Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CIV APP FB 20/2022

HIGH COURT CASE NO: UM87/2021

In the matter between:-

SEKHOANE BENJAMIN SEHOLE First Appellant

THABANG TEFO RAMOREI Second Appellant

MORAKANE SELEKE Third Appellant

and

TEKO GAANAKGOMO First Respondent

DR RUTH SEGOMOTSI MOMPATI DISTRICT MUNICIPALITY Second Respondent

DR RUTH SEGOMOTSI MOMPATI

MUNICIPAL COUNCIL Third Respondent

CLLR. LORATO V. SETLHAKE Fourth Respondent

CLLR. KGALALELO SEREKO Fifth Respondent

CLLR TOTONG GRACE

(the then Acting Speaker) Sixth Respondent

THE MEC FOR COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, NORTH WEST PROVINCE Seventh Respondent

CORAM: PETERSEN J, REDDY AJ & DEWRANCE AJ (in absentia)

HEARD: 21 July 2023

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **27 February** 2024 at 14h00pm.

ORDER

1. The appeal is dismissed.

2. The appellants are ordered to pay the costs of the appeal, which costs shall include the costs of the

application for leave to appeal in the court *a quo*, the costs of the application for leave to appeal in the Supreme Court of Appeal, and the costs of one Counsel.

JUDGMENT

PETERSEN J:

Introduction

[1] This is an appeal against the whole of the judgment and order of the court *a quo* (per **Gura J**) handed down on **01 June 2021**. Leave to appeal was refused by the court *a quo* on **28 April 2022**. The appeal is with leave of the Supreme Court of Appeal ('SCA') dated **21 July 2022**. The order of the SCA reads as follows:

> "1. Condonation as applied for is granted. The applicant for condonation is to pay the costs of the application.
> 2. Leave to appeal is granted to the Full Court of the North West Division of the High Court of South Africa, Mafikeng.
> 3. The costs of the court *a quo* in dismissing the application for leave to appeal are set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.
> 4. In light of section 160 of the Constitution of the Republic of South Africa, a determination ought to be made as regards the

Applicant's legal standing, taking into account the First Respondents legal standing."

[2] This appeal is brought by the first to third appellants who were cited as the sixth, third and seventh respondents in the urgent application in the court *a quo*. The said appellants were "Senior Managers" of the second respondent ('the Municipality') – being the second applicant in the urgent application. The subject matter of the urgent application implicated the third respondent, the "Council" of the Municipality and was brought by the first respondent ("the Acting Municipal Manager").

[3] The order of the court *a quo* which is assailed in this appeal reads as follows:

"27.1 The Council meeting of 29 October 2020 is declared to be unlawful and invalid;

27.2 All resolutions taken at the said meeting of 29 October 2020 are declared to be unlawful and invalid;

27.3 Subject to paragraph 27.5 hereof, all resolutions taken at the said meeting are set aside;

27.4 The Speaker of the Municipality and/or the Municipal Manager are ordered to convene a Council meeting within fourteen (14) days from date hereof to transact on the business of the meeting of 29 October 2020, the application for employment by the Senior

Managers and any other matter which needs Council attention;

27.5 The effective date of the declaration of invalidity of the Council resolution to appoint the Senior Managers is suspended and will come into effect only on 1 July 2021.

27.6 The Municipality is ordered to pay the costs of the Senior Managers on the scale as between attorney and client."

[4] The writing of the judgment was assigned by the Judge President to Acting Judge Dewrance, who has not provided a draft judgment for consideration since the hearing of the appeal. I find myself in a similar position to Satchwell and Classens JJ, as described in *Myaka and Others v S* (A5040/2011, 215/2005) [2012] ZAGPJHC 174 (21 September 2012) where they said:

"**SATCHWELL J**:

[1] This appeal was heard by a Full Bench of the South Gauteng Division of the High Court (Claassen J presiding) on 11 April 2012. The senior judge allocated the writing of this judgment to another member of the Full Bench (Mailula J). In the intervening five month period, which included a five week administrative recess in court sittings, I have not received a draft judgment on which I may comment nor has there been any indication from my colleague that a judgment is in production.

[2] I understand from the senior presiding judge that he has made a number of approaches to the judge assigned to write this judgment – at the time of the hearing on 11th April, during the week of 23rd July

and in writing on both 1st and 6th August. He has received no indication that any judgment has been prepared or is underway.

[3] The attorney for the appellants wrote to the senior presiding judge on 26th July 2012 requesting an indication when the judgment may be expected. There after the appellants' attorney in a telephone call to the senior judge's secretary, made a further enquiry as to when the judgment will be available. The senior judge is not in any position to provide such indication in the absence of any communication or intimation from the assigned judge. This untoward delay in finalizing the judgment, is deprecated.

…

[5] In good conscience, I cannot continue to wait upon a colleague to attend to the writing of a judgment in these circumstances.

[6] Accordingly, I have prepared a judgment of my own notwithstanding that I have not been requested by the presiding Judge so to do. In the event of the presiding judge signifying his agreement with this judgment, it would in any event constitute the majority judgment of this court of appeal. The absence of the third member's consent to this judgment can only, at worst for the appellants, be regarded as her having not concurred in the majority judgment, for whatever reason.

…

CLAASSEN J:

[1] I have had the benefit of reading the judgment prepared by Satchwell J. I agree with the reasoning and conclusion therein. However, I wish to add some observations of my own.

[2] It is correct that I requested my colleague, Mailula J, to prepare the judgment in this Full Bench Appeal. I confirm the fact that the attorney for the appellants have approached me, both in writing and in a telephone call enquiring when judgment in this matter may be expected. I passed on to my colleague, Mailula J, the aforesaid letter under cover of my own requesting her to indicate when we might expect her judgment After receiving no response to my letter, I sent a second letter reminding her the first and again requesting when we may expect a judgment. Again I have received no response to these requests in writing.

[3] It would be a sad day in the administration of justice in this country if the laches of one member of a three bench tribunal, should cause the stifling of the normal appeal procedures prescribed by law. In my view this approach was necessitated by the conduct of Mailula J not responding to the requests made by the senior judge. In my respectful view, a deadlock occurred preventing the finalization of the appeal.

[4] I am respectfully of the view that drastic approaches are sometimes called for as was adopted by the Supreme Court of Appeal in *New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005 (3) SA 238 (SCA) at pages 249 – 250, paragraphs [5] – [8]. In this regard it was stated in paragraph [31]:

> "The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower Court to give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction

makes the right to apply for leave from this Court illusory. This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In appropriate circumstances, where there is **deliberate obstructionism on the part of a Court of first instance or sheer laxity or unjustifiable or inexplicable inaction**, or some ulterior motive, this Court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us."

(emphasis added)

[5] In my respectful view, judges ought not to be the cause for the adage, "justice delayed, is justice denied" to apply to any case. The rendering of judgment within a reasonable time is not merely a matter of courtesy towards the litigants – the public's respect for the administration of justice is at stake. It was stated more than half a century ago:

"Much more than a matter of courtesy is involved. By such conduct the administration of justice is hampered, and **may be seriously hampered**, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays."[1] (Emphasis added)

[6] For the reasons set out above I am in agreement with Satchwell J that this matter can no longer be delayed. It concerns the liberty of individuals and the reputation of the administration of justice. Both these considerations are of such importance that I am driven to agree to this majority judgment being handed down."

(emphasis added)

[1]See **S v Lifele** 1962 (2) SA 527 (AD) at 531F. The context was different.

[5] Dewrance AJ has become unreachable. Despite several emails reminding him of this appeal, nothing has been forthcoming. I may add that the outcome of the appeal was discussed by the panel and the outcome or result was agreed. If, for whatever reason, the third member may emerge at a later stage and not concur in the judgment and order of the majority, any judgment penned by him will constitute the minority judgment. In good conscience I have therefore taken the decision to pen this judgment.

The grounds of appeal

[6] At the hearing of the application for leave to appeal in the court *a quo*, the appellants only pursued the following grounds, as initially set out in the Notice of Appeal and have constrained themselves to those grounds in this appeal:

> "1. The Council meeting of **29 October 2020** was duly quorated and was in compliance with the Local Government: Municipal Structures Act No. 117 of 1998 ("the Structures Act"), as well as the Council Standing Rules of Order ("the Council Rules of Order") ("the Quorum Submission");
>
> 2. The learned Judge erred in failing properly to apply the *Turquand Rule*, which, is a just and equitable remedy, which is aimed at protecting the rights of third parties, such as the *Senior Managers*, who are entitled in terms of the *Rule*, to assume in good faith that all internal procedures of the *Municipality* have been complied with and are carried out (*"the Turquand Rule Submission'*);

3. The learned Judge erred in failing (sic), having found that the hands of the *Senior Managers* were clean in respect of their appointments, to grant appropriate, "just and equitable" remedy to the *Senior Managers*, which is required to protect and enforce the Constitutional rights of the *Senior Managers*, including the right to fair labour practices (*"the Just and Equitable Remedy Submission"*).

The issues

[7] *Adv Muza* raises several points *in limine*. In my view, these points *in limine* greatly detract from the main issues in the appeal. For purposes of this judgment, this Court will focus on the main issues.

[8] The crisp issues in this appeal, in my view, are whether there are exceptional circumstances permitting this Court to admit the *Attendance Register* as evidence on appeal; and whether the *Council Meeting* was in fact unlawful and invalid. The appellants further contend that if it is assumed that the court *a quo* was correct in finding that the *Council Meeting* was unlawful and invalid, and that the hands of the *Senior Managers* are clean in their appointments, what then would constitute an appropriate, *"just and equitable"* remedy to the *Senior Managers* in those circumstances.

Factual Background

[9] The facts which are central to this appeal may be succinctly summarised as follows. The Acting Municipal Manager, purporting to act of behalf of the Municipality, launched an urgent application in the court *a quo* in which a declaratory order was sought regarding the lawfulness of a Council Meeting which was convened and held on **29 October 2020**. The Acting Municipal Manager in seeking a declaratory order, sought to have the Council Meeting and all the decisions taken there set aside. At this Council Meeting the appellants and a certain Ms Tshegofatso Modise, who subsequently resiled or withdrew from the litigation, were appointed as employees of the Municipality in senior manager positions as per resolution 45/2020/21. The appointment of the senior managers was not part of the Agenda of the Council Meeting and was added during the sitting of Council. For present purposes all other items on the Agenda of Council are irrelevant. The appellants were joined in the urgent application as interested parties by virtue of the resolution taken by Council to appoint them as Senior Managers.

[10] As to the pertinent facts relevant to the Council Meeting, the following is evident from the papers. On **23 October 2020**, notice of an Ordinary Council Meeting scheduled for **29 October 2020** was sent to Councillors. It is not disputed that the Ordinary Council Meeting of **29 October 2020** was called on six (6) days' notice. In terms of Paragraph 8.1 of the Standing Rules of Order:

*"**At least seven (7) days before any ordinary meeting of the council** and at least forty-eight (48) hours before any special meeting of the council, **a notice to attend the meeting, specifying the business proposed to be transacted there and signed by the Speaker or the Municipal Manager as contemplated in 3.3 above, shall be left or delivered to an accessible distribution point within the municipality as determined by the council from time to time/sent by electronic mail to an address provided by the councillor as his/her official address/mail address**."*

[11] **The Ordinary Council Meeting of 29 October 2020 was scheduled for 10h00am**. The meeting commenced more than two (2) hours later. Rule 36.1 of the Standing Rules of Order provides, in the event of no quorum being reached, that:

*"If at the expiry of thirty (**sic**) 45 minutes after the official commencement time at which a meeting is scheduled to take place, a quorum of members has not assembled, no meeting shall take place."*

[12] The case for the respondents is that at the expiry of 45 minutes, the meeting had not reached a quorum. The Standing Rules of Order as quoted above, provide an anomaly in that it seemingly provides for thirty minutes in writing (recorded in writing), after the official commencement at which the meeting is scheduled to take place, but in numeral time, for 45 minutes. For present purposes this is mentioned in passing and may need an amendment by Council. From Rule 37.1 below, the correct time appears to be 45 minutes.

[13] Rule 37.1 of the Standing Rules of Order read with Rule 36.1 provides that:

> *"The members present shall after the expiry of the forty-five minutes, if no quorum has assembled by then, request the Speaker or chairperson to convene another meeting, notice of which shall be given in terms of Section 29(1) of the Structures Act and such meeting shall be deemed to be an adjourned meeting for purpose of Standing Order 39 of the Rules."*

[14] The issue of the application to adduce an attendance register received from the fourth respondent, after the urgent application was heard, in the application for leave to appeal, is considered below.

The legal standing of the appellants' and the Acting Municipal Manager

[15] The order of the SCA calls on this Court in terms of section 160 of the Constitution of the Republic of South Africa, Act 108 of 1996, to decide the legal standing of the appellants' *vis-a-vis* the legal standing of the Acting Municipal Manager.

[16] Section 160 of the Constitution provides that:

> "**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;

(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.

(3) *(a)* A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.

(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

(c) All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless-

(a) all the members of the Council have been given reasonable notice; and

(b) the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining-

(a) the size of a Municipal Council;

(b) whether Municipal Councils may elect an executive committee or any other committee; or

(c) the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for-

(a) its internal arrangements;

(b) its business and proceedings; and

(c) the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that-

(a) allows parties and interests reflected within the Council to be fairly represented;

(b) is consistent with democracy; and

(c) may be regulated by national legislation."

(emphasis added)

[17] The legal standing of the first respondent, the Acting Municipal Manager, or more specifically the authority of the Acting Municipal Manager was not challenged in the court *a quo*. Out of an abundance of caution, it is surmised that the SCA, in the application for special leave by the appellants which it granted, invites this Court firstly, to consider the legal standing of the Acting Municipal Manager to launch the urgent application in the court *a quo*, as a self-review of the decisions of Council. The Council was not cited as an applicant but as a respondent, or an "interested party".

[18] And, secondly, it is surmised that the SCA appears to invite this Court to determine the legal standing of the Senior Managers, if this Court finds that the court *a quo* was correct in finding that the Council Meeting was not constituted

properly and therefore unlawful.

[19] *Adv Mashigo* for the appellants highlights the following from the founding affidavit of the Acting Municipal Manager, on the basis for the application in so far as it impacts on the legal standing of the Acting Municipal Manager:

"1.3 I have authority to depose to this affidavit. I am the accounting officer of the second applicant.

…

2.1 …The impugned meeting and the resolutions adopted thereat has a direct impact on the second applicant [i.e the Municipality] which now seeks to correct the illegality.

2.2 …The meeting and the resolutions which form the subject matter of this application was taken by the Council albeit that it was inquorate. The first respondent [i.e. the Council] is thus cited herein as an interested party."

[20] *Adv Mashigo*, against the aforesaid contentions of the Acting Municipal Manager in the founding affidavit, submits that the Acting Municipal Manager sought to use his position of accounting officer at the *Municipality*, to challenge a decision that was made by *Council*; that he only cited himself and the *Municipality* as the applicants to the application which was supposedly intended for the self-review of *Council*'s decisions; and the *Council* was cited

only as a respondent and “an interested party” to the *Urgent Application*. To this end, he submits that the Acting Municipal Manager brought the urgent application to review the decision of *Council*, when in terms of section 160 of the *Constitution*, the *Municipality* cannot act on its own, but only through *Council* and that it is its *Council* that is seized with the responsibility of reviewing its own decisions, should the need arise, and not the accounting officer of the *Municipality*.

[21] Reliance is placed on *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2019 (3) SA 451 (SCA) (26 September 2018), in submitting that this Court should make an order upholding this appeal and replace the order of the court *a quo* with an order that the *Urgent Application* is dismissed with costs on attorney and client scale (as tendered by the Municipality at the hearing of the *Urgent Application*). In *Four Wheel Drive Accessory Distributors*, the SCA held that:

> *“[7] The logical starting point is locus standi – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.*

[8] *The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in Dalrymple:*

> *'The general rule of our law is that no man can sue in respect of a wrongful act,* ***unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.****'*

…

[19] ***The court a quo was thus correct in holding that the plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently failed to establish locus standi.*** *The court also rightly found that no contract came into being because there was no consensus regarding the terms (and nature) of the agreement.* ***That should have been the end of the matter. Indeed, the court a quo held that the failure to prove locus standi was 'dispositive of the entire action'.*** [Bold and underlining for emphasis]

[22] I re-iterate that the authority of the Acting Municipal Manager to launch the urgent application was not challenged in the court *a quo*. The authority of the attorney who signed and delivered the application also comes squarely into focus. The decision in *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) is apposite in this appeal, as it deals with the same issue this Court has been invited to deal with by the SCA. In *ANC Umvoti Council Caucus and Others v Umvoti Municipality* the respondent, a Municipality *"launched an application seeking a rule nisi with interim relief on an urgent basis.* ***It arose out of conduct which purported to be resolutions taken by the municipal council (the council) of the respondent. The***

respondent contended that these resolutions were not taken by the council because, at the time they were taken, the council was not properly constituted."

[23] The issues in *ANC Umvoti Council Caucus and Others v Umvoti Municipality* were identified as follows:

"[5] Leave was granted by the court a quo to appeal to this court in relation to the authority of the municipal manager to bring the application, and in relation to the question of costs.
[6] The first aspect, therefore, is the finding that the respondent proved on the papers that the acting municipal manager (the manager) had authority to bring the application on behalf of the respondent."

[24] Gorven J (as he then was) writing for the Full Court agreed that from all relevant legislation applicable to Municipal Managers and Speakers of Council, none authorised such functionaries to act as an agent of a municipality in launching an application in court. Section 151(2) of the Constitution, it was said, vests the executive and legislative authority of a municipality in its municipal council and as such, it was necessary for the council to have delegated the power to institute legal proceedings in writing; and absent any such delegation, a council resolution was required to empower an official to institute court proceedings on its behalf.

[25] After an extensive examination of various authorities[2], the

[2] *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351G - 352B; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) ([2004] 2 All SA 609) at 624, para

Full Court ultimately found, borrowing from the headnote, that "regarding the authority to represent an artificial person, it seemed that the legislature intended the authority of 'anyone' who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under rule 7(1) and not by way of the application papers; that, having regard to the provisions of rule 7(1) of the Uniform Rules of Court and having analysed relevant case law, the deponent to an affidavit was merely a witness. It was the attorney of a litigant who, by signing a notice of motion and issuing application papers, signified that that attorney had been authorised to initiate the application on behalf of the named litigant. Whether or not the litigation had been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity were required, it should be obtained by means of rule 7(1), since this was a procedure which safeguarded the interests of both parties. It freed the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in 'the many resolutions, delegations and substitutions still attached to applications'. It protected a respondent, in that, once the challenge was made in terms of rule 7(1), no further steps could be taken by the applicant unless the attorney satisfied the court that he or she was so authorised… and that, absent a specific challenge by way of rule 7(1), 'the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant' were sufficient…further, that there was no challenge in terms of rule 7(1) in the application which was the subject of the appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. The appeal was therefore dismissed."

19, *per* Streicher JA; *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - J

[26] I fully align myself with the reasoning in *ANC Umvoti Council Caucus and Others v Umvoti Municipality*. The issue of the authority of the Acting Municipal Manager was neither raised in the urgent application in the court *a quo*, or in the subsequent application for leave to appeal in the court *a quo*. The ratio of the Full Court in *ANC Umvoti Council Caucus and Others v Umvoti Municipality* at paragraph [29] is equally applicable in the present appeal in that that there was no challenge in terms of rule 7(1) in the application which was the subject of the appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. In my view, the appellants were not prejudiced by the failure to raise the authority of the Acting Municipal Manager to launch the application, as they elected to oppose the application on substance rather than form. This should suffice in answer to the question on the authority of the Acting Municipal Manager.

[27] The second question relevant to section 160 of the Constitution, on invitation of the SCA as stated above, is the legal standing of the Senior Managers, if this Court finds that the court *a quo* was correct in finding that the Council Meeting was not constituted properly and therefore unlawful. The answer to the determination on section 160

in respect of the Senior Managers that ought to be made by this Court according to the order of the SCA, must be considered against the concession by the appellants, as extrapolated by *Adv Mashigo* in his heads of argument that:

> *"7. In response to the Urgent Application, the Senior Managers contended, inter alia, that, although they could (sic - not) speak to the internal processes of the Municipality in respect of their appointments, given that they were not present at the Council Meeting which appointed them:…"*

[28] The answer to the question on the legal standing of the Senior Managers requires this Court to consider as a point of departure the Attendance Register, which the appellants sought to adduce on appeal, constitutes the high watermark of the appeal.

The application to adduce further evidence on appeal by the appellants incorporating the quorum submission

[29] *Adv Mashigo* contends that the court *a quo* erred in finding that the *Attendance Register* was a fabricated piece of evidence, and no reasonable Court would allow the *Attendance Register* to be introduced on appeal. The test for the admission of new evidence on appeal was re-affirmed by the SCA in *Moor and Another v Tongaat-Hulett Pension Fund and Others* (518/17) [2018] ZASCA 83; [2018] 3 All SA 326

(SCA); 2019 (3) SA 465 (SCA) at paragraph [36], where the SCA held that:

> "[36] The test for the admissibility of further evidence on appeal is well-established (S v de Jager 1965 (2) SA 612 (A) at 613C – D). An applicant must meet the following requirements:
>
> (a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court *a quo*;
>
> (b) there should be a prima facie likelihood of the truth of the new evidence; and
>
> (c) the evidence should be materially relevant to the outcome of the case. Further evidence is allowed only in exceptional cases (De Aguiar v Real People Housing (Pty) Ltd [2010] ZASCA 67 2011 (1) SA 16 (SCA) para 11)."

[30] On the first requirement, the appellants explain that the Attendance Register emerged from the fourth respondent, the Speaker after the hearing of the Urgent Application. In those circumstances it was incumbent on the appellants to adduce evidence from the source from which the Attendance Register emerged. That they did not do, and rather called upon the court *a quo* to draw inferences from the contents of the document and a broad statement that it emanated from the email address of the Speaker. In so doing, the appellants failed in demonstrating that the explanation for not adducing the evidence initially was a "reasonably sufficient explanation, based on allegations which may be true". It follows axiomatically that in failing to satisfy the first requirement, that the second and

third requirements alluded to above would not be satisfied.

[31] In my view therefore, the court *a quo* despite the criticism levelled against it, correctly found that only eight Councillors signed the Attendance Register. There was no explanation proffered why the other nine who emerged in the Attendance Register secured from the fourth respondent, a Councillor, did not sign the register. More importantly it is not clear, who in the same handwriting, caused the word “Present’ to be inscribed in manuscript upon the Attendance Register in respect of the nine Councillors who did not sign. The court *a quo* was further correct in finding that the Attendance Register constituted inadmissible hearsay evidence given that neither the Fourth Respondent [the Speaker], nor anyone from her office filed any explanation confirming that the Attendance Register originates from her office, that notwithstanding an email purporting to be her official email address. The submission on petition and in which the appellants persist in this appeal, that Covid 19 meant that virtual hearings were held, and this could account for Councillors not signing the Attendance Register, does not avail the appellants, unless this assumption was confirmed on affidavit by the Speaker or someone from her office.

[32] The finding by the court *a quo* that the meeting had not reached a quorum therefore remained extant, and by implication its finding that the meeting of **29 October 2020** was unlawful cannot be disturbed by this Court on appeal.

The *Turquand*/Estoppel Submission in relation to the unlawfulness of the Council Meeting

[33] The court *a quo*, albeit for different reasons was correct that the *Turquand Rule* played no role in circumstances where the *Council Meeting* did not quorate. On the just and equitable remedy alluded to by the appellants, the court *a quo* was correct to refer the matter back to the "organ of state" from where it originated, being the Council. The order did nothing more than provide what Standing Rule of Order 37.1 in the ordinary business of Council would provide for. In fact, the order provided not only for the issue of the appointment of the Senior Managers to be considered by Council but any other business of Council, which would have included the business of Council of 29 October 2021, which was also set aside by the order of the court *a quo*.

[34] *Adv Mashigo* on the issue of the application of the *Turquand* Rule, if even if Council was not quorated, submits that, the *Turquand Rule*, in itself is a just and equitable remedy, which is aimed at protecting the rights of third parties, such as the *Senior Managers*, who are entitled to assume in good faith that all internal procedures of the *Municipality* had been complied with. To this end, the submission further goes that, having found that the hands of the *Senior Managers* were clean in respect of their appointments, the learned Judge erred in failing to grant an appropriate, "just and equitable"

remedy to the *Senior Managers* in terms of section 172 of the *Constitution*, including to either; declining the setting aside of the appointment of the *Senior Managers,* notwithstanding its alleged invalidity; or to suspend the declaration of unlawfulness and invalidity of the appointments of the *Senior Managers* to a period, pending the end [by effluxion of time] of the *Senior Managers*' five (5) years fixed-term employment contracts, which at the time still had a period in excess of four (4) years remaining.

[35] In my view, the application of the *Turquand* Rule in the circumstances proposed by *Adv Mashigo* is not applicable to the matter. If applied to the peculiar circumstances of this matter, it would have constituted an error in law and lead to an unreasonable result, particularly when one considers the main remedy sought by the appellants as well as the proposition of alternatives thereto. The decision in *TEB Properties CC v MEC, Department of Health and Social Development, North West* 2012 JOL 28203 (SCA) at paragraphs [32]-[33] is apposite in this regard, where the SCA found that the *Turquand Rule* ought to be treated no differently from estoppel, namely that the claim of an innocent contracting party to enforce a contract, cannot make an *ultra vires* act by a state official *intra vires*.

[36] It was further held in *Mbana v Mnquma Municipality* 2003 JOL 12106 (Tk) at paragraphs [26]-[27] that:

"*The Turquand Rule can never be used as a mechanism whereby a*

court could or would bind an authority such as the defendant municipality to enact which is ultra vires."

[37] The *Turquand* submission accordingly cannot be sustained.

The issue of short notice calling for the meeting

[38] The issues on appeal in my view skirt a very important issue. The ordinary Council Meeting was called on six (6) days' notice. The parties appear to agree that this was the case. In terms of Standing Rule of Order 36.1, the meeting could not be held and for that reason alone the application in the court *a quo* should have succeeded, as seven (7) days notice was required.

Costs

[39] Costs follow the result. There is no basis to order otherwise. Subject to the order of the SCA, the respondents are entitled to the costs of the appeal. The costs of Counsel, however, is limited to the costs of one Counsel.

Order

[40] In the premise the following order is made:

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs of the appeal which costs shall include the costs of the application for leave to appeal in the court *a quo*, the costs of the application for leave to appeal in the Supreme Court of Appeal and the costs of one Counsel.

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A H PETERSEN
JUDGE OF THE HIGH COURT, NORTH WEST DIVISION, MAHIKENG

I agree.

_____

A REDDY
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

Appearances

For the Appellants:	Adv G Mashigo
Instructed by:	Motsoeneng Bill Attorneys c/o Zisiwe Attorneys Office 5 Shason Centre Shippard Street MAHIKENG
For the second and third Respondents:	Adv CZ Muza with Adv M Mpya
Instructed by:	Kgomo Attorneys Inc Motheo House 56 Shippard Street MAHIKENG