulations. • Applicable to persons who have demonstrated a superior competency as measured against the competency framework.

[65] Section 9(3) is vital in the circumstances of the Intervention.

(3) Notwithstanding sub -item (1), if a municipal council is unable to offer the relevant total remuneration package or cannot afford to pay the remuneration as determined in this Notice, a lesser offer may be made by such municipality on appointment.

(4) Despite sub - item (2), if the municipal council is unable to attract suitable candidates or decides to appoint a senior manager falling within the basic range ofachievement as measured against the competency framework, the provisions of sections 54A(10) and 56(6) of the Act read in conjunction with item 13 of this Notice shall mutatis mutandis apply.

[66] *It is imperative to at this stage understand that there is a significant difference between the "upper limit" of a salary package and the "upper level" of a salary.* The Regulation prescribe a minimum level, midpoint level and maximum level as the total remuneration packages. Within the packages are the upper limits prescribed for each level and the Category of the Municipality. The Resolutions of the Municipal Council referred to "upper limit" and not "upper level".

[67] *The Administrator is legislatively allowed to make any lower offer to the candidates than prescribed in the Regulations.* The caveat *in casu* to this is that the appointments of the second and third respondents on the salaries suggested by the Administrator had to have regard to the Job Advertisements for the Chief Financial Officer and Municipal Manager and the 26 March 2020 - Municipal Council Resolutions.

[68] He took the above into consideration and appointed on a Category 6 Municipality because this was what was advertised. He appointed them on the upper limit of their qualifications. This in accordance with the Resolutions.

[69] This brings me to the appointment letters dated 8 April 2020 and addressed to both the second and third respondents. Without knowing that contracts have already been concluded the Administrator proceeded to investigate and establish the salaries to be offered to the two respondents. He went about it as follows:

1. The Category of the Municipality is a major factor determining remuneration levels. The further key issue is the Municipality revenue and income generation. If a Municipality has not submitted its audited financial statement for the 2017/2018 year for categorising, the 2016/2017 financial year

would apply. The Municipality defaulted on submitting the audited financial statements for the financial years 2016/2017, 2017/2018 and 2018/2019. Prior to 2018/2019 the Municipality was categorized at level 4 and not 6. This was the situation at the time the contracts were entered into without the knowledge of the Administrator and when he prepared the appointment letters of 8 April 2020. This point is uncontentious.

2. Directly linked to this is section 9(1) of Regulation 42023 of 2018 and Regulation 43122 dated 20 March 2020 depicted above.

3. The criteria are imperative. In the case of the second respondent the qualifying criteria was that he had five years' experience;[41] had attained a competent level in the prescribed assessment[42] and the first respondent is a Category 4 Municipality. In the case of the third respondent, similarly, the third respondent would have fallen squarely on the minimum of the Category 4 Municipality due to the fact that she had five years' experience, had attained a competent level in the prescribed assessment and the first respondent was a Category 4 and not a Category 6 Municipality.

4. Their salaries on a Category 4 Municipality were supposed to be R1 129 229.00 or R1 160 847.00 for the second respondent and R932 548.00 or R972 648.00 for the third respondent; depending on the Regulation that was applied.

5. The salary on the proposal of the Administrator of the second respondent on a Category 6 Municipality were to be R1 424 447.00 or R1 464 332.00. For the third respondent R1 156 263.00 or R1 188 638.00.

6. When the overpayments are to be calculated the numbers on the March 2020 - Regulation might have to be regarded namely: R1 464 332.00 and R1 188 638.00 respectively. HOWEVER; it must be noted that the Administrator had the discretion in terms of section 9 of the Regulation to offer a lesser salary than the salary fixed in sections 7 and 8 of the Regulation.

AD 3: The Resolutions

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41 Page 170 at paragraph 27.

42 Page 171 at paragraph 28.

[70] The Resolutions of the Municipal Council was for *the upper limits - salary and not the upper level/maximum level - salary.* The Administrator did therefor not alter the Resolutions and the respondents misinterpreted the Resolutions.

[71] The 26 March – Resolutions stated that the Administrator must ratify the decisions within the Resolutions. This did not happen and was the Resolutions of the Municipal Council not complied with.

[72] The Resolutions of the Council Meeting held on 26 March 2020 is common cause and undisputedly valid to be ratified by the Administrator and with notice to the MEC: COGTA to be condoned by her in her capacity as constitutionally and legislatively appointed overseer of the actions of the Municipality. The MEC did not condone the Resolutions and the salaries.

[73] The Resolutions of 26 March 2020 on the Municipal Managers' fate and as submitted by himself [43] read as follows:

> "ANNEXURE B"
>
> RESOLVED:
>
> a) That note be taken of the report.
> b) That according to the report that Mr Futhuli Patrick Mothamaha is a suitable candidate, he be appointed as the Municipal Manager of the Maluti-a-Phofung Local Municipality for a period equivalent to the remaining terms of the Council plus an extra one year calculated from the last day of the current Council.
> c) That the appointment of Mr Futhuli Patrick Mothamaha is subjected to the receipt of the concurrency from the MEC Cogta.
> d) That all interviewed candidates, including applicants who were unsuccessful, be informed of the outcome of the interview for the position of Municipal Manager.

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[43] Pages 232 to 233.

e) That a report regarding the appointment process and the outcome of the position of Municipal Manager be submitted to the MEC for Cogta within 14 days from the date of the Council decision (26 March 2020).

f) That The Executive Mayor enters into an employment contract with the incumbent (Mr FP Mothamaha) subject to the current upper limits.

g) That The Executive Mayor enters into a performance contract with the incumbent (Mr FP Mothamaha) within 60 days.

Note

Independent: Cllr N Ramohloki does not align himself with the appointment of the Municipal Manager without the concurrence from the MEC Cogta.

The Resolution was endorsed with three additional clauses or instructions that were handwritten presumably, by the then Administrator B Moseley-Lefatola:

Ratification on the following conditions only:

1. That the Administrator enters into a performance agreement with the MM and
2. That the Administrator enters into a formal contract of employment with MM
3. The above to change to EM once the intervention is revoked.

[74] TF Mopeloa the Acting Municipal Manager of the Municipality signed the document on 7 April 2020 and the Administrator B Moseley-Lefatola signed it on 14 April 2020. The Court was not made privy to the employment contract with the Municipal Manager and the date of the contract is not clear in his affidavit. The dates are significant because apparently the contracts with the second and third respondents were expeditiously finalised when the Council and the second and third respondent were of the view that the post of Administrator was vacant. It was not and the Intervention subsisted. In the alternative and as the third respondent declared; Mr B

Moseley-Lefatola was in office. They then ignored him and entered into the contracts without his knowledge and approval.

[75] The Resolution pertaining to the third respondent is word by word the same as that of the second respondent and signed on the same dates. The handwritten clauses are not on it but the prevailing law at the time remains the same. The Administrator had to oversee and ratify.

[76] The respondents did not comply with the salaries decided on and declared in the Resolutions.

AD 4: The Advertisement

[77] The advertisement at annexure "FA6": "Department: Office of the Municipal Manager – 30/2019" with closing date 22 November 2019 states the remuneration offered to the applicant for the post of the Municipal Manager to be R1 424 447.00 (minimum), R1 705 024.00 (midpoint) and R1 987 402.00 (maximum). For the position of the Chief Financial Officer, the advertisement offered R1 156 263.00 (minimum), R1 376 505.00 (midpoint) and R1 508 747.00 (maximum). This is clearly in line with a Category 6 Municipality classification.

[78] The above is the salaries that was, by implication, offered to the candidates and on which they reacted and lodged their applications for the positions. The process of contract commenced here. The salaries were under the condition of compliance to the criteria in sections 7, 8 and 9 of the Regulation No. 42023 published on 8 November 2018.

[79] The Administrator complied with the Advertisement.

AD 5: The MEC of Co-operative Governance and Traditional Affairs had to condone the salaries after having been properly informed thereof.

[80] The appointments of the second and third respondents were also subject to the receipt of concurrence by the MEC: COGTA.[44] As already indicated; this did not happen; hence the litigation.

CONCLUSION

[81] The salaries currently earned and in issue are *ultra vires* and illegal because the contracts are illegal and it does not comply with the prevailing law. The question is now what was the avenue; the remedy, that had to be followed to rectify the glaringly illegal conduct of all four the respondents and by whom?

THE RELATIONSHIP BETWEEN THE APPLICANT AND THE SECOND AND THIRD RESPONDENTS. THE EMPLOYMENT CONTRACT: IS THE CONTRACT BETWEEN THE DISPUTING PARTIES A HORIZONTAL RELATIONSHIP? DOES IT NOT RESORT UNDER LABOUR LAW?

[82] Koen, J was confronted with a similar scenario in the matter of *The MEC for the Department of Co-Operative Governance and Traditional Affairs v The Nkandla Local Municipality and Others, The MEC for the Department of Co-Operative Governance and Traditional Affairs v The Mthonjaneni Municipality and Others* (5369/18P, 5370/18P) [2019] ZAKZPHC 4; (2019) 40 ILJ 996 (KZP); [2019] 3 All SA 772 (KZP) (21 February 2019) ("the Nkandla -case"). He did an intensive investigation into the law on the issue and came to a conclusion of the state of affairs in law that cannot be faulted by this Court on the specific facts of the case; the role players and their actions.

> [27] The present challenge therefore does not arise out of the LRA, but from the provisions of the Systems Act. All that the applicant seeks to do, in carrying out her supervisory role, is to prevent unlawful conduct by the municipalities, specifically the appointment of persons as municipal managers if they do not have the required experience. It is a right not arising from the LRA. The issue raised is not one where specific remedies (sic) provided for in the LRA, such as

[44] Page 81 at paragraph 8.

conciliation and the like, or the rights flowing from an unfair labour practice might arise and should be available to the respective third respondents. The basis of the challenge is found squarely within the provisions of s 54A of the Systems Act and it is confined to the lawfulness of the respective first respondent's decisions, taken by their respective councils, to select the respective third respondents as their municipal managers.

[83] The Supreme Court of Appeal has ruled on the issue of jurisdiction as far back as 2010 in *Manana v King Sabata Dalindyebo Municipality* [2011] 3 BLLR 215 (SCA); (2011) 32 ILJ 581 (SCA); [2011] 3 All SA 140 (SCA)) [2010] ZASCA 144; 345/09 (25 November 2010).

> [23] The final submission is reminiscent of a debate that I thought had run its course once *Gcaba* was decided. It was submitted that the facts of this case ground a claim for relief under the Labour Relations Act. In those circumstances, so I understood the submission, it cannot be a claim that is good in law in the high courts. Counsel said that the decisions of this court in *Makhanya v University of Zululand* and *South African Maritime Safety Authority v McKenzie* support that submission. They do no such thing. *The evidence in this case establishes the existence of a contract of employment between the municipality and Mr Manana and he wishes to enforce the contract. It is conceded that the high court had jurisdiction to do so, which it clearly does. That he might have been entitled to other relief under the remedies provided for under the Labour Relations Act does not somehow extinguish his contractual rights.* (Accentuation added)

***LOCUS STANDI* & THE DOCTRINE OF LEGALITY AS A GROUND FOR REVIEW**

[84] The question is now what is the remedy in law for the illegal contracts concluded by the respondents. I touched on the dilemma during the introduction. Again, the same impasse prevailed in the Nkhandla - case and the presiding judge correctly ruled that:

> [50] Whether the PAJA applies depends on whether the action sought to be reviewed amounts to 'administrative action' as defined in the PAJA. That definition is not without problems. The appointment of each of the third respondents arises from a decision of the council of each municipality pursuant to s 54A(1) of the Systems Act. This must be contrasted to for example the appointment of other employees of municipalities who are appointed by the municipal manager in the exercise of his duties, which would amount to administrative action. The appointment of a municipal manager involves the exercise of executive powers or functions of the municipal councils. The exercise of 'executive powers or functions of the municipal council' is expressly excluded in terms of paragraph (cc) from the definition of 'administrative action'. The PAJA accordingly does not apply. I am in any event not persuaded that an 'administrative action' as defined is involved. Accordingly, the 180-day limitation in s 7 of PAJA does not apply. The applicant correctly had not pursued any application for condonation.

[85] The Constitutional Court has declared the Municipal Systems Amendment Act, 2011, which contained section 54A invalid and suspended it for 24 months in *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* (CCT54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017).

[86] The question is now if the MEC: Department of Co-operative Governance and Traditional Affairs may bring the matter to the court and on what basis?

[87] This is a so-called "public interest case". The sphere of law wherein the case orbits is the application of the local government legislative regime, regulating the powers and function of the Municipal Council and its Resolutions which are subject to salary determinations by the Minister of Co-operative Governance and Traditional Affairs in the Regulations.

[88] The section 139 - Intervention subsisted and was supported by the Court Order.

[89] The above all in the shadow of the decree, by implication, in the Constitution that the fixing and payment of exorbitant salaries, *ultra vires* and in defiance of the needs of the people and contra constitutional governance, will be illegal in terms of section 2 of the Constitution of the Republic of South Africa, 1996

> 2 Supremacy of Constitution
>
> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[90] The above is the Rule of Law.

[91] In terms of section 169 of the Constitution:

> (1) The High Court of South Africa may decide-
>
> (a) any constitutional matter except a matter that-
>
> (i) the Constitutional Court has agreed to hear directly in terms of section 167 (6) (a); or
>
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
>
> (b) any other matter not assigned to another court by an Act of Parliament.

[92] *Ex Parte Millsite Investments Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585 G-H captured the jurisdiction of the High Court: “The inherent power is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation.”

[93] The Constitution: Section 33. Just administrative action:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> > (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> >
> > (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> >
> > (c) promote an efficient administration.

[94] Section 34 of the Constitution guarantees access to a court to address a dispute over any legal right. This includes the right of organs of the State to protect their citizens. The inherent jurisdiction of a High Court to regulate and protect its process against exploitation for improper purposes is well known, but to exercise a right to choose a court of jurisdiction could not constitute such an abuse.[45]

[95] This is a legality review and legality reviews are the order of the day in the courts of South Africa. The strange dichotomy that developed between the PAJA, the Constitution and the common-law principles of judicial review of administrative action is well known in our courts. Kohl, L has investigated the situation and called it: “Our

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45 *The Standard Bank of SA Ltd and Others v Thobejane and Others (38/2019 & 47/2019) and The Standard Bank of SA Ltd v Gqirana N O and Another* (999/2019) [2021] ZASCA 92 (25 June 2021).

curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law".[46]

[96] I align myself with her finding that given the complexities of the curious relationship between the PAJA, the Constitution and the common law; the latter has come to play a far more extensive role in our "new administrative law" than that of "mere interpretative aid". The common law principles of judicial review of administrative action have not been entirely replaced by the section 33 right to administrative justice, as given effect to through the PAJA. Rather, the common law is "the golden thread that runs through South African administrative law" and although its role may have changed somewhat, it nonetheless remains important.

[97] Section 172(1)(b)(i)[47] of the Constitution now finds application as was ruled in *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* (CCT163/14) [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) (12 May 2015) and specifically after section 54A of the Municipal Systems Amendment Act, 2011 was ruled unconstitutional:

> [20] In summary, the consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default position.
>
> Orders properly construed

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46 *Supra* at footnote 12.

47 172. Powers of courts in constitutional matters.
(1) When deciding a constitutional matter within its power, a court
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[21] This default position can, however, be varied by an order of court, exercising the express power under section 172(1)(b)(i) of the Constitution, for numerous reasons pertaining to justice and equity. The language of both this provision and what was stated in National Coalition suggests that it is only an order of court that can vary the consequences that flow from the doctrine of constitutional invalidity.

[22] Unless the order of court expressly varies those consequences, then it would appear that retrospectivity must follow. However, this would be too formalistic. In the Supreme Court of Appeal, Cameron JA in De Kock described this approach as "both too absolute and too general" and held that "[t]he effect of a declaration of invalidity must rather depend on the terms and context of the order the Court . . . issues". The order must be interpreted on the terms and the context of the order together with the judgment as a whole.

[98] Hoexter[48] highlighted some truths in our law when one must adjudicate and review the conduct of public organs and officials on the constitutional principle of legality and in basic compliance with the Constitution: The Rule of Law.

1. In the first place it operates as a residual repository of fundamental norms about how public power ought to be used. It thus acts as a kind of safety net, catching exercises of public power that do not qualify as administrative action.
2. Its spread is reassuringly wide: it covers a good deal of the area protected by the administrative justice clause. To say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a considerable number of well-established administrative law grounds.
3. The statement could easily be seen as covering all the grounds relating to authority, delegation, jurisdiction, errors of fact and law, ulterior purpose and

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48 *Supra* at footnote 12: "VI BACK TO BASICS: A LESSON FROM THE RULE OF LAW".

motive and ‘failure to apply the mind’, including such detailed grounds as having regard to irrelevant considerations and acting under dictation.

4. The Constitutional Court’s principle of legality does not yet cover procedural fairness, of course, and has not yet been made to require the giving of reasons by an Administrator. Nevertheless, the principle is already an extensive one.

5. The observance of natural justice is one of the most important principles implied by the doctrine. It goes to open and fair conduct; absence of bias is essential for the correct application of the law and thus to its ability to guide action.

6. Primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts. At one time our courts looked to the ‘duty to act fairly’ to rescue themselves from the conceptual wilderness of the classification of functions. Similarly, we now seem to need the principle of legality to tell us that it is perverse to spend our time working out whether decisions pass the test of ‘administrative action’.

7. By telling us that all exercises of public power must comply with standards such as lawfulness, reasonableness and fairness, the principle of legality points away from all this conceptualism and parsimony and perversity. We must apply our minds to what administrative justice requires in every case. And it tells us that it is, in fact, possible to give appropriate content to lawfulness, reasonableness and fairness in individual cases.

8. Notwithstanding all that is explicit in our Constitution and in our legislation, we still need the generality of the Rule of Law. Will we ever stop needing it? Perhaps – when it has finally taught us that there is no real sense in distinguishing between public and private power, and that all power should be exercised according to certain minimum standards. Perhaps then ...

[99] Section 56(5) of the Local Government: Municipal Systems Act, 32 of 2000 decrees that:

> 56(5) If a person is appointed to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, *which steps may include an application to a court for a declaratory order* on the validity of the appointment or any other legal action against the municipal council.[49] (Accentuation added)

[100] The Intergovernmental Relations Framework Act, 13 of 2005 ("IRFA") does not find application *in casu* because the Municipality was under Intervention in terms of section 139 of the Constitution.

Section 39 of the IRFA states:

> Application of Chapter. - This Chapter *does not apply* -
>
> (a) to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms or procedures; or
> (b) *to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.* (Accentuation added)

[101] The matter of *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning Western Cape Provincial Government v Bitou Municipality and others* [2019] 12 BLLR 1346 (LC) was confronted with the applicability of the IRFA. Due cognisance is given to the fact that section 54A was declared unconstitutional. The ruling was suitably that:

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[49] This Act has been updated to Government Gazette 45305 dated 11 October, 2021.

[90] The first respondent contended that the MEC was not entitled to approach this Court because he had not complied with the provisions of section 45 of the Intergovernmental Relations Framework Act ("IRFA").

[92] In deciding this issue, it must be borne in mind that the dispute between the MEC and the first respondent turned on a very narrow point; namely the validity of the appointment of the fourth respondent as municipal manager.

[93] IRFA was considered by a Full Bench of the High Court in City of Cape Town v Premier, Western Cape and others. That matter concerned the appointment of a commission by the respondent to investigate alleged misconduct by the applicant. The respondent submitted that the applicant had failed to comply with the provisions of IRFA. The Court dealt with this challenge as follows:

"The provisions of the Framework Act must be construed consistently with the Constitution. Consequently, although s 45(1)[50] of the Framework Act is couched in peremptory language, it has to be read consistently with the provisions of ss 41(3) and (4) of the Constitution. To disregard the provisions of s 41(4)[51] of the

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50 IRFA: Section 45. Judicial proceedings. —
(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.
(2) All negotiations in terms of section 41, discussions in terms of section 42 and reports in terms of section 43 are privileged and may not be used in any judicial proceedings as evidence by or against any of the parties to an intergovernmental dispute.

51 The Constitution: Section 41. Principles of co-operative government and inter-governmental relations.
(1) All spheres of government and all organs of state within each sphere must—
(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;

Constitution, which vests in a Court a discretion to hear a matter even if not satisfied that the parties have made every reasonable effort to settle the dispute, would run counter to the provisions of s 34 of the Constitution, which guarantee the right of the individual to have any dispute, resolved by the application of law, decided in a fair public hearing before a Court. A limitation of this right by the provisions of s 45(1) of the Framework Act would not be reasonable and justifiable in terms of s 36(1)[52] of the Constitution."

[94] The Court ruled that it did have the discretion to entertain the matter even though the parties had not made every reasonable effort to settle it and proceeded to set out the relevant facts that it had to consider in exercising this discretion. It is clear that the fact that the applicant in that matter was faced with the imminent commencement of the commission's proceedings played a

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(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(i) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(ii) adhering to agreed procedures; and
(iii) avoiding legal proceedings against one another.

(2) An Act of Parliament must—
(a) establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and
(b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.

(3) An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

[52] 36. Limitation of rights. —

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

significant role in the decision of the Court. In this matter the urgency was caused by the provisions of section 54A (8) of the Systems Act which required the MEC to act within 14 days after the information relating to the appointment of the fourth respondent, prescribed by regulation 17(4) of the Appointment Regulations, had been supplied to him.

[95] There is an additional element in this matter; section 39(1)(a) of IRFA provides that the chapter relating to the settlement of disputes does not apply to disputes "in respect of which other national legislation provides resolution mechanisms or procedures". Section 54A(8) of the Systems Act is such a procedure or mechanism. *The MEC is thus not non-suited by the provisions of IRFA.* (Accentuation added)

CONCLUSION

[102] The applicant has appropriate *locus standi* to institute legal proceedings against the first respondent and is not non-suited by the provisions of the Intergovernmental Relations Framework Act, 2005. The Doctrine of Legality found application as ground for review.

[103] The Resolutions adopted by the first respondent's council was unambiguous that the appointment of the second and third respondents was subject to the current upper limits, which upper limits are prescribed in the Regulations, the ratification of the Administrator and the receipt of the concurrency from the MEC Cogta.

[104] The Administrator had correctly made an offer of remuneration packages to the second and third respondents, which factored the variables prescribed in the Regulations, the Intervention, the Resolutions and the Job Advertisements.

[105] Consequently, the remuneration packages authorised by the first and fourth respondent as also represented by the second respondent and the resultant contracts

between the impugned parties, are unlawful and irregular and must be declared as such and set aside. The second and third respondents must reimburse the overpayment.

[106] This Court may not hinder the constitutional freedom of the parties to contract and may not force any contract upon them. The parties must be allowed to re-negotiate contracts that will comply with the local government legislative regime regulating the powers and functions of the Municipal Council and its resolutions that are subject to the salary determinations and authorization by the Minister of Co-operative Governance and Traditional Affairs in the Regulations. This Court will limit itself to the relief sought in the Heads of Argument of the Applicant in conclusion:

> 42. … that the respondents' attitude of impunity will be deprecated and by extension, the unlawful increases of the second and third respondents' salaries/remuneration will be declared unlawful, irregular and fell to be reviewed and set aside. Remuneration drawn in excess to what was prescribed will be recoverable from the second and the third respondents.

THE COSTS

[107] The costs must follow the cause. The respondents to pay the costs of this application. The request for a punitive order cannot be granted. The illegal conduct of the respondents must be dealt with in terms of the relevant law, legislation and remedies and by the applicant; not a costs order.

[108] ORDER

1. The appointment of the second respondent as Municipal Manager by the first and fourth respondents and resultant contract in March 2020 and on a salary of R1 987 402.00 per annum, is declared to be unlawful and irregular and set aside.
2. The excess in the salary earned by the second respondent and pursuant to the contract in March 2020 and the salary authorised in the relevant Regulations, for the period ending March 2020 to date, are recoverable in full. The repayment by the second

respondent to be made to the first respondent in full and within ninety (90) days of the date of this order.

3. The appointment of the third respondent as Chief Financial Officer/a manager directly accountable to the Municipal Manager, by the second respondent and the resultant contract in March 2020 and on a salary of R1 596 747.00 per annum, is declared to be unlawful and irregular and set aside.

4. The excess in the salary earned by the third respondent and pursuant to the contract in March 2020 and the salary authorised in the relevant Regulations, for the period ending March 2020 to date, are recoverable in full. The repayment by the third respondent to be made to the first respondent in full and within ninety (90) days of the date of this order.

5. The respondents to pay the costs of this application; such costs to include that consequent upon the employment of two counsel by the applicant.

M OPPERMAN, J

I concur

P MOLITSOANE, J

APPEARANCES ACCORDING TO THE NOTICE OF SET DOWN AND HEADS OF ARGUMENTS

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