IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT, MTHATHA

CASE NO: 2607/10

Heard on : 13/01/11

Delivered on : 17/02/11

In the matter between:

RICHARD FEZEKILE NGQELE **Applicant**

and

KING SABATA DALINDYEBO MUNICIPALITY **First Respondent**

MONDE MBOMVU TOM **Second Respondent**

FRANCES RONALD SIPHO NGCOBO **Third Respondent**

JUDGMENT

NHLANGULELA J:

[1] *The relief sought:*

This is an urgent application in which the applicant seeks a final relief in the following terms:

> "1. Dispensing with the normal forms and requirements for service and directing that this application be heard as one of urgency pursuant to the provisions of rule 6 (12).
>
> 2. The second respondent's contract of employment with the first respondent be declared to have lawfully and legally terminated on the 30th October 2010 by effluxion of time.
>
> 3. The second respondent be interdicted and restrained from performing any of the duties of the municipal manager of the first respondent.
>
> 4. The first respondent be directed to inform the second respondent that the employment contract between itself and the second respondent has legally terminated by effluxion of time on the 30th October 2010.
>
> 5. The first respondent be interdicted and

restrained from paying the second respondent's salary.

Alternatively:

6. Alternatively, that the second respondent's contract of employment with the first respondent be and is hereby declared *null* and *void.*

7. Further and or alternative relief."

[2] *The parties*:

The parties in this matter are described on affidavits as follows: The applicant is an adult male, a member of the United Democratic Front, a political party, who has been deployed by his party to represent it as a member in the Council of the first respondent. The first respondent is King Sabata Dalindyebo Municipality, a local government municipal structure which is formed in terms of s 12 of the Local Government: Municipal Structures Act, Act No 117 of 1998 (the Structures Act) and s 2 of the Local Government: Municipal Systems Act), Act N. 32 of 2000. The second respondent is Monde Patrick

Tom, an adult male, who is employed by the first respondent as a Municipal Manager. The third respondent is Frances Ronald Sipho Ngcobo, an adult male, who used to serve in the first respondent's Council as an elected member and Executive Mayor. Mr Ngcobo had already terminated his services with the first respondent when this application was brought on 08 December 2010.

[3] The urgency of this application arises from the fact that the cycle of life of the current Council of the first respondent will come to an end in April/May 2011. Therefore, if this application is disposed of at this stage the first respondent might, in theory, be in a better position to appoint a new municipal manager to commence his/her duties at the inception of the new Council. There is no dispute between the parties regarding the afore-stated position. Consequently, to succeed the applicant will have to show that he has a right to the relief sought, actual harm has ensued or is imminent and that there is no other legal remedy available to him to secure the relief sought other than by means of this application.

[4] The relief sought is opposed by the first and second respondents. The third respondent neither filed a notice to oppose the relief sought nor filed a notice to abide the outcome of the application. This is not surprising as the

applicant states in the founding affidavit that no relief is being sought against the third respondent.

[5] The parties have filed full sets of affidavits. In addition Mr Ndiyabulela Mtwa and Mr Mondli Cyprian Songca have filed confirmatory affidavits on behalf of the parties respectively. The second respondent's answering affidavit was filed for himself as well as the first respondent, he having been duly authorized by an appropriate resolution of the first respondent's Council to oppose the relief sought.

[6] *The issue for decision*:

The central issue for deciding this application is whether the second respondent's contract of employment with the first respondent, which commenced on 19 November 2007, terminated by effluxion of time on 30 October 2010.

[7] *The applicant's case:*

The thrust of the case sought to be made by the applicant on the founding affidavit is that in terms of the advertisement dated 28 August 2007 (annexure "A1" to the founding affidavit) for a post of the municipal manager, a letter of appointment dated 02 November 2007 (annexure "C" to the founding affidavit) a certain written employment contract and Council Resolution SCM 101/06/08 (annexure "B" to the founding affidavit) and a written fixed term contract of employment of the second respondent (annexure "MMPT 4" to the answering affidavit) was for a duration of three (3) years. It started in November 2007 and should have come to an end on 30 October 2010 by effluxion of time. However, the third respondent, who served as the Executive Mayor at the time, signed annexure "MMPT 4" for a fixed term of five (5) years. The applicant states that the third respondent was not authorized by the Council to do so and, thus, annexure "MMPT 4" is *null* and *void.*

[8] In so far as the documents annexure "A1" and Resolution SCM 101/06/08 as aforementioned are vital for the decision of this case they must be quoted hereinunder. Annexure "A1", in a truncated form, reads:

"The Municipality herein invites applications

form experienced, qualified, innovative committed and energetic individuals with vision for appointment to the following positions on a three-year fixed term based contract:

...

MUNICIPAL MANAGER

…

CHIEF FINANCIAL OFFICER

... ."

The Resolution SCM 101/06/08 reads:

" <u>The Contract Of The Municipal Manager:</u>

The matter was introduced verbally by the Portfolio Chairperson of the Corporate Services. No documentation was circulated on the matter.

On the motion of Councillor L.N. Ntlonze, seconded by Councillor F.R.S. Ngcobo,

<u>RESOLVED</u>

(a) That His Worship the Executive Mayor, Councillor F.R.S. Ngcobo is **<u>AUTHORISED</u>** to sign the contract

between the KSD Municipality and the Municipal Manager, retrospectively;

(b) That it is **NOTED** that Council has paid the balance of R13 000-00 towards the studies of the Municipal Manager; and

(c) That a detailed report on the payment of the cellphone contract for the Municipal Manager would be tabled at the next ensuing Council meeting by the Convernor of the Adhoc Committee, Councillor L.N. Ntlonze."

The Honourable Speaker requested Councillor to vote for the appointment of the Municipal Manager. Councillor M.A. Mayekiso moved that the request by the Speaker is supported and he was seconded by Councillor M. Soldati. The Office of the Council and Committee Services calculated the number of Councillors who were in favour or against the appointment of Mr M.M.P. tom as the Municipal Manager for KSD Municipality. All Councillors voted by show of hand. The results were as

follows:

IN FAVOUR OF THE APPOINTMENT: 40

AGAINST THE APPOINTMENT : 0

All the names of 40 Councillors who were in favour of the appointment of the Municipal Manager are reflected in this set of minutes."

[9] On the foregoing, the applicant contends that since it was never the intention of the first respondent to conclude an employment contract with the second respondent for a period of five (5) years, this Court should declare that the contract of employment of the applicant terminated on 30 October 2010.

[10] In an apparent alteration and/or expansion of the cause of action the applicant sets out further grounds for the relief sought in the replying affidavit. He states that annexure "MMPT 4" never came into existence but that another employment contract for a period of three (3) years was circulated for perusal and deliberations at a special Council meeting held on 15 April 2008 at eNkululekweni Council Chamber, Mthatha. It will help to quote paragraphs 10.1 of the applicant's replying affidavit. It reads:

" 10.1.1 The document concerned [the unidentified employment contract] and which

> was submitted to Council insofar as the term and or duration of the contract is concerned was for three (3) years and same was collected back from me and same was the case with all Councillors as it was a confidential contractual document that involves one of our employees. For that reason, I no longer have it in my possession.
>
> 10.1.2 I categorically deny that a 5 (five) year fixed term contract [annexure MMPT "4"] was ever circulated in the Council meeting of the 15th April 2008 or any other Council meeting for that matter hence there is not a single Councillor who gainsays my allegations and or who supports the respondent's version on issued debated by Council even in the second respondent's absence."
>
> (The underlining is mine for emphasis)

[11] The applicant states further in the replying affidavit that annexure "MMPT 4", even if it did exist, was in any event *null* and *void* for lack of compliance with s30(5)(c) of the structures Act.

[12] *The respondents' defences:*

In *limine*, the respondents raised an objection to annexure "C" as well as to any averment relating thereto which is made by the applicant in his affidavits concerning the existence of such annexure. Annexure "C" is in all respects a replica of annexure"D" except that it provides that the respondents agreed to an employment contract for three years. The thrust of the objection is that annexure "C" had never come into existence but that annexure "D" to the founding affidavit, in terms of which the second respondent was appointed as the Municipal Manager for a fixed term of five (5) years, is the authentic document which was made by the first and second respondents on 02 November 2007. To this objection the applicant stated crisply in the explanatory affidavit as follows:

> " I do not know how annexure "C" to my founding affidavit was generated [by one Mr Voices Njomane] and as such am not able to assist the Court in this respect"

He went further to say the following in the replying affidavit:

> " 1.3 Now that it has since transpired that annexure "C" was placed before experts and knowing their findings [that it is a forged document] I do not place reliance on it at all

given the credential wait (*sic)* it carries."

Based on these concessions to the respondents' objection I granted the order in an *interlocutory* application striking out annexure "C" and all the averments relevant thereto which are contained in the applicant's papers.

[13] In my view the ruling I made on annexure "C" explains the reason for applicant's reliance on the new ground that annexure "MMPT 4" is *null* and *void* for non compliance with s30(5)(c) of the Structures Act.

[14] The next defence raised on the papers is that all procedural steps for the appointment of the second respondent were adhered to until a written and legally binding written contract of employment, annexure "MMPT 4", for a period of five (5) years was made on 20 November 2007 for the second respondent to commence with statutory duties of the municipal manager on 19 November 2007 until 18 November 2012, the date which falls within a period ending two years after the election of a new Council in April/May 2011 as envisaged in s 57 of the Systems Act. The respondents state further that annexure MMPT "4" had been preceded by his acceptance of the offer of employment for five (5) years in terms of annexure "D" dated 02 November

2007. Then the Council confirmed the five year contract by means of Resolution 125/10/07 of 30 October 2007 (annexure "MMTP 2" to the answering affidavit). This resolution set in motion negotiations regarding: "the package and the terms and conditions of the contract". The negotiations culminated in the written contract "MMPT 4". Thereafter, Resolution 60/04/08 dated 15 April 2008 (annexure MMPT "6(b)" to the answering affidavit) took the process further by, firstly, approving the terms and conditions as set out in "MMP 4" and, secondly, establishing the executive committee of five members and empowering it to scrutinize and validate annexure "MMPT 4" with a view of submitting a final report containing recommendations to the Council in due course. Resolution SCM 101/06/08 is to the respondents a formal approval, by ratification, of the contents and the signatures in annexure "MMPT 4" in terms of which they consider themselves legally bound to an employment relationship for a period of five years.

[15] It seems to me that to determine the central question the Court has to deal with two questions, firstly, whether the processes adopted which led to the formation of the contract of employment "MMPT 4" produced an agreement for a three (3) or five (5) years period and, secondly, whether those processes had been authorized by the first respondent.

[16] *The processes leading to the conclusion of the employment contract:*

On 03 August 2007 the first respondent advertised the post of a municipal manager by means of Notice No. 10 of 2007, annexure "A", for a fixed term period of three (3) years. When it was discovered that the Notice was defective for a lack of certain treasury specifications the first respondent resolved to re-advertise the post. That was duly done on 28 August 2007 by means of annexure "A1". On 30 October 2007 a special meeting of the Council was held at the City hall, Mthatha on, *inter alia*, the matter of the appointment of the second respondent. The meeting produced Resolution 125/10/07 which reads:

> "**RESOLVED**
>
> (a) That Mr M.P. Tom be **APPOINTED** as the new Municipal Manager of King Sabata Dalindyebo Municipality; and
>
> (b) That negotiations be entered into between the candidate and Council regarding the package and the terms and conditions of the contract."

This resolution, paved the way for the negotiations which culminated on the acceptance by the second respondent of the offer of employment, in terms of annexure "MMPT 3" or "D", as a municipal manager on a fixed term of five years. The appointment letter was duly signed by the parties on 02 November 2007. It provides further that a written agreement containing the details of the second respondent's duties, remuneration, terms and conditions of employment would be signed upon assumption of duty. Such written agreement would also incorporate a performance agreement. Having assumed his duties the second respondent together with the third respondent signed a "Fixed Term Contract Of Employment", annexure "MMPT 4", on 20 November 2007. Clause 2.2 of this agreement is significant. It provides:

> " Regardless of the date of signing this contract, the employment of the Municipal Manager with the Municipality commences on 19 November 2007 and terminates on 18 November 2012."

[17] The issue concerning the appointment of the second respondent was dealt with in a further special meeting of the Council on 15 April 2008 at eNkululekweni Council Chamber, Mthatha. At this meeting annexure "MMPT 4" was submitted for approval after it had been circulated to all members for perusal before the meeting was started. A resolution, Resolution SCM

60/04/08, was passed. It reads:

" **RESOLVED**

(a) That the fixed term of contract of employment of the Municipal Manager, Mr M.M.P. Tom is **APPROVED** in principle; and

(b) That the following five Councillors are **AUTHORISED** to scrutinize, validate the Municipal Manager's contract and favour the next ensuing meeting of Council with a final report containing recommendations:-

(i) Councillor L.N. Ntlonze (Convenor);

(ii) Councillor H.M. Ntshobane;

(iii) Councillor P.J. Gwadiso;

(iv) Councillor N. Ngqongwa; and

(v) Councillor M.A. Mayekiso

c) That the committee is also authorized to consult SALGA for their final recommendations on the Municipal Manager's contract."

[18] Mr Mtwa, one of the councillors of the first respondent, stated that he was delegated, together with others, to serve in the interviewing committee which interviewed the second respondent for the post of a municipal manager. According to him the committee conducted the interview on the basis of a contractual period of three (3) years as it had been indicated in the advert (annexure "A1"). Mr Songca, the Head of Human Resources Office of the first respondent, corroborates the version of the respondents on the issue of the duration of the employment contract of the second respondent. He states that it was one of his functions to advertise posts and to issue letters of appointment of municipal managers. In this particular matter he, when advertising the post, inadvertently used a template which had been used to advertise a vacant post for the Chief Financial Officer (CFO). The posts for the CFO would be of three (3) years duration and the advert had been published as such. As a result of using a wrong template, the advert for the post of the municipal manager carried an employment term of three (3) years erroneously.

[19] Then in the last special meeting of the Council held on 18 June 2008 it was resolved, per Resolution SCM 101/06/08, that the third respondent is authorized to sign the contract of employment with retrospective effect. At the

time when this resolution was made the employment contract "MMPT 4" had already been signed on 20 November 2007. Based on this resolution the respondents contend that the signature that had been appended on employment contact "MMPT 4" by the third respondent on 20 November 2007 was ratified by the Council with the result that the employment contract binds the parties to an employment relationship for a period of five (5) years, which will come to an end on 18 November 2012.

[20] Although mention is made by the applicant that there was a certain written contract of employment that was circulated in a meeting of 15 April 2008 no such contract has been discovered in this case.

[21] *Submissions by the applicant:*

I next deal with the submissions advanced on behalf of the parties. *Mr Bodlani*, counsel for the applicant, argued the applicant's case on two fronts. In the first place, he submitted that the employment contract "MMPT 4" for a fixed term of five (5) years never came into existence. There was another employment contract for a period of three (3) years which the applicant saw

being circulated to him and other members of Council in a Special Council meeting that was held on 15 April 2008. He contended that the circulated contract is in synch with the intention of the first respondent to offer a three (3) years contract as is evidenced in Notice No.40 of 2007 and the subsequent advertisements on which the second respondent submitted an application for appointment as the municipal manager. At the same breath, *Mr Bodlani* submitted that if the applicant fails on the first submission, it will be submitted that, in the second place, the employment contract "MMPT 4" is in any event *null* and *void ab initio* in that it does not comply with the provisions of s 30 (5) (c) of the Structures Act, which reads:

> " Before a municipality council takes a decision on any of the following maters it must first require its executive committee or executive manager, if it has such a committee or manager, to submit to it a report and recommendation on the following matter ---
>
> ---
>
> --- the appointment and conditions of service of the municipal manager and a head of department of a municipality."

He then contended that the validity of the employment contract "MMPT 4" is

impugned to the extent that despite the Council Resolution dated 15 April 2008 which required a committee to scrutinize, validate the contract, consult Salga for its recommendation and then favour the next Council meeting (which was held on 18 June 2008) with a final report containing its own recommendation on the manager's contract, the Council made Resolution SCM 101/06/08 authorising the third respondent to sign the employment contract with retrospective effect. He contended strenuously that on that score the resolution violated the provisions of s 30 (5)(c) of the Structures Act with the result that the employment contract "MMPT 4" is *null* and *void.* For this submission counsel placed reliance on the case of *City of Cape Town v Mgoqi and Another* 2006 (4) SA 355 (C) at 386c-f.

[22] *Submissions by the respondents:*

Mr Mbenenge SC, duly assisted by *Ms Da Silva*, submitted that an employment contract in terms of which a municipal manager is engaged to serve for a period of five (5) years is not *per se* unlawful due to the amendment of the Systems Act on 09 October 2008, which reads:

" (6) The employment contract for a

> municipal manager must –
>
> a) be for a fixed term of employment up to a maximum of five (5) years, not exceeding a period ending one after the election of the next council of the municipality."

[23] The second submission made by *Mr Mbenenge* is that a legally binding employment contract "MMPT 4" was authorized by the Council of the first respondent in terms of Resolution SCM 101/06/08 dated 18 June 2008 and it remains valid and enforceable to the extent that the resolution has not been rescinded by a competent authority. On this submission Senior Counsel pinned his faith on the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[24] It was submitted further that flowing from the *maxim omnia praesumuntur rite esse acta* the councillor such as the applicant can only upset the invalid resolution by way of giving a notice of rescission or reconsideration of the decision of Council to pass the resolution as provided by the standing orders of the municipality or, if the resolution is clearly wrong or illegal, to approach a court of law and ask to have such resolution declared

illegal. In this regard counsel referred to the Supreme Court of Appeal case of *Manana v KSD* (345/09) [2010] ZASCA 144 (25 November 2010), which is not yet reported. In this case the applicant has utilised neither of the two remedies which were available to him when the application was brought; so the argument went. *Mr Mbenenge* also argued that the Court should exercise its discretion in favour of the retention of the employment contract "MMPT 4" because of the inordinate delay, which has not been condoned, it took the applicant to bring the present application. On this submission counsel referred to the cases of *Harnaker v Minister Of The Interior* 1965 (1) SA 372 (C) at 381A-C; and *Mamabolo v Rustenburg RLC* 2001 (1) SA 135 (SCA), para [13].

[25] *Applying the law to the facts:*

The submission concerning the employment contract of three (3) years that was allegedly circulated at the special meeting of the Council on 15 April 2008 raises an issue of dispute of fact rather than law. *Mr Mbenenge* submitted anent this issue that the allegation concerning the existence of such contract may be given a short shrift if one has regard to the fact that the existence of such contract lacks evidential support in that on the applicant's own showing in paragraph 10.1.1 of the replying affidavit he has no possession of it. The

applicant makes a bold assertion that a written contract for three (3) years exists on the face a of clear and unequivocal statement by the respondents that annexure "MMPT 4" is the only existing written agreement that was signed by the second and third respondents on 20 November 2007 and which was later on ratified in terms of Resolutions SCM 60/04/08 and SCM 101/06/08. In the circumstances, I agree with the submission by *Mr Mbenenge* that a denial by the applicant of the existence of the employment contract "MMPT 4" by merely asserting the existence of some unknown contract falls to be treated as fanciful and untenable as envisaged in the case of *Truth Verification Testing Centre CC v PSE Truth Detection CC & Others* 1998 (2) SA 689 (W) at 698H-J. It is my finding that the employment contract "MMPT 4" is the only existing document on which the terms and conditions of the employment agreement between the first and second respondents are recorded. In the light of this finding the applicant's factual denial that the intention of the first respondent was to offer five (5) years contract does not raise a genuine dispute of fact. The same goes for the allegations made by Mr Mtwa. In a nutshell, this application falls to be decided on the version of the respondent in terms of the rule in the case of *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634H-I. Therefore, it seems to me that annexure "MMPT 4" has been proved to be the only contract that was ratified by

Resolution SCM 101/06/08. But that is not the end of the matter.

[26] The submission that a contract period of five (5) years may be applied in the appointment of municipal managers is sustained. *Mr Bodlani* did not argue otherwise. His only submission after the striking out of annexure "C", on which the intention argument was anchored, seems to be the validity argument to which I now turn.

[27] I am in agreement with *Mr Bodlani* that the provisions of s 30 (5)(c) of the Structures Act were not complied with by the first respondent in that the first respondent did not obtain a final report and recommendations of the committee of five councilors that had been formed for that purpose. In the event, Resolution SCM IOI/06/08 is invalid.

[28] In contending that the employment contract "MMPT 4" is *null and void* on the basis that absent the compliance with the provisions of s30(5)(c) by the first respondent, the third respondent did not have a proper delegation of the Council to bind the first respondent in an employment relationship with the second respondent for a period of five years, *Mr Bodlani* placed reliance on

the *dictum* in the case of *Mgoqi, supra,* at 386C-F which is in the following terms:

> " [106] If indeed it had been possible to delegate such power to the Executive mayor, it would, as pointed out by Mr Binns-Ward, lead to an absurd situation. A municipal council wishing to appoint a municipal manager would be obliged to comply with s 30 (5)(c) of the Structures Act, which requires that the executive mayor submit a report and recommendation regarding his appointment and conditions of service. An executive mayor clothed with the delegated power of making such appointment could, however, dispense with such requirement on the basis that he or she could not be expected to render a report or make a recommendation to himself or herself. This would amount to the municipal council delegating greater powers to the executive mayor than it itself possessed."

[29] Based on the shortcoming as aforestated, *Mr Bodlani* argued strenuously that all the actions and /or omissions of the third respondent which led to the signing of a fixed term contract for a period of five (5) years should be treated

as *null* and *void.* With respect, I cannot agree with that conclusion. Whilst I accept that the submission that Resolution SC 101/06/08 is invalid for non-compliance with the provisions of s 30(5)(c) of the Structures Act, I am not persuaded that the applicant has made out a case for the nullification of the consequences of the first respondent's unlawful omission; of which the employment contract "MMPT 4" is one. I say this for the following reasons:

(a) The resolution of the Council of the first respondent, Resolution SCM 101/06/08 remains valid notwithstanding non-compliance with the provisions of s 30(5)(c) of the Structures Act.
(b) The administrative remedies available to the applicant were not utilized.
(c) The applicant has made no attempt to persuade the Court to exercise discretion against the retention of the employment contract "MMPT 4".

These reasons have been eloquently dealt with by *Mr Mbenenge* in both the heads of arguments and oral arguments. I proceed to deal with these reasons in the paragaraphs that follows:

[30] The principal relief sought in the notice of motion is that the second respondent's contract of employment "MMPT 4" should be declared to have

been terminated by effluxion of time on 30 October 2010. In the alternative, the Court is being asked to declare the employment contract *null* and *void.* There is no relief seeking an annulment of Resolution SCM 101/06/08 on the ground that it does not comply with s 30(5)(c) of the Structures Act. In my view it would be impermissible for a court to grant to a litigant the relief which it never sought. In terms of the notice of motion the applicant seeks to impugn the contract and not the Resolution that brought such a contract into existence. The other relief, including the alternative relief, are ancillary to the principal relief and do not take the applicant's application any further.

[31] For some reasons which are not apparent from the applicant's papers the administrative remedies which were available to the applicant at the time of bringing the application were not utilized. The correct approach to have been followed by the applicant was to either attack Resolution SCM 101/06/08 in the chamber of the Council itself and ask for a rescission or reconsiderations of it by means of a vote or, if he felt that the Resolution was illegal, to approach a court of law and seek judicial review of the Resolution. Significantly, the applicant, being the councillor who is expected to be *au fait* with legal disputes arising from the municipality, ignored the instruction of the Supreme Court of Appeal in the case of *Manana v KSD, supra, at p11* which is stated in the

following terms:

> " [W]hen once the council has taken a resolution it is not competent for the chairman, any more than for any other councillor, to declare it invalid and of no effect; nor is it competent for him to take upon himself the responsibility of instructing the town clerk not to act on a resolution passed by a majority of the council. If the chairman or any councillor is dissatisfied with a resolution, his course is to give notice of motion to rescind or reconsider the resolution as provided by the standing orders. That is one course. If the resolution is clearly wrong or illegal, another course is to come to Court, and ask to have such resolution declared illegal."
> *(cf Grace v McCulloch* 1908 TH 165 at 175)

[32] The third reason is predicated on the *maxim omnia praesumuntur rite esse acta,* the presumption of law which is explained in the case of *Oudekraal Estates (Pty) Ltd v City Of Cape Town And Others* 2004 (6) SA 222 (SCA) paras. [26] and [27] at 241-242 as follows:

> "[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also

exceeded his powers in granting extensions for the lodgment of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally

valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter Administrative Law at 355:

> 'There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta;* and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are "voidable" because they have to be annulled.'

At other times it has been explained on little more than pragmatic grounds. In *Harnaker v Minister of the Interior 1*965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) '(i)n a sense delay would . . . "validate" a nullity'. Or

> as Lord Radcliffe said in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 769 - 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 888):
>
> 'An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'"
>
> (The underlining is mine for emphasis.)

[33] This Court would only be disposed to come to the assistance of the applicant if it had been persuaded that the substantive invalidity of the Resolution has produced unlawful administrative consequences. In the absence of an application for review of the Resolution it is impossible to make any assessment. The applicant would have been required to demonstrate on affidavit that the employment contract "MMPT 4" has invoked an injustice for the municipality and which has an adverse effect to himself directly. What is noteworthy of the Resolution is that it produced, and it indeed confirmed, a normal employment relationship between the first and second respondent.

[34] It would again be impermissible of the Court to come to the assistance of the applicant who had not brought an application for judicial review of administrative action within the time frames as prescribed in s 7 (1) of the Promotion of Administrative Justice Act, Act No.3 of 2000. Consequently, the invalid Resolution has for all intents and purposes to be regarded as valid together with all the consequences flowing from it, including the employment contract "MMPT 4".

[35] In the circumstances the applicant has failed to make a case for the relief sought. The application falls to be dismissed as the second respondent's contract of employment did not terminate on 30 October 2010. The date of its termination should be determined in terms of the provisions of annexure "MMPT 4".

[36] *The costs:*

The circumstances of this case are such that the costs of the application should be paid by the applicant, including the costs that were reserved on 15 December 2010. I will also grant costs against the applicant for the employment of two counsel because the case was of sufficient complexity to have warranted their employment. The importance and magnitude of the case

to the local government is another factor which justified of the employment of two counsel in my view. The costs order should include the costs that were reserved on 17 December 2010. However, there will be no costs order made for the application to strike out as such costs were considered in the interlocutory application for discovery of documents.

[37] *The order:*

The following order shall issue:

> **"The application be and is hereby dismissed with costs which shall include the reserved costs of 17 December 2010 and costs attendant upon the employment of two counsel."**

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Z. M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv. M. Bodlani.

Instructed by	:	V.V. Msindo & Associates Mthatha.
Counsel for the 1st and 2nd respondents:		Adv. S.M.Mbenenge SC appearing with Adv. A. M. Da Silva.
Instructed by	:	Mnqandi Inc. Mthatha.