



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

Case No.: 1345/2021

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL  
GOVERNMENT, ENVIRONMENTAL AFFAIRS AND  
DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE** Applicant

and

**KNYSNA MUNICIPALITY** First Respondent

**DR SANDILE NGQELE** Second Respondent

**ERICK VAN ASWEGEN** Third Respondent

**COUNCILLOR PATRICK MAKHETHA** Fourth Respondent

**COUNCILLOR MERTLE GOMBO** Fifth Respondent

**COUNCILLOR MNCENDISI SKOSANA** Sixth Respondent

**COUNCILLOR SITHEMBELE NGQEZU** Seventh Respondent

**COUNCILLOR MANDLA MATIWANE** Eighth Respondent

**COUNCILLOR THANDO MATIKA** Ninth Respondent

**COUNCILLOR LORRAINE OPPERMAN** Tenth Respondent

**COUNCILLOR CLAUDINE CROUTZ** Eleventh Respondent

**COUNCILLOR MILLICENT NAKI** Twelfth Respondent

**COUNCILLOR AUBREY TSENGWA** Thirteenth Respondent

**COUNCILLOR WELCOME SALAZE** Fourteenth Respondent

**MERTLE GOMBO** Fifteenth Respondent

**MNCENDISI SKOSANA** Sixteenth Respondent

<b>SITHEMBELE NGQEZU</b>	Seventeenth Respondent
<b>MANDLA MATIWANE</b>	Eighteenth Respondent
<b>THANDO MATIKA</b>	Nineteenth Respondent
<b>LORRAINE OPPERMAN</b>	Twentieth Respondent
<b>CLAUDINE CROUTZ</b>	Twenty First Respondent
<b>MILLICENT NAKI</b>	Twenty Second Respondent
<b>AUBREY TSENGWA</b>	Twenty Third Respondent
<b>WELCOME SALAZE</b>	Twenty Fourth Respondent
<b>DAWID ADONIS</b>	Twenty Fifth Respondent

**AND**

Case No.: 1330/2021

In the matter between:

<b>WILLIAM CLAYTON</b>	Applicant
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and

<b>KNYSNA MUNICIPALITY</b>	First Respondent
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<b>DR SANDILE NGQELE</b>	Second Respondent
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<b>MEMBER OF EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT</b>	Third Respondent
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**Heard on: 1 December 2023**

**Delivered on: 18 June 2024**

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**JUDGMENT**

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**Pillay AJ:**

## INTRODUCTION

1 The key issue for determination in this matter is the lawfulness of a decision by the Municipal Council of the Knysna Municipality (“**the Council**”) to appoint and employ Dr Sandile Wiseman Ngqele (“**Dr Ngqele**”) to the position of Director: Community Services, a Senior Manager and to remunerate him on a particular scale.

2 Three separate applications were instituted: (a) one application was brought by the MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province (“**the MEC**”); (b) another application was brought by Mr William Clayton (“**Mr Clayton**”); and (c) a third application was brought by the Accountability Group under case number 1234/2021 (“**the AG application**”).

3 These applications were consolidated pursuant to an Order of Court granted on 16 October 2023.<sup>1</sup> On or about 30 October 2023 the AG application was withdrawn. Accordingly, this judgment pertains to applications brought by the MEC and Mr Clayton, as consolidated.

4 The matter came before me on 27 November 2023 and was postponed to 1 December 2023 in order to afford Dr Ngqele an opportunity to file Heads of Argument.

5 At regards the substantive relief sought:

5.1 The MEC seeks Orders reviewing and setting aside the resolutions taken by the Council:

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<sup>1</sup> It was ordered that the costs in respect thereof shall stand over for later determination.

- (a) On 29 April 2021 to appoint Dr Ngqele to the position of Director: Community Services (“**the appointment resolution**”).
- (b) On 12 July 2021 to make an offer of employment to Dr Ngqele for the position of Director: Community Services (“**the employment resolution**”).
- (c) On 29 July 2021 to offer Dr Ngqele a total remuneration package of R 1 133 463.00 (“**the remuneration resolution**”).

5.2 Mr Clayton seeks some overlapping and other different relief, viz:

- (a) The decision and resolution taken by the Council on 29 April 2021 appointing Dr Ngqele to the position of Director: Community Services is unlawful, unconstitutional and is reviewed and set aside. As stated, I shall refer to this as the “**the appointment resolution**”.
- (b) The failure and/or refusal of the Municipal Council to appoint Mr Clayton to the position of Director: Community Services is unlawful, unconstitutional and is reviewed and set aside.
- (c) The Council’s decision of 29 April 2021 is substituted with a decision appointing Mr Clayton to the position of Director: Community Services with effect from one month of the date of the Court Order alternatively, with effect from such date determined to be just and equitable by this Court (“**the substitution order**”).

## THE LEGAL FRAMEWORK

## **The Systems Act**

6 The appointment and employment resolutions must comply with the Local Government: Municipal Systems Act No 32 of 2000 (“**the Systems Act**”).

7 Section 56 of the Systems Act reads as follows:

*“56 Appointment of managers directly accountable to municipal managers*

*(a) A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.*

*(b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.”*

## **The Senior Manager Regulations**

8 In terms of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers published under GN21 in GG 37245 of 17 January 2014 (“**the Senior Manager Regulations**”):

8.1 These regulations must be read in conjunction with the Local Government: Municipal Regulations on Minimum Competency Levels, 2007, issued in terms of the Municipal Finance Management Act, as published under Government Notice 493 in Government Gazette 29967 of 15 June 2007.<sup>2</sup>

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<sup>2</sup> Regulation 2(2).

- 8.2 Selection must be competence-based to enhance the quality of appointment decisions and to ensure the effective performance by municipalities of their functions.<sup>3</sup>
- 8.3 No person may be appointed as a Senior Manager on a fixed term contract, on a permanent basis or on probation, to any post on the approved staff establishment of a municipality, unless he or she: (a) is a South African citizen or permanent resident; and (b) possesses the relevant competencies, qualifications, experience, and knowledge set out in Annexures A and B to the Regulations.<sup>4</sup>
- 8.4 A person appointed as a Senior Manager in terms of these Regulations “must have the competencies as set out in Annexure A”.<sup>5</sup>
- 8.5 A person appointed as a Senior Manager in terms of these Regulations “must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.”<sup>6</sup>
- 8.6 An application for the vacant post of Senior Manager must be submitted on an official application form (attached as Annexure C to the regulations), “accompanied by a detailed curriculum vitae.”<sup>7</sup>

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<sup>3</sup> Regulation 6(3).

<sup>4</sup> Regulation 8(1).

<sup>5</sup> Regulation 9(1).

<sup>6</sup> Regulation 9(2).

<sup>7</sup> Regulation 11(1).

- 8.7 An applicant for a Senior Manager post must, disclose, *inter alia*, his or her academic qualifications, proven experience and competencies.<sup>8</sup>
- 8.8 Any misrepresentation or failure to disclose information contemplated in subregulation 3 and 4 is a breach of the Code of Conduct for Municipal Staff as provided for in Schedule 2 to the Act and shall be dealt with in terms of the disciplinary regulations.<sup>9</sup>
- 8.9 A Municipal Council must appoint a selection panel to make recommendations for the appointment of candidates to vacant Senior Manager posts.<sup>10</sup>
- 8.10 Screening of the shortlisted candidates must take place within 21 days of the finalisation of the shortlisting by: (a) conducting the necessary reference checks; (b) contacting a candidate's current or previous employer; (c) determining the validity of a candidate's qualifications; and (d) verifying whether a candidate has been dismissed previously for misconduct or poor performance by another employer.<sup>11</sup>
- 8.11 Before making a decision on an appointment, a Municipal Council must satisfy itself that<sup>12</sup>:
- (a) the candidate meets the relevant competency requirements for the post, as set out in Annexures A and B to the regulations;

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<sup>8</sup> Regulation 11(4)(a).

<sup>9</sup> Regulation 11(5).

<sup>10</sup> Regulation 12(1).

<sup>11</sup> Regulation 14(1).

<sup>12</sup> Regulation 17(1). See too Regulation 17(2).

- (b) screening of the candidates has been conducted in terms of regulation 14;
- (c) the candidate does not appear on the record of staff members dismissed for misconduct as set out in Schedule 2 to the Regulations.

8.12 Regulation 35 reads as follows:

*“35 Upper limit of total remuneration package of senior managers*

- (1) The Minister must by notice in the Gazette annually determine the upper limit of the total remuneration package of senior managers according to different categories of municipalities.*
- (2) The upper limit of the total remuneration package of senior managers for a financial year, must be determined by the Minister before 31 March of the following financial year, after consultation with the Minister for Public Service and Administration, the Minister of Finance, the MECs for local government, and organised local government, by notice in the Gazette after taking into consideration-*
  - (a) the classification of municipalities according to different grades;*
  - (b) the respective duties, powers and functions and responsibilities of the municipality;*
  - (c) the affordability of different levels of remuneration, the number of municipal employees, and the salary and wage bill of the municipality;*
  - (d) the population, operating budget and assets of the municipality;*
  - (e) the current principles and levels of remuneration in society in general;*
  - (f) the need for the promotion of equality and uniformity of salaries, allowances and benefits for equal work performed;*
  - (g) the provision of uniform norms and standards nationally to address disparities; and*



*(h) inflationary increases.”*

8.13 In Annexure B, minimum competency requirements are prescribed. The terms “middle management level” and “senior management level” are defined and the competencies for various positions including that of a Community Services Manager and that of other Senior Managers are prescribed. “Senior Management Level” is defined as:

*“A management level associated with persons in senior management positions responsible for supervising staff in middle management positions, and includes-*

- (a) The municipal manager of a municipality or the chief executive officer of a municipal entity;*
- (b) Any manager directly accountable to-*
  - (i) the municipal manager, in the case of a municipality; or*
  - (ii) the chief executive officer, in the case of a municipality; or*
- (c) A person that occupied a position in a management level substantially similar to senior management level, outside the local government sphere;”*

9 The work-related experience and knowledge of a Community Services Manager is identified as five years’ experience at middle management level and having proven successful institutional transformation within the public or private sector.

10 The work-related experience and knowledge of other Senior Managers is identified as five years’ experience in: (a) good knowledge and interpretation of policy and legislation; (b) good knowledge of performance management system; (c) good governance; and (d) good knowledge of Supply Chain Management Regulations and the Preferential Procurement Policy Framework Act No 5 of 2000.

## The MFMA

- 11 The Local Government: Municipal Finance Management Act No 56 of 2003 (“**the MFMA**”) makes clear that its provisions (which includes the Regulations adopted thereunder) apply to all municipalities and that in the event of any inconsistency on any aspect of the fiscal and financial affairs of a municipalities, the provisions of the MFMA prevails.<sup>13</sup>
- 12 Section 83(1) of the MFMA under Part 2 which deals with “Financial Administration” makes clear that Senior Managers “must meet the prescribed financial management and competency levels.”

## The Minimum Competency Regulations

- 13 In terms of the Municipal Regulations on Minimum Competency Levels, 2007 published under GN R 493 in GG 29967 of 15 June 2007 (as amended by GN 1146 in GG 41996 of 26 October 2018) (“**the Minimum Competency Regulations**”):

- 13.1 “Senior Management Level” is defined as:

*“A management level associated with persons in senior management positions responsible for supervising staff in middle management positions, and includes-*

- (a) *The municipal manager of municipality or the chief executive officer of a municipal entity;*

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<sup>13</sup> Section 3(2).

- (b) *Any manager directly accountable to-*
  - (i) *the municipal manager, in the case of a municipality; or*
  - (ii) *the chief executive officer, in the case of a municipality entity; or*
- (c) *A person that occupied a position in a management level substantially similar to senior management level, outside the local government sphere;”*

13.2 “Senior Manager” is defined as:

- “(a) *in relation to a municipality, means a manager referred to in section 56 of the Municipal Systems Act; or*
- (b) *in relation to a municipal entity, means a manager directly accountable to the chief executive officer of the entity;”*

13.3 Regulation 6 reads as follows:

“6 *General competency levels for Senior Managers*

- (1) *A Senior Manager of a municipality must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers assigned in terms of the Act to that Senior Manager.*
- (2) *A Senior Manager of a municipal entity must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers assigned in terms of the Act to that Senior Manager.*
- (3) *A Senior Manager must note that any failure to comply with any financial management responsibilities, functions and powers entrusted to that Senior Manager may constitute financial misconduct.”*

13.4 Regulation 7 reads as follows:

“7 *Minimum competency levels for Senior Managers*

*A Senior Manager of a municipality or municipal entity must comply with the minimum competency levels required for higher education qualification, work related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency areas as set out below”.*

- 13.5 The minimum competence levels for Senior Managers in the present instance requires a minimum of 7 years at senior and middle management level, of which at least 2 years must be at Senior Management Level.

## **BACKGROUND**

### **The advertisement**

- 14 On 1 March 2021 the position for Director: Community Services was advertised by the Municipality. According to the advertisement, the stipulated requirements included seven years’ relevant experience at senior and middle management level, of which two years should be at senior management, preferably in the local government sector.

### **Dr Ngqele’s curriculum vitae**

- 15 According to the curriculum vitae submitted by Dr Ngqele as part of his application:
- 15.1 He held the position of Senior Manager: Strategic Services at the Mossel Bay Municipality from 1 December 2019 until present. It is explained that the position was “to provide an efficient and proactive strategic service to the Council, the Municipal Manager and the entire organisation by managing the legislative, administrative, operational and developmental processes associated with the identification, facilitation, execution, implementation, monitoring, assessing and reporting with respect to” a range of functional disciplines.

- 15.2 He held the position of Manager: IDP, PMS and Public Participation from April 2016 to November 2019. The purpose of the position is described as to oversee and manage the provision of Integrated Development Planning / corporate strategic planning, organisational performance management and public participation of the municipality.
- 15.3 He held the position of part-time lecturer at South Cape College from February 2019 until July 2019.
- 15.4 He held the position of Manager: IDP and PMS at the George Municipality since March 2011 until June 2015. This, he described as “a professional advisory and coordinating service to the municipality with respect to the effective and efficient implementation of strategic planning, organisational performance management and public participation.”
- 15.5 He held the position of Manager: IDP and PMS at the Ndlambe Municipality from July 2009 until February 2011. He describes his responsibilities as including the oversight function for all IDP -related activities and project implementation. The reason given for having left was that he accepted a senior position within a bigger municipality.
- 15.6 He held the position of Coordinator: IDP and Budget Integration at Buffalo City Metropolitan Municipality since October 2008 until June 2009. He described his duties in this regard as assisting the Manager: IDP and Budget Integration in a number of respects.

- 15.7 He held the position of Coordinator: IDP, Strategy and Performance Management at the Knysna Municipality from January 2004 until August 2008. He explains that this period includes an acting period from January 2004 to December 2005.
- 15.8 He held the position of Administrative Officer: Development Facilitation and Public Participation at Knysna Municipality from October 1999 until December 2003.
- 15.9 He held the position of Field Worker/Community Liaison Officer (Housing Project) at Knysna Municipality from January 1999 until September 1999.

### **The Municipality's assessment**

- 16 According to the Master List for the position, it was recorded that Dr Ngqele was a Senior Manager for Strategic Services since December 2019 to date. However, in the comments section, it was recorded that Dr Ngqele had no senior management experience.
- 17 According to the Screening Report, Dr Ngqele held a PhD qualification. It was noted that his financial record disclosed three judgments and two default judgments against

him and that he had received negative feedback from his current and previous employers. It was further noted that his references had given positive feedback.

18 According to the minutes of the Shortlisting Panel for the position of Director: Community Services which was held on 24 and 25 March 2021, it was noted, amongst other things, that:

18.1 Each candidate was scrutinised through comparing their skill sets, qualifications and experience against the criteria for the position.

18.2 After a detailed comparison of the candidates on the long list, five candidates were proposed for shortlisting to the position. Mr Clayton was among these five candidates whereas Dr Ngqele was not among them.

18.3 A Councillor had proposed that Dr Ngqele be added to the shortlist. The Panel had declined to do so “as there was concern with regard to his lack of senior managerial experience”.

18.4 After debate on this issue, the Committee had decided to reconvene the next day to consider the inclusion of Dr Ngqele on the shortlist. The Panel reconvened on 25 March 2021 and after a detailed discussion it had agreed to include Dr Ngqele on the shortlist.

18.5 It was recommended that the appointed service provider be instructed to conduct screening on the shortlisted candidates and report back to the Panel before the interviews took place.

19 According to the Selection Report:

- 19.1 A total of 36 applications were received, of which one was late.
- 19.2 Six candidates were shortlisted and invited to assessment and interview sessions which were held on 13 April 2021. The selection process consisted of the following primary components:
- (a) Screening process (contacting of current and previous employers, references by candidates, verifying qualifications, financial history, criminal status and disciplinary history).
  - (b) Psychometric testing, where applicable.
  - (c) Case study evaluation.
  - (d) An intensive structured interview based on 15 competency areas.
- 19.3 In the interviews, Dr Ngqele ranked top.
- 19.4 According to the knowledge and experience competencies, Dr Ngqele was found to have been competent in all areas. The criteria noted in respect of Work Related Experience: “five years’ experience at a middle management level and have proven successful management experience in administration.”
- 19.5 The findings recorded that Dr Ngqele was not suitable for appointment for three reasons: (a) he did not conform to the requirements of the advertisement and lacked senior managerial experience which may result in a costly dispute for the municipality; (b) his personality and integrity report categorised him in



the Elimination Frame; and (c) the Screening Report shows three judgments and two default judgments on his financial history.

19.6 It was recommended, *inter alia*, that: (a) the Acting Municipal Manager extend an offer of employment to Mr Clayton who was deemed to be suitable under the circumstances; (b) if Mr Clayton should decline the offer or not to sign an employment contract within one month of the Council resolution, the position be offered to the next qualifying candidate; (c) if the Council decided not to appoint any of these candidates, the Acting Municipal Manager shall be authorised to re-advertise the position.

20 According to a report from the Municipal Manager, Dr Ngqele was noted as not being suitable for appointment for the following reasons:

20.1 Investigation shows that he does not conform to the requirements of the advertisement and lacks senior managerial experience which may result in a costly dispute for the municipality.

20.2 His personality and integrity report categorised him in the Elimination Frame.

20.3 The Screening Report shows three judgments and two default judgments on his financial history.

### **The appointment resolution and notification to the MEC**

21 On 29 April 2021 the Council resolved to appoint Dr Ngqele to the position of Director: Community Services.

22 On 6 May 2021 the Acting Municipal Manager advised the MEC that the Municipality had resolved to appoint Dr Ngqele to the position of Director: Community Services, subject to the conclusion of the contract of employment and performance agreement.

**Engagement between the Office of the MEC and the Office of the Executive Mayor**

23 On 10 June 2021 the MEC addressed correspondence to the Executive Mayor, which, *inter alia*:

23.1 Set out the legislative and regulatory framework (including the definition of Senior Management Level) and expressed the view that none of the positions set out in Dr Ngqele’s employment history “was at Senior Management Level, as contemplated in the MMC Regulations”.

23.2 Referred to the competency assessment which was undertaken by Steele and Associates whereby Dr Ngqele was found to be competent but not suitable for appointment for the reasons that it had given.

23.3 Referred to the Council minutes which do not disclose the reasons as to why the Council did not resolve to appoint Mr Clayton who was the Selection Panel’s preferred candidate.

**Attempts at obtaining and verifying information after the appointment resolution had been adopted**

Engagement between the Knysna Municipality and the Ndlambe Municipality

24 On 10 June 2021, the Knysna Municipality addressed correspondence to the Ndlambe Municipality which stated, *inter alia*, as follows:

*“We write to advise that the Knysna Municipal Council at its meeting held on the 29<sup>th</sup> of April 2021, resolved to appoint Dr S Ngqele as the Director: Community Service.*

*In terms of the provisions of the Regulations on the Appointment and Conditions of Service for Senior Managers, the resolution of Council was reported to the office of MEC Bredell.*

*The office of the MEC reverted to the Knysna Municipality on even date and made the following submissions:*

*“I am of the view that none of the below listed positions in Dr Ngqele’s employment history was at senior management level as contemplated in the MMC regulations:”*

*Manager: IDP, PMS-Ndlambe Municipality*

*In order for the office of the Executive Mayor to respond comprehensively to MEC Bredell, we would be pleased if you could provide us with:*

- *A copy of the organogram for the directorate where Dr Ngqele reported;*
- *Whether the position of Manager: IDP, PMS at the Ndlambe Municipality is that of a manager directly accountable to the Municipal Manager as contemplated in the aforementioned regulations.*

*We have five days to respond to the office of the MEC and would be pleased if you would respond to our enquiries as a matter of urgency.....”*

*(Emphasis added)*

25 In response on 11 June 2021 the Manager: Human Resources at the Ndlambe Municipality advised:

*“Kindly note that the position occupied by Dr Ngqele at the time at Ndlambe Municipality reported directly to the Municipal Manager and was/is a permanent position.”*

*(Emphasis added)*

26 Also on 11 June 2021, the Knysna Municipality followed up with a request as to whether Mr Ngqele was a Section 56 Manager as defined in the Systems Act, to which the response was “no”.

#### Engagement between the Knysna Municipality and the Mossel Bay Municipality

27 On 10 June 2021, the Knysna Municipality addressed an email to the Mossel Bay Municipality along the lines of what was stated in the email to the Ndlambe Municipality as quoted above.

28 The response to that email (dated 10 June 2021) attached the organogram and stated:

*“The position of Manager: Strategic Services: T 16 (Dr Ngqele) at Mossel Bay Municipality is that of a manager directly accountable to Director Corporate Services: Mr Edward Jantjies (section 56 position). Dr Ngqele is therefore not accountable to the Municipal Manager as contemplated in the regulations.”*

#### **The advice sought and obtained by the Municipality from Legal Services after the appointment resolution had been adopted**

29 According to a memorandum from the Manager: Legal Services, addressed to the Office of the Executive Mayor and dated 22 June 2021, the following was noted (among other things):

29.1 Its purpose was to provide the Office of the Executive Mayor with a short report on the information gathered with the view of responding to the correspondence from the office of the MEC in relation to the appointment of the Director: Community Services.

29.2 In order to respond to the office of the MEC in relation to the experience of Dr Ngqele as Senior Manager, the Manager: Legal Services had addressed

correspondence to the previous employers of Dr Ngqele as contained in his CV which he submitted together with his application for the position.

29.3 All three municipalities responded: “Dr Ngqele was not employed by them in a Senior Manager position, as contemplated in the MMC regulations”.

29.4 What the Council needs to consider is “whether having had regard to the documents attached hereto in relation to the experience of Dr Ngqele, they regard their resolution of 29 April 2021, to appoint Dr Ngqele to be lawful.”

29.5 It is further recorded that “should Council, after having considered all relevant documentation at their disposal, be of the view that the decision is legal and will withstand scrutiny, they may proceed to extend an offer of employment to Dr Ngqele.” It was however also noted that should Council be of the view that the decision will not pass muster, that decision must be set aside.

29.6 Reference is made to a different appointment. According to the memorandum “one could therefore argue that a precedent has been established by the Knysna Municipality in setting aside a decision which they were of the view was invalid.”

29.7 According to the records, the decision of Council to appoint Dr Ngqele has never been communicated to him. It is pointed out in this regard that vested rights would only accrue after an offer of employment has been extended.

29.8 The final two paragraphs of the memorandum read as follows:

- “46. *It is our considered view, having regard to the legislative provisions, the summary of academic qualifications and experience of Dr Ngqele that his appointment is not legislatively permissible.*
47. *In the premises, it is our recommendation that the Office of the Mayor submit the appointment of Dr Ngqele to Council to consider the legitimacy of same, having regard to relevant information.”*

### **The Municipality’s adoption of the Employment Resolution and its offer to Dr Ngqele**

30 According to the minutes of a Special Municipal Council meeting that was held on 12 July 2021, it was resolved by a majority that:

30.1 The report regarding the appointment of an Acting Director: Community Services, be noted.

30.2 That the Acting Municipal Manager appoint Dr Ngqele as the Director: Community Services before the end of the day as per the official appointment letter.

31 On 13 July 2021 the Municipality made an offer to Dr Ngqele which stated as follows in its first paragraph:

*“We write to advise that Council, at its meeting held on the 29<sup>th</sup> of April 2021 resolved to offer you the position of Director: Community Services on a fixed term contract of 5 years, in terms of section 56(a) of the Local Government: Municipal Systems Act 32 of 2000.”*

32 A contract of employment was concluded in execution of the resolution of the majority of Councillors, as of 1 August 2021.

### **Further engagement between the Municipality and the MEC**

- 33 On 14 July 2021 the Municipality addressed correspondence to the MEC advising that at its meeting on 12 July 2021 Council resolved, by majority vote, to extend an offer of employment to Dr Ngqele.
- 34 On 17 August 2021 the MEC addressed a further letter to the Executive Mayor in which he:
- 34.1 Referred to his previous correspondence of 10 June 2021 and advised that though he had not received a response to the letter, he had been advised on 14 July 2021 by the Municipality that it had made an offer of employment to Dr Ngqele on 13 July 2021, which offer was made in spite of possible non-compliance that the MEC had brought to the Municipality's attention.
- 34.2 Explained that he had been advised by his Office, based on the reporting information previously submitted by George and Mossel Bay Municipalities that none of the posts held by Dr Ngqele at these two municipalities are at a Senior Management Level.
- 34.3 Advised that the MEC had received no assurance from the Municipality that its Council had satisfied itself that Dr Ngqele possesses the required senior management experience and that the MEC had therefore made direct contact with the Director: Corporate Services at Ndlambe Municipality "to confirm if the post held by Dr Ngqele at the Ndlambe Municipality was at Senior Manager Level during his tenure" and that a response was awaited.
- 34.4 Advised further that "even in the unlikely event that the Ndlambe Municipality advises that the post of Manager: IDP and PMS was at Senior Manager Level,

the duration of his appointment, being June 2009 – February 2011, does not amount to the required two (2) years.”

34.5 Urged the Municipality to provide its views, including any documentation and information it deems necessary to respond to possible areas of non-compliance, raised in his prior correspondence.

35 On 17 August 2021 the Municipality addressed correspondence to the MEC advising, *inter alia*:

35.1 Council had considered the matter and had resolved by a majority that “they were satisfied that Dr Ngqele had the necessary qualifications, skill, experience and expertise to be appointed to the position. At a special meeting of Council held on the 12<sup>th</sup> of July 2021, Council by majority vote resolved to extend a formal offer of employment to Dr Ngqele. Your office was informed of same on the 14<sup>th</sup> of July 2021.”

35.2 Expressed concern at “how fixated” the office of the MEC had become with the appointment of Senior Managers by the current political leadership.

35.3 Advised that the Mayor’s Office had perused personnel files of other persons where the office of the MEC had only submitted comments, even at times where the Office of the MEC “knew or ought reasonably to have known” that an individual did not possess the requisite academic qualifications for appointment.



35.4 Advised further that Dr Ngqele had commenced with employment and a contract of employment had been concluded in execution of the resolution of the majority of Councillors, as of 1 August 2021.

## **THE APPOINTMENT AND EMPLOYMENT RESOLUTIONS WERE TAINTED BY REVIEWABLE IRREGULARITIES**

### **The evidence**

36 According to the MEC's founding affidavit:

36.1 The advertisement for the position of Director: Community Services of the Municipality expressly indicated that applicants should have seven years' relevant experience at senior or middle management level, of which two years should be at Senior Management Level.

36.2 It was expressly recorded that Dr Ngqele had no senior management experience.

36.3 The Screening Report showed that Dr Ngqele was the only candidate with negative references from current and previous employers.

36.4 The Acting Municipal Manager's Report recommended the appointment of Mr Clayton on the basis that he met all the requirements for the advertised position.

36.5 The Selection Report stated that Dr Ngqele was not suitable for appointment for the following reasons:

*“Investigation shows that he does not conform to the requirements of the Advertisement and lacks senior management experience which may result in a costly dispute for the municipality;*

*Dr S Ngqele’s personality and integrity report categorised him in the elimination frame;*

*Our screening report shows three judgments and two defaults on his financial history.”*

36.6 The Selection Report recommended that the Selection Panel considers the suitability of each of the candidates in order of preference, which is Mr WB Clayton, followed by Me S Somnath and Me Boyce and “that the Acting Municipal Manager extends an offer of employment to Mr Clayton who is deemed to be suitable under current circumstances.”

37 In response to these paragraphs, the Councillors state as follows in their answering affidavit:

*“21. I set out extensively in the AAG case why those of us who voted in favour of Dr Ngqele believed, good faith, that he has the necessary skills and qualifications for the position he now holds.”*

38 In the Councillors’ affidavit in the AG matter, it is alleged, *inter alia*, as follows:

38.1 Ms Paulsen erred in her email engagement with the Ndlambe Municipality by simply asking whether Dr Ngqele was a section 56 manager. This question was predicated upon the misconceived view that for one to hold senior managerial experience, one should have been appointed to a position specifically under section 56 of the Systems Act.

38.2 When proper regard is had to Dr Ngqele’s CV and his experience, he met the qualification as advertised – and as required by law.

- 38.3 Dr Ngqele did have senior managerial experience. At Ndlambe Municipality, he held a senior managerial position so much so that he was directly accountable to the Municipal Manager. His position at Mossel Bay Municipality as Senior Manager, Strategic Services also qualifies as a senior management position. The Panel misconstrued the “Senior Management Level” experience requirement to mean that a person must have been a section 56 manager.
- 38.4 Ms Paulsen overlooked the fact that Dr Ngqele’s previous position at Ndlambe Municipality was akin to a Senior Manager position as contemplated in section 56 of the Systems Act. Dr Ngqele was regarded as a manager (a senior one) so much so he reported directly to the Municipal Manager.
- 38.5 Ms Paulsen failed to consider whether this reality meant that in substance (qualitatively), Dr Ngqele satisfied the requirements envisaged in section 56 of the Systems Act read with the MMC Regulations.
- 38.6 Ms Paulsen failed altogether to take a purposive approach to the interpretative task, applying as she did, a literalist style, which has been discarded by our Courts.
- 39 The Councillors allege that Dr Ngqele:
- 39.1 “did in fact have senior managerial experience”;
- 39.2 had “senior (or substantially similar) managerial experience”; and
- 39.3 “substantially complied with the requirements”.

40 Dr Ngqele alleges that:

40.1 Though he had never held the position of director as defined in term of section 56 of the Systems Act, he has “from time to time acted in the capacity of Director: Corporate Services whilst employed by the Mossel Bay Municipality.”

40.2 He has at least 8 years’ Senior Management Level experience which is based on:

(a) Having been employed as Senior Manager: Strategic Services at Mossel Bay Municipality from December 2019 up until August 2021 where he reported to the Director Corporate Services which “entailed the management of the Municipality’s entire integrated development programme (IDP) which is the overall strategy plan of the Municipality’s main function.”

(b) From March 2011 to June 2015 he was employed at the George Municipality where he “reported to the Municipal Manager”.

(c) From July 2009 up until February 2011 he was employed at Ndlambe Municipality where he also reported to the Municipal Manager.

40.3 He “has been employed in [his] current position since the date of [his] appointment on 1 August 2021 and [remains] so employed...”.

**The lack of clarity as to Dr Ngqele’s experience at Senior Management Level**

41 There is much uncertainty as to Dr Ngqele’s compliance with the requirement of two years’ experience at Senior Management Level:

41.1 First, this information does not appear from Dr Ngqele’s CV, to which reference has been made. As indicated, Dr Ngqele’s CV indicates that he held the position of Senior Manager: Strategic Services at the Mossel Bay Municipality from 1 December 2019 until present, which amounts to a period of less than two years. No other reference is made in Dr Ngqele’s CV to his experience at Senior Management Level.

41.2 Second, it is clear that at the time that the appointment resolution was adopted, the Council did not have before it evidence of whether his prior positions at, *inter alia*, Mossel Bay Municipality and Ndlambe Municipality were at Senior Management Level for a period of two years. Hence, further information was sought on 10 June 2021. Although the Municipality sought this information in order for “the office of the Executive Mayor to respond comprehensively to MEC Bredell”, it appears that the correct position is that the Municipality did not have information before it to show that Dr Ngqele had two years’ experience at Senior Management Level. Had this information been to hand, it would have been in a position to respond to the MEC directly and without having to engage previous employers after the appointment resolution had been adopted.

41.3 Third, the assertion in his CV that Dr Ngqele held a position as a Senior Manager (with due regard to the definition of this term in the Competency Regulations as a manager referred to in section 56 of the Systems Act) does not

accord with the feedback received from the Mossel Bay Municipality which stated that Dr Ngqele is therefore not accountable to the Municipal Manager as contemplated in the regulations. Notably, “Senior Manager” is defined in the Regulations (in relation to a municipality) as a manager referred to in section 56 of the Municipal Systems Act. The latter provision, in turn refers to “a manager directly accountable to the municipal manager.”

41.4 Fourth, based on the information provided by the Ndlambe Municipality, Dr Ngqele had reported directly to the Municipal Manager. This information however does not appear from Dr Ngqele’s CV. This issue is further complicated by the fact that according to the Ndlambe Municipality, Dr Ngqele was not a Section 56 Manager as defined in the Systems Act.

41.5 Fifth, according to Dr Ngqele’s answering affidavit in the MEC’s application, he makes reference to his prior experience which was at Senior Management Level. This has been set out above. This information however does not appear from the documents that served before the Council in the appointment process.

41.6 Sixth, in the Heads of Argument filed on behalf of Dr Ngqele, he disputes the contention that he lacked senior management experience but “conceded that he did not have the 7 years’ experience in the sense that he was not responsible for supervising staff at middle management level ... but that he had senior management experience based on his past employment in his capacity Senior Manager: Strategic Services...”

41.7 Seventh, according to the Heads of Argument filed on behalf of the Councillors the proper question was whether Dr Ngqele’s experience was of the type

“associated with persons in senior management positions” which often entails “supervising staff in middle level management positions”. The Councillors argue that this exercise had to be done with substantive and qualitative reference to Dr Ngqele’s CV and the nature of positions he held in his previous employment. There is however no evidence before me to show that this exercise was done. This notwithstanding, the Councillors conclude that Dr Ngqele had the requisite experience with due regard to the following:

- (a) At Ndlambe Municipality, Dr Ngqele held a senior managerial position so much so that he was directly accountable to the Municipal Manager, which was confirmed by Ndlambe Municipality.
- (b) Dr Ngqele’s managerial position at Mossel Bay Municipality, in which he held the designation “Senior Manager, Strategic Services” also qualifies as a Senior Management Level position within the contemplation of the regulation.
- (c) His experience at Ndlambe and Mossel Bay Municipalities combined meant he (at the very least) had more than two years’ experience at Senior Management Level.

42 It is unsurprising that there is such a remarkable lack of clarity as to whether Dr Ngqele met the minimum competency requirement of 2 years’ experience at Senior Management Level given that: (a) this information does not appear from the documents that served before Council; (b) as a result, the Municipality had to seek further information after the appointment decision had been taken; (c) the information that was

elicited did not resolve the issue and nor did it accord with certain information that appeared in Dr Ngqele's CV and for which there is no explanation. There is nothing on the record to indicate that the Council sought to obtain clarity on this key issue before any of the impugned decisions were taken.

## **Findings**

- 43 I agree with the arguments advanced on behalf of the MEC and Mr Clayton that the appointment and remuneration resolutions are vitiated by reviewable irregularities.
- 44 The following considerations are, in my view, of key importance: (a) based on the information that served before the Council when the appointment resolution was adopted, it did not have the relevant information before it to show compliance with the threshold requirement of two years' experience at Senior Management Level; (b) the Municipality sought to obtain the information after the appointment resolution had been adopted but before the employment resolution had been adopted; (c) leaving aside whether it was competent for the Municipality to seek this information at the stage that it did, there is no evidence before me to suggest that the Council considered and interrogated the further information in light of what had already served before it in order to ascertain whether the threshold requirement of two years' experience at Senior Management Level had been complied with; (d) further new evidence has been placed before the Court in these proceedings in circumstances where it is unclear as to why such information was not placed before the decision-maker and the basis on which I am to assess the reviewability of the impugned decisions in light of such new information.
- 45 In light of the foregoing, I am of the view that the appointment and employment resolutions were irrational and unlawful because they did not comply with and were not



authorised by the Systems Act, the MFMA and the Competency Regulations, and the Council ignored relevant considerations (compliance with the minimum competency regulations in respect of 2 years' experience at Senior Management Level). These are recognised grounds of review under both the principle of legality and the Promotion of Administrative Justice Act No 3 of 2000 (“PAJA”).

46 I am also of the view that, for reasons given, the appointment resolution and the employment resolution are vitiated by unreasonableness. This is a recognised ground of review under PAJA but not under the principle of legality.<sup>14</sup>

47 The reliance on substantial compliance by the Councillors fails because, as was argued on behalf of the MEC, the Competency Regulations make no provision for ‘substantial compliance’. Regulation 7 makes it clear that the competency levels it prescribes for Senior Managers are ‘minimum competency levels’.

48 I am not satisfied that the evidence demonstrates that the appointment resolution and the employment resolution were (a) influenced by bias; (b) made for an ulterior motive or purpose; and/or (c) made in bad faith. I am also not satisfied that the impugned decisions were tainted by procedural unfairness in that they were plainly influenced by bias. I agree with the arguments advanced on behalf of the Councillors in this regard.

49 None of these grounds of review are, in my view, sustainable on the evidence which has been addressed above in some detail. More particularly: (a) an improper motive was alleged but what that motive entailed was not identified; (b) disagreeing with legal advice does not, in my view, without more, necessarily disclose bias, improper motive and/or bad faith.

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<sup>14</sup> **DA v President of the RSA** 2013 (1) SA 248 (CC) at para 41.

**THE DECISION TO APPOINT DR NGQELE TO THE POSITION OF DIRECTOR: COMMUNITY SERVICES WAS IRRATIONAL AND/OR UNREASONABLE BECAUSE HE WAS CATEGORISED IN THE ELIMINATION FRAME AND THE SCREENING REPORT SHOWED THAT HE HAD THREE JUDGMENTS AND TWO DEFAULT JUDGMENTS AGAINST HIM**

50 It was further argued that the Selection Report found that Dr Ngqele was not suitable for appointment for three reasons: (a) he did not comply with the requirements of the position and lacked senior managerial experience; (b) his Personality and Integrity Report categorized him in the Elimination Frame; and (c) the Screening Report showed that he had three judgments and two defaults on his financial history.

51 I have already made a determination in respect of the first of these factors.

52 As regards the latter two considerations, they do not, in my view, found a reviewable irregularity. This is so for the following reasons:

52.1 The criteria for the appointment of a Senior Manager are carefully prescribed by the legislative and regulatory framework.

52.2 Neither of these considerations are identified as relevant criteria in the legislative and regulatory framework.

53 In the circumstances, I conclude that this ground of challenge must fail. In reaching this conclusion, I make clear that this is not to suggest that these factors may not be considered in the overall decision-making process. However, they do not, in my view, constitute a basis on which to found a reviewable irregularity.

**THE FAILURE AND/OR REFUSAL OF THE MUNICIPAL COUNCIL TO APPOINT MR CLAYTON TO THE POSITION OF DIRECTOR OF COMMUNITY SERVICES WAS TAINTED BY REVIEWABLE IRREGULARITIES**

54 I accept that the decision appoint Dr Ngqele (i.e. the appointment and employment resolutions) fall to be reviewed and set aside for reasons indicated.

55 I also accept that the decision not to appoint Mr Clayton to the position falls to be reviewed and set aside. I agree with the arguments advanced on behalf of Mr Clayton that this is so for the following reasons:

55.1 There is no record or justification whatsoever in the Council records (including its minutes) for the decision not to appoint Mr Clayton as recommended in the reports or why he was considered unsuitable for appointment.

55.2 The Council clearly had before it the report of the Acting Municipal Manager on the selection of the Director: Community Services which recorded the findings of the Selection Report that that Dr Ngqele was not suitable for appointment to the position. This notwithstanding, there is no evidence to show that the Council engaged with these findings.

56 In the circumstances, I am of the view that the decision not to appoint Mr Clayton falls to be reviewed and set aside on the basis that relevant considerations were ignored and irrelevant were considered and it was, as a result, irrational. These are recognised grounds of review under both the principle of legality and PAJA.

57 I make clear that in reaching this conclusion I do not express any view whatsoever on the merits of Mr Clayton's application for the position and whether he ought to have been appointed or not.

## REVIEWABILITY OF THE APPOINTMENT AND EMPLOYMENT RESOLUTIONS UNDER THE PRINCIPLE OF LEGALITY AND /OR PAJA

58 There was a dispute as to whether the appointment and employment resolutions fall within the purview of the definition of “administrative action” in PAJA. Though this determination bears on the grounds of review that apply to the challenge, it is of little significance in the present matter given that I find that the impugned decisions are reviewable on grounds of review that are recognised grounds of review under both PAJA and the principle of legality. I do however also make a finding of reviewability on the ground of unreasonableness, which is a ground of review under PAJA and not the principle of legality. For that reason, I am required to make a finding on whether the appointment resolution and the employment resolution fall within the definition of administrative action under PAJA.

### Overlapping grounds of review under both PAJA and the principle of legality

59 In **Premier, Gauteng and Others v Democratic Alliance and Others** 2022 (1) SA 16 (CC) the Constitutional Court restated the key principles underpinning a review founded on the principle of legality as follows:

“[66] *It is trite that the principle of legality is but one aspect of the rule of law, which is a value enshrined in s 1(c) of the Constitution. In **Fedsure** this court held, in respect of the powers of both the legislative and executive arms of government, that —*

*'it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law. . . .*

...

*It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle*

*that they may exercise no power and perform no function beyond that conferred upon them by law.' In terms of the principle of legality, the exercise of public power will only be legitimate where lawful. Thus, to exercise more power than what has been conferred in terms of the law would be ultra vires. This is now firmly settled in our law."*

60 The Court further observed that the principle of legality has developed significantly in our jurisprudence since **Fedsure** and that the grounds for a legality review have expanded along with it. The Constitutional Court summarised that they now include lack of authority, abuse of power, and jurisdictional facts as well as rationality.<sup>15</sup>

61 In **DA v President of the RSA** 2013 (1) SA 248 (CC) the Constitutional Court held (in the context of a legality review) that:

61.1 Both the process by which the decision is made and the decision itself must be rational.<sup>16</sup>

61.2 The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.<sup>17</sup>

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<sup>15</sup> At para 67.

<sup>16</sup> At para 34.

<sup>17</sup> At para 36.

61.3 A failure to take into account relevant considerations in the process of making a decision can render it irrational where: (a) the factors ignored are relevant; (b) the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and (c) ignoring relevant facts of a kind that colours the entire process with irrationality and thus renders the final decision irrational.<sup>18</sup>

62 Unreasonableness is not a ground of review under the principle of legality but is a recognised ground of review under PAJA.<sup>19</sup> In respect of unreasonableness, the Constitutional Court has held that the Court is required to examine the decision for the reasons motivating the decision reached. According to the Constitutional Court, if the reasons advanced rationally support the outcome arrived at, interference with the decision on the basis of unreasonableness would not be justified. This would be the position even if the Court does not agree with the reasons furnished.<sup>20</sup> The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.<sup>21</sup>

### **Are the appointment and employment resolutions reviewable under PAJA?**

63 The Constitutional Court has held in **Minister of Defence & Military Veterans v Motau** 2014 (5) SA 69 (CC) at paragraph 33 that the rather unwieldy definition of

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<sup>18</sup> At para 39.

<sup>19</sup> **DA v President of the RSA** 2013 (1) SA 248 (CC) at para 41.

<sup>20</sup> **Duncanmec (Pty) Ltd v Gaylard NO and Others** 2018 (6) SA 335 (CC) at para 50.

<sup>21</sup> *Ibid* at para 43.

“administrative action” in PAJA can be distilled into seven elements in that there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

64 In **Motau**, the Constitutional Court also held that in the determination of what constitutes administrative action: (a) courts must make a 'positive decision in each case whether a particular exercise of public power . . . is of an administrative character'; and (b) a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. A reviewing court must undertake a close analysis of the nature of the power under consideration.<sup>22</sup>

65 In this matter, the dispute between the parties focussed on whether the impugned decisions constitute an exercise of executive power or an administrative function.

66 In making this determination, I am guided by the following considerations:

66.1 The determination of what constitutes administrative action does not occur by default; the court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character.<sup>23</sup>

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<sup>22</sup> **Motau** at para 34.

<sup>23</sup> **Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others** 2010 (5) SA 574 (KZP) at para 61.

66.2 The question of whether the decision is taken by a public official or authority is central to the enquiry.<sup>24</sup>

66.3 The question is not whether the action concerned is performed by a member of the executive arm of government but rather what the nature of the function is.<sup>25</sup>

66.4 In terms of section 156(1) of the Constitution a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matter assigned to it by national or provincial legislation.

66.5 Conduct of an administrative nature is generally understood as “the conduct of the bureaucracy...”. In this regard, the Constitutional Court has held<sup>26</sup>:

*“[37] Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, '(a)administrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals'. Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example...”*

66.6 It may be useful to consider the source of the power, though “special care” must be exercised. Where a power flows directly from the Constitution, this

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<sup>24</sup> **Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others** 2010 (5) SA 574 (KZP) at para 60.

<sup>25</sup> **President of the Republic of South African and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at para 141.

<sup>26</sup> **Motau** at para 37. See too: **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA) at para 24.



could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation.<sup>27</sup>

66.7 The constraints imposed on the power should be considered, though caution must be exercised. The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature.<sup>28</sup>

66.8 It should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review. It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject-matter or policy matters for which courts should show the executive a greater level of deference.<sup>29</sup>

67 On an application of the above-mentioned considerations, I am of the view that the appointment and employment resolutions fall within the definition of administrative action in terms of PAJA. I reach this conclusion with due regard to the fact that it meets all of the threshold elements for it to constitute administrative action and more particularly, it is a decision of an administrative nature and not the exercise of an executive power in that:

67.1 It is an exercise of a public power or public function in terms legislation (the Systems Act and the MFMA), which adversely affects the rights of any person and which has a direct, external legal effect.

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<sup>27</sup> **Motau** at para 39 and 40.

<sup>28</sup> **Motau** at para 41 and 42.

<sup>29</sup> **Motau** at para 43.

- 67.2 Decisions concerning the appointment of Senior Managers concern “the conduct of the bureaucracy” in carrying out the daily functions of the State.
- 67.3 There are several constraints on the exercise of the power in that objective minimum competencies are stipulated. As such, the exercise of the power to appoint a Senior Manager is carefully circumscribed by legislation and regulations.
- 67.4 The power is of such a nature that its exercise ought to be subject to a higher threshold of scrutiny under PAJA than what would apply under the principle of legality. It is clear from the statutory framework that the underlying reason for selection to be competence based is to ultimately ensure “the effective performance by municipalities of their functions.” As such, the appointment of Senior Managers are, in my view, central to the effective discharge by municipalities of key constitutional functions in respect of service delivery.
- 67.5 The power to appoint Senior Managers does not fall within the purview of the exclusion of executive powers or functions of a municipal council. The executive functions of a municipality as contemplated by section 156(1) of the Constitution read with Part B of Schedules 4 and 5.
- 67.6 Section 11 of the Systems Act (under the heading of Executive and Legislative Authority) provides that the executive and legislative authority of a municipality is exercised by the Council of the municipality. Section 11 further provides that a municipality exercises its legislative or executive authority by, *inter alia*, establishing and maintaining an administration. Section 67(1) of the Systems Act (under the heading of Human Resource

Development) provides that a municipality must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons as staff members. These provisions are directed at the systems and procedures (such as recruitment policies) which pertain to, *inter alia*, the appointment of staff as distinct from decisions to appoint and employ particular individuals.

68 My conclusion that a decision by a Municipal Council to appoint a Senior Manager constitutes administrative action aligns with the following case law where it was held that a decision by a Municipal Council to appoint a Municipal Manager constitutes administrative action:

68.1 In **Mlokoti v Amathole District Municipality and Another** (1428/2008) [2008] ZAECHC 184; 2009 (6) SA 354 (ECD) ; [2009] 2 BLLR 168 (E); (2009) 30 ILJ 517 (E) (6 November 2008) the Court held that while the formulation of a municipality's recruitment policy may constitute executive action, its implementation clearly constitutes administrative action. The Court held: "Seen against the enabling framework of the legislation, including the Constitution it is clear in my view that the power given to a Council to appoint Municipal Managers is a necessary administrative adjunct of its functioning." As such, the Court held that a decision to appoint a Municipal Manager is an administrative act which is susceptible to review.

68.2 In **Notyawa v Makana Municipality and Others** (683/2017) [2017] ZAECGHC 95; [2017] 4 All SA 533 (ECG) (24 August 2017) at para 46 the

Court concluded that the decisions sought to be reviewed and set aside (which included the appointment of a Municipal Manager) amounted to administrative action as envisaged in PAJA. In **Notyawa v Makana Municipality and Others** (CCT115/18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) (21 November 2019) the majority decision of the Constitutional Court held that it was not necessary to determine whether the challenged decisions were administrative or executive actions. However, in the concurring judgment of Froneman J, he observed that the High Court’s determination that the impugned decision was administrative action that fell under PAJA was unassailable but that it was not necessary to go into any further detail on that.

69 I have considered the matter of **Democratic Alliance v City of Johannesburg Metropolitan Municipality and Others** (2023-041913) [2023] ZAGPJHC 1374 (7 November 2023) which was argued on the basis that “since ‘the Council is a deliberative body which exercises both legislative and executive functions,’ and the impugned decisions are executive, they are most likely administrative.” The Court disagreed with this submission and referred to the exception in paragraph (cc) of the definition of “administrative action” in PAJA, noting that the executive functions of a Municipal Council are therefore expressly excluded from the definition of administrative action. There can be no dispute that the executive functions of a Municipal Council are expressly excluded from the definition of administrative action. However, I reach the conclusion, for reasons addressed, that the decision of a Municipal Council to appoint a Senior Manager is a decision that is of an administrative nature and does not constitute the exercise of an executive power.

70 In the circumstances, I agree with the arguments advanced on behalf of the MEC that the appointment and employment resolutions are reviewable under PAJA.

71 The remuneration resolution, in my view, clearly falls within the purview of administrative action in that it clearly accords with the criteria referred to above.

**THE REMUNERATION RESOLUTION WAS INCONSISTENT WITH PEREMPTORY STATUTORY AND REGULATORY REQUIREMENTS**

72 The 2020 Upper Limits Notice provides, in item 8, that the upper limits of the annual remuneration package payable to managers accountable to municipal managers in a ‘Category 3’ municipality are R894,447 (minimum); R1,022,226 (midpoint) and R1,133,463 (maximum).

73 The Knysna Municipality is a ‘Category 3’ municipality by virtue of the points allocated to it in terms of items 2, 3, and 4 of the 2020 Upper Limits Notice, read with the table under item 5 thereof.

74 In terms of item 9.2 of the 2020 Upper Limits Notice, the criteria for an offer of a total remuneration package at the maximum level are:

74.1 Relevant qualification.

74.2 Applicable to persons who have more than 10 years’ experience as provided in the Regulations.<sup>30</sup>

74.3 Applicable to persons who have demonstrated a superior competency as measured against the competency framework.

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<sup>30</sup> ‘Regulations’ is defined in the 2020 Upper Limits Notice as meaning ‘the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers issued in terms of Government Notice No. 21 as published under Government Gazette No. 37245 of 17 January 2014’.

75 In terms of the remuneration resolution, Dr Ngqele was given a total remuneration package of R1 133 463.00. This is the maximum total remuneration package for managers directly accountable to the Municipal Manager in Category 3 municipalities.

76 According to a report that was sent to the Council by the Acting Municipal Manager it was recommended:

*‘[a] That the Council approves the remuneration offer for the Director Community Services at midpoint in the amount of R1 022 226.00;*

*[b] That the Acting Municipal Manager inform Dr Sandile Ngqele of the decision of the Council and conclude the contract of employment in accordance with (a) above.’*

77 The Councillors raised two key arguments in opposition to the challenge to the remuneration resolution, viz:

77.1 First, that the “Councillors who voted in favour of the total remuneration package offered to Dr Ngqele believed in good faith that Council has the overriding discretion to decide the conditions of employment of its employees, in particular salaries.” The Councillors go on to explain that there can be no doubt that such a belief was reasonably held and that while a Minister may make regulations, this does not denude Council of its overriding discretion to determine matters such as conditions of employment of employees.

77.2 Second, the Council is a “deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself”.<sup>31</sup> Neither the “national nor provincial government may compromise or impede on a municipality’s

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<sup>31</sup> **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1999 (1) SA 374 (CC) at para 2.

ability or right to exercise its powers or functions”.<sup>32</sup> As such, this Court should not interpret the Upper Limits Notices (made by a Minister) so as to deprive *in toto* a municipal council of the power to decide matters relating to the terms and conditions of employment of its employees. I was referred to the matter of **Manana v King Sabata Dalindyebo Municipality** [2011] 3 All SA 140 (SCA) on behalf of the Councillors in support of an argument that the Upper Limits Notices do not have the effect of depriving Municipal Councils of their ultimate constitutional authority to decide how much to pay its employees.

78 I do not accept the correctness of either of the two submissions made on behalf of the Councillors:

78.1 As to the first submission, good faith and a reasonably held belief is not sufficient to meet a charge of a reviewable irregularity on the grounds brought.

78.2 As to the second submission, the Upper Limit Notices are, in my view, clear. They provide in clear and unambiguous terms for minimum, midpoint and maximum thresholds and for the threshold to be met for a total remuneration package at the maximum level. For me to give an alternative interpretation to the Upper Limit Notices, I would be placing undue strain on the language of the notices.<sup>33</sup>

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<sup>32</sup> **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal** 2010 (6) SA 182 (CC) at para 43-4.

<sup>33</sup> In **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others** 2001 (1) SA 545 (CC) (“Hyundai”), the Constitutional Court held: “[24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not,

79 I have carefully considered the case of **Manana** and do not agree that it is authority for the proposition that was advanced on behalf of the Councillors. This is so for the following reasons:

79.1 The principle applied in **Manana** is that ordinary legislation is not constitutionally capable of divesting a municipal council of its executive authority – or any part of it – and the construction of a statute that would produce that result must be avoided if it is possible to do so.<sup>34</sup> This principle was laid down by the Constitutional Court in **Hyundai**.

79.2 On the evidence in **Manana**, a resolution had been adopted by the Municipal Council. It was however argued that the resolution was not relevant because the power to appoint employees vests in the Municipal Manager and not in the Municipal Council.<sup>35</sup>

79.3 The Court observed that there was a resolution by the Municipal Council which had not been reviewed or set aside. This notwithstanding, it was argued that the resolution was invalid and not binding on the municipality. According to the SCA, a duly adopted resolution of a local authority may not be ignored by its officials if they have a belief that it is invalid, even if that belief is well-founded.<sup>36</sup>

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however, be unduly strained.”

<sup>34</sup> At para 14.

<sup>35</sup> At para 15.

<sup>36</sup> At para 20 and 21.



80 I am of the view that the remuneration resolution is reviewable because Dr Ngqele did not meet the requirements prescribed in the 2020 Upper Limits Notice to be offered a total remuneration package at the maximum level. The Council accordingly lacked the power to offer Dr Ngqele a total remuneration package at the maximum level and consequently, the remuneration resolution was irrational and unlawful. Moreover, the Council ignored relevant considerations (compliance with the 2020 Upper Limits Notice). These are recognised grounds of review under both the principle of legality and PAJA.

## **SUBSTITUTION**

81 Mr Clayton argues that:

81.1 Dr Ngqele has no personal knowledge of the matters dealt with in the reports regarding the suitability of appointing Mr Clayton and the recommendations that he be so appointed. Mr Clayton relies on the fact that the Municipality has provided no reasons in this regard and has taken a decision not to oppose the review and substitutionary relief sought by Mr Clayton.

81.2 Remitting the appointment decision to the Council will be a waste of time, will result in further delay and unjustifiable prejudice to Mr Clayton. It is submitted that the end result that Mr Clayton should be appointed to the position is in any event a foregone conclusion in the absence of a challenge to the contents of and recommendations in the two selection reports before the Council. In such circumstances, substitutionary relief as provided for in section 8(1)(ii)(aa) of PAJA is appropriate.

82 I am of the view that an Order for substitution would not be appropriate in light of the well-established legal principles as set out by the Constitutional Court in **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC), with particular reference to the following:

82.1 In exceptional circumstances, a court has the discretion to make a substitution order.<sup>37</sup>

82.2 In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. The idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.<sup>38</sup>

82.3 Given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a

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<sup>37</sup> At para 34.

<sup>38</sup> At para 43.

substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties.<sup>39</sup>

83 In my view, issues of appointment of Senior Managers at municipalities are eminently matters that fall outside the expertise of judicial officers, particularly in light of the range of considerations that are relevant to such a determination. I do not accept that exceptional circumstances have been shown. I also do not agree that the outcome is a foregone conclusion. While it is so that a preference for Mr Clayton is expressed in the reports that served before the Council, it must be emphasised that the Council must nevertheless bring an open mind to bear in making the appointment and employment determinations. The role of the Council is not to rubber stamp a particular outcome that is supported by the recommendations. The fact that the Council did not consider Mr Clayton's application at all and that further information came to light after the appointment resolution was adopted (in respect of which the Council's views are unknown), this Court does not consider a substitution to be the appropriate course. I am also cognisant of the fact that the present composition of Council is materially different to the Council that considered and appointed Dr Ngqele in 2021. In these circumstances, there is no reason to assume that they will not bring an open mind to bear on the matter.

## **COSTS**

84 In the MEC's application costs are sought against the named Councillors on the following grounds:

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<sup>39</sup> At para 47.

84.1 These Councillors voted in favour of the three resolutions in circumstances where they were informed and advised that the resolutions would be unlawful and that they could be personally liable for costs. They were further advised that they would be: (a) in dereliction of their duties under the Systems Act; (b) acting with bias, bad faith and improper motive.

84.2 When the Councillors made the employment resolution, they were fully apprised of the findings and recommendations of Ms Paulsen and their votes were cast in direct conflict with the legal advice that Dr Ngqele's appointment was not legislatively permissible. As such, they were motivated by bias, improper motive and bad faith.

85 Section 28(1) of the Local Government: Municipal Structures Act No 117 of 1998 (**"the Structures Act"**) provides, under the heading 'Privileges and immunities', that provincial legislation must provide '*at least*':

- "(a) that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as envisaged in section 160(6) of the Constitution; and*
- (b) that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –*
  - (i) anything that they have said in, produced before or submitted to the council or any of its committees; or*
  - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees."*

86 The Western Cape Privileges Act, published in terms of section 28 of the Structures Act, provides for 'Freedom of speech of councillors' (section 2) and 'Immunity of councillors' (section 3).

86.1 Section 2 provides:

*‘2. Freedom of speech of councillors*

- (1) A councillor has freedom of speech in any meeting of the council of which he or she is a member, and in any committee or subcouncil or mayoral committee of that council.*
- (2) A councillor’s right to freedom of speech in terms of subsection (1) –*
  - (a) includes participation in the deliberations and voting on any resolution, decision, report, paper or minutes adopted or approved by the council or any of its committees or subcouncils or its mayoral committee; and*
  - (b) is subject to the council’s rules and orders and the Code of Conduct.’*

86.2 Section 3 provides:

*‘3. Immunity of councillors*

- ‘(1) A councillor is not liable to civil or criminal proceedings, arrest, imprisonment or damages for –*
  - (a) anything that the councillor has said in, produced before or submitted to the council of which he or she is a member, or any committee or subcouncil or mayoral committee of that council; or*
  - (b) anything revealed as a result of anything that the councillor has said in, produced before or submitted to that council or any of its committees or subcouncils or its mayoral committee.*
- (2) A councillor who is not otherwise protected in terms of this Act in respect of any decision of a council, committee or subcouncil or mayoral committee, is not liable to civil or criminal proceedings in respect of that decision if the councillor –*
  - (a) voted against the decision; or*

(b) *where the matter concerned was not put to the vote, before the decision was taken, requested his or her opposition to the decision to be recorded.'*

87 In **Swartbooi v Brink** 2006 (1) SA 203 (CC) the Constitutional Court held as follows:

87.1 In making its costs order, the High Court relied on the conduct of the appellants in supporting the council resolutions that had been set aside, which falls within the purview of section 28(1)(b) of the Structures Act.<sup>40</sup>

87.2 The precise delineation of a particular function of a council as being legislative, executive or administrative is not determinative of the bounds of protection afforded by the legislation in the context of the Constitution. The words of section 28 are certainly wide enough to exempt members of a municipal council from liability for their participation in deliberations of the full council.<sup>41</sup> It does not matter whether the resolution ultimately adopted by the full council after its deliberations can properly be classified as an administrative or an executive decision or a legislative act.<sup>42</sup>

87.3 As regards resolutions that are subsequently set aside:

*“[19] It was also submitted on behalf of the respondents that s 28 protection should not apply to the conduct of members of a municipal council in support of resolutions subsequently set aside. The basis of the submission was that all unlawful acts of a municipal council are contrary to the Constitution and that neither the Constitution nor s 28 could have contemplated protection for conduct of members of a municipal council in support of an unconstitutional decision.*

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<sup>40</sup> At para 12.

<sup>41</sup> At para 16.

<sup>42</sup> At para 18.

[20] *This submission is wrong. If it were correct, the protection would not be afforded for conduct of any councillor in support of a decision which had been set aside for any reason whatsoever. It would not then matter whether the member of the council knew that the resolution that was being supported would be or was inconsistent with the Constitution. A member of the municipal council would be liable even if she had no knowledge of the unconstitutionality of the resolution. On this interpretation, the section would protect only that conduct of members of the municipal council in support of lawful resolutions. There is no warrant for reading this limitation into the wide wording of the section. If the section were to protect only that conduct in support of lawful resolutions of a council, the protection would, in my view, be too limited to fulfil the purpose of the protection. That purpose is to encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy. Any curtailment of that debate would compromise democracy. The protection is not limited to conduct in support of lawful resolutions.”*

88 In **Swartbooi**, the Court also held (obiter) that interesting hypothetical questions were raised as to the outer limits of this protection, for example, whether councillors would attract personal liability if they utilise the processes of the council for a party political or some other ulterior purpose.<sup>43</sup> That obiter finding does not however, in my view, find application in the present matter given the absence of evidence in this regard.

89 In **MEC for Local Government, Housing and Traditional Affairs, KZN v Yengwa** 2010 (5) SA 494 (SCA) the SCA held:

“[13] *In my view the appellant's earlier insistence that the councillors should pay the costs was futile and ill-conceived in the light of the decision in Swartbooi and Others v Brink and Others, which laid down that councillors cannot be held personally liable for costs incurred in the performance of their functions as councillors. The appellant would also have been aware of the protection they enjoy, under s 28(1)(b) of the Local Government: Municipal Structures Act 117 of 1998, from personal liability for the costs of legal proceedings. It is difficult to understand why the appellant pressed on and insisted on payment of costs in the light of the abovementioned authority on the point. He surely would have had access to legal advice in the matter. I do not see any reason why the appellant should not be ordered to pay the costs of the councillors, even though the appeal is decided substantially in his favour.”*

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<sup>43</sup> At para 22.

90 With due regard to the aforementioned authorities, I make the following findings:

90.1 Section 28 of the Structures Act exempts the named members of the Municipal Council in this matter from liability. In this regard, I am bound by the decision of the Constitutional Court in **Swartbooi** and the SCA in **Yengwa**.

90.2 While the Constitutional Court in **Swartbooi** left open hypothetical questions as to the outer limits of this protection and whether the protection would apply, those considerations do not arise on the evidence in this matter.

91 In light of the foregoing, the question arises as to which party ought to bear the costs of this application. The following is of relevance in this regard:

91.1 Costs were sought by Mr Clayton against the Knysna Municipality.

91.2 The MEC sought costs against the Knysna Municipality in the alternative.

91.3 In the circumstances, the Knysna Municipality was fully aware that costs orders were being sought against it. This notwithstanding, it did not oppose the application.

91.4 Even though the Municipality did not oppose the application, in my view, it ought to bear the costs given that the “root cause of the litigation” is the reviewable irregularities as committed by the Municipal Council.<sup>44</sup>

92 The costs referred to above do not include the costs of the postponement on 27 November 2023. The costs occasioned by the postponement on 27 November 2023 was as a result of Dr Nqgele needing an opportunity to file Heads of Argument. In the

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<sup>44</sup> **Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO** 2020 (4) SA 375 (CC) at para 65 and 66.



circumstances, I am of the view that the costs of 27 November 2023 (which shall include the costs of two counsel where so employed), ought to be borne by Dr Ngqele.

## **REMEDY**

93 The first question is whether I declare the appointment resolution, the employment resolution and the remuneration resolution invalid. The Constitutional Court has held in this regard<sup>45</sup>:

*“[30] Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.”*

94 In light of the conclusion that I reach in respect of the merits of the challenge, I am of the view that the appointment resolution, the employment resolution and the remuneration resolution fall to be declared unconstitutional, unlawful and invalid.

95 The second question is whether I set aside the appointment resolution, the employment resolution and the remuneration resolution. The Councillors submit that if the Court is to find that the appointment and employment resolutions are unlawful, it should nevertheless exercise its discretion to decline to set the resolution aside. They advance the following grounds in support thereof: (a) Dr Ngqele himself has “done nothing wrong”; (b) there would be practical prejudice to Dr Ngqele; and (c) there would be prejudice to the Municipality as it would have to undergo another process of

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<sup>45</sup> **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others** 2014 (4) SA 179 (CC).

recruitment and expend monies on induction training for a new appointee. I disagree for the following reasons:

95.1 The issue of minimum competences of Senior Managers is, in my view, a central issue that has a significant bearing on the ability of a municipality to execute its constitutional and statutory functions. For that reason alone, I am of the view that a Court should be slow to depart from the prescribed threshold in the name of just and equitable relief.

95.2 Even at this stage, there are various unanswered questions as to: (a) the actual extent of Dr Ngqele's experience at Senior Management Level; (b) an explanation in respect of the various inconsistencies that appear between (i) the information as initially submitted as part of the application process; (ii) the information that was subsequently obtained from Dr Ngqele's previous employers; and (iii) some of the additional new matter raised by way of evidence in this matter.

95.3 When ordering just and equitable relief I do not accept that Dr Ngqele's interests bear paramountcy. There are competing interests in respect of: (a) Mr Clayton and his rights; and (b) the Municipality and its rights and obligations and the impact thereof for the broader public. Furthermore, Dr Ngqele may apply for the position as part of the process attendant on this Court's Order.

95.4 While it is correct that the Municipality would have to undergo another process of recruitment and expend monies on induction training for a new appointee, the Municipality itself has placed no evidence before this Court as to why this is unduly expensive or onerous.

96 For all of these reasons, I am of the view that the resultant contract that was entered into between the Municipality and Dr Ngqele must be declared unconstitutional, unlawful and invalid and be set aside.

97 I am of the view that the declarations of invalidity and setting aside should be suspended for a period of six weeks in order for alternative arrangements to be put in place.

98 The third question that arises is what becomes of decisions and actions that were taken by Dr Ngqele in light of the declaratory relief that I have ordered. I am of the view that it should not follow that all actions and decisions that he took are invalid. This would, in my view result in chaos for the Municipality.

99 The fourth question relates to the issue of costs which I have determined as set out above.

100 In the circumstances I make the following order:

100.1 The following resolutions of the Municipal Council of the Knysna Municipality (“**the Council**”) are declared unconstitutional, unlawful and invalid and are reviewed and set aside:

(a) The resolution of 29 April 2021 to appoint Dr Ngqele to the position of Director: Community Services.

(b) The resolution of 12 July 2021 to make an offer of employment to Dr Ngqele for the position of Director: Community Services.

(c) The resolution of 29 July 2021 to offer Dr Ngqele a total remuneration package of R 1 133 463.00.

100.2 The employment contract and/or performance contract that the Municipality concluded with Dr Ngqele pursuant to the resolutions in subparagraph (1) are declared unconstitutional, unlawful and invalid and is/are set aside.

100.3 The failure and/or refusal of the Municipal Council to appoint Mr Clayton to the position of Director: Community Services is declared unlawful, unconstitutional and invalid and is reviewed and set aside.

100.4 The orders in subparagraphs (1) to (3) are suspended for a period of six weeks from the date of this Order for the Municipality to put in place alternative measures.

100.5 Decisions taken and acts performed by Dr Ngqele in his official capacity will not be invalid solely by reason of the declarations of invalidity in paragraphs (1) to (3).

100.6 Remuneration paid by the Municipality to Dr Ngqele since having been appointed to the position of Director: Community Services will not be invalid solely by reason of the declarations of invalidity in paragraphs (1) to (3).

100.7 The costs of this application (save for the costs occasioned by the postponement on 27 November 2024) shall be paid by the Knysna Municipality which costs shall include the costs of the consolidation, and shall include the costs of two counsel where so employed.

100.8 The costs occasioned by the postponement on 27 November 2023 (which shall include the costs of two counsel where so employed), shall be borne by Dr Ngqele.

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**Pillay AJ**

**Acting Judge of the High Court**

**APPEARANCES:**

For the MEC: Advocate Michelle Norton SC & Advocate Ashleigh Christians  
Instructed by: State Attorney (Ref: S Appalsamy)

For Mr Clayton: Advocate Sheldon Margardie  
Instructed by: Shortles Attorneys Inc. (Ref: E Shortles)

For Dr Sandile Ngqele: Advocate Jerome van der Schyff  
Instructed by: Beddy Phillips Attorneys Inc.

For the Counsellors: Advocate Michael Tsele  
Instructed by: Nandi Bulabula Inc.