

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4107/2005

In the case between:

DIHLABENG LOCAL MUNICIPALITY

Applicant

and

S.L.K. NTHUTE

1st Respondent

P.G. MOKOENA-RADEBE

2nd Respondent

P.M. COLEMAN

3rd Respondent

T.M. MHLOPHE

4th Respondent

M.E. FOKANE

5th Respondent

MOTHIBEDI MATSHELE

6th Respondent

JUDGMENT:

KRUGER, J

HEARD ON:

25, 26 APRIL 2006, 5, 6, 7, 8, 9
FEBRUARY 2007

DELIVERED ON:

22 FEBRUARY 2007

[1] On 23rd September 2005 the applicant launched an application seeking a declaratory order that the appointments of 1st to 5th respondents by 6th respondent are *ultra vires* and of no force or effect and that the employment contracts of the 1st to 5th respondents be terminated.

[2] The appointments in question were made by the 6th respondent in his capacity as Municipal Manager of the applicant, a post he held from 1 December 2003 until his suspension on 4 August 2005.

[3] Applicant's case is that the appointments did not fall within the express bounds of the empowering legislation and should be declared a nullity because of the illegality of the appointments. Applicant says that the 2nd to 5th respondents are all managers directly accountable to the Municipal Manager and as such subject to section 57 of the Local Government: Municipal Systems Act No. 32 of 2000. Applicant's case is that 2nd to 5th respondents were not properly appointed in terms of section 57 which provides as follows in section 57(1):

"57. Employment contracts for Municipal Managers and managers directly accountable to Municipal Managers. –(1)

A person to be appointed as the Municipal Manager of a municipality, and a person to be appointed as a manger directly

accountable to the Municipal Manager, may be appointed to that position only—

- (a) in terms of a written employment contract with the municipality complying with the provisions of this section; and
- (b) subject to a separate performance agreement concluded annually as provided for in subsection (2)."

[4] Section 56 deals with the appointment of managers directly accountable to Municipal Managers. Section 56(a) reads:

"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."

[5] The 2nd to 5th respondents were appointed as "Unit Managers", who, according to applicant, are directly accountable to the Municipal Manager and thus have to be appointed under section 57. The 2nd to 6th respondents, on the other hand, say that the 2nd to 5th respondents were

properly appointed by the 6th respondent under section 57(1)(e) which reads as follows:

"55. Municipal Managers. –(1) As head of administration the Municipal Manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for—

....

(e) the appointment of staff other than those referred to in section 56(a), subject to the Employment Equity Act, 1998 (Act No. 55 of 1998);"

[6] Applicant's case against the 1st respondent, who was appointed as labour relations officer/legal assistant, is that such post does not exist on the staff establishment of the applicant.

[7] Because of the disputes of fact on the papers, the application was on 26 January 2006 referred for the hearing of oral evidence. The applicant called four witnesses and only the 6th respondent testified on behalf of the respondent.

[8] Applicant's first witness was **Mr. D. R. Evans**, who is the Integrated Development Planning Manager of the applicant. He has been working for local government since at least 1976. He was the town clerk of Paul Roux from 1993, a post he held for 11 years. Before that he was a town clerk at Odendaalsrus for 14 years. The name "Town Clerk" is no longer used today. Under current legislation the post is referred to as "Municipal Manager".

[9] Prior to the year 2000 there were separate municipalities at Bethlehem, Rosendal (Mautesendal), Paul Roux, Clarens and Fouriesburg (Mashae-Fourie). Comprising, respectively the five areas of (1) Bethlehem, (2) Rosendal and Mautse, (3) Paul Roux and Fateng, (4) Clarens and Kgubetswana, and (5) Fouriesburg and Mashaeng. On 5 December 2000 these 5 municipalities were consolidated into the new Dihlabeng Local Municipality, with its seat at Bethlehem in terms of Free State Provincial Notice 184 of 2000 of 28 September 2000 as corrected by Notice 201 of 2000 dated 6 October 2000. The municipalities (TLC's) of Clarens, Mashae-Fourie, Paul Roux and Mautsendal were

in the Notice disestablished and described as administrative units (paragraph 9(1)). The Notice stated in paragraph 9(2):

- "(2) The head of an administrative unit shall –
- (a) be responsible for the control, co-ordination and general supervision of that administrative unit; and
 - (b) act under the direction of, and be accountable to the Municipal Manager for the continued operation of the said administrative unit."

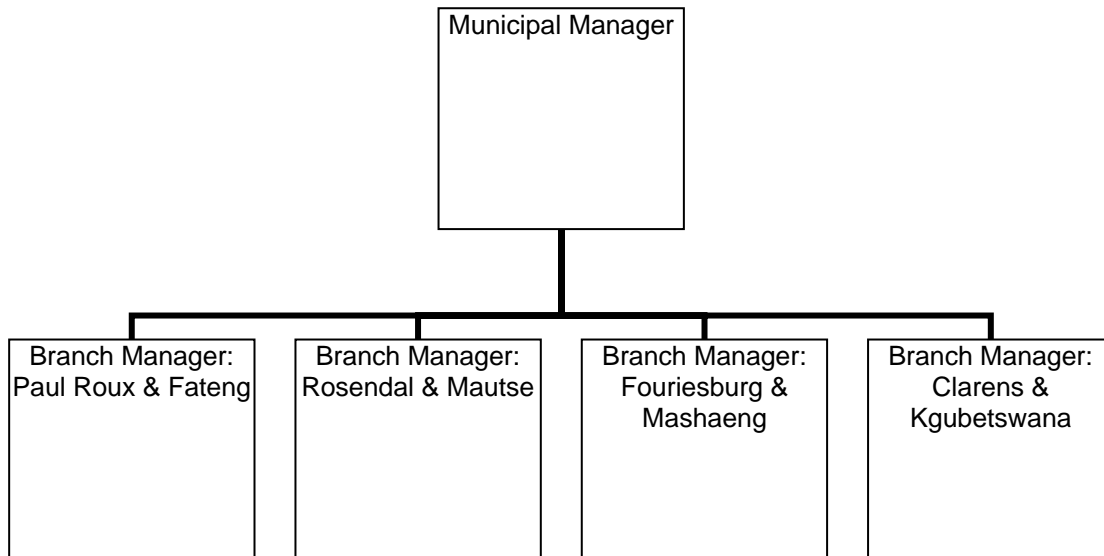
[10] As to the duties of Unit Managers Evans testified that the Unit Manager must manage the town and then report directly to Municipal Manager, so he works directly under the Municipal Manager. The unit manager must see to it that finances are controlled in that town; that services are rendered there; that maintenance is done in that town; he must see to staff at that town. Basically he has to manage the whole office and then report to the Municipal Manager. His post is comparable exactly to that of the former town clerk.

[11] It was put to Evans that the respondents' case is that they did not fall under the Municipal Manager, but reported to the various directors, to which he responded that that would be contrary to the section 12 Notice (184 of 2000) referred to above.

[12] Evans referred to the organogram proposed by the 6th respondent, annexure "MM1" to the answering affidavit. Paragraph 5 deals with the office of the Municipal Manager and paragraph 5.8 deals with Unit Managers (also referred to as Branch Managers). Several witnesses were referred to this page:

5.8 BRANCHES/UNITS

5.8.1 Organisational structure: All Branches/Units



5.8.2 Main functions: All Branches/Units

1. To manage the provision of the municipality's services within the principles of effectiveness, efficiency, reliability and economy and in line with the Municipal Service Delivery Plan.
2. To manage resources of the municipality within the Town (Human, capital, technology) in line with the Municipal Manager's directives, legislation and council resolutions and policy.
3. To support the Municipal Manager in the discharge of his/her duties within a town in line with legislation and as determined by himself/herself from time-to-time so as to

strengthen **governance**, **service delivery** and **development impact**.

4. To lead and manage the provision of **municipal services** in respect of **cemeteries**, **reception and customer care**, **refuse removal**, **maintenance**, **gardening**, **cleaning**, **sanitation**, **local economic development**, and **housing** etc. under the **technical and functional supervision and control of respective Directors/General Managers** so as to contribute to the upliftment of the quality of life of communities in a town, and as determined by the Municipal Manager from town to town."

[13] In the proposal, annexure "MM1", put forward by the 6th respondent it is stated under "Organisational Decision Principals":

"3. DECENTRALIZED STRUCTURE AND RESPONSIBILITIES

Devolution of power to the units closest to communities for service delivery. Towns to have Branch Managers reporting to Municipal Manager for obtaining responsiveness to communities."

In cross-examination Evans agreed that section 66 of the Local Government: Municipal Systems Act 35 of 2000, (hereinafter referred to as the Systems Act), provides that the responsibility for approving the staff establishment lies with the Municipal Manager with the qualification that Council has to approve it, because council has to approve the financial expense on the budget. Section 66 reads as follows:

"66. Staff establishments. –(1) A Municipal Manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must—

- (a) approve a staff establishment for the municipality;
- (b) provide a job description for each post on the staff establishment;
- (c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
- (d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

- (2) Subsection (1)(c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57."

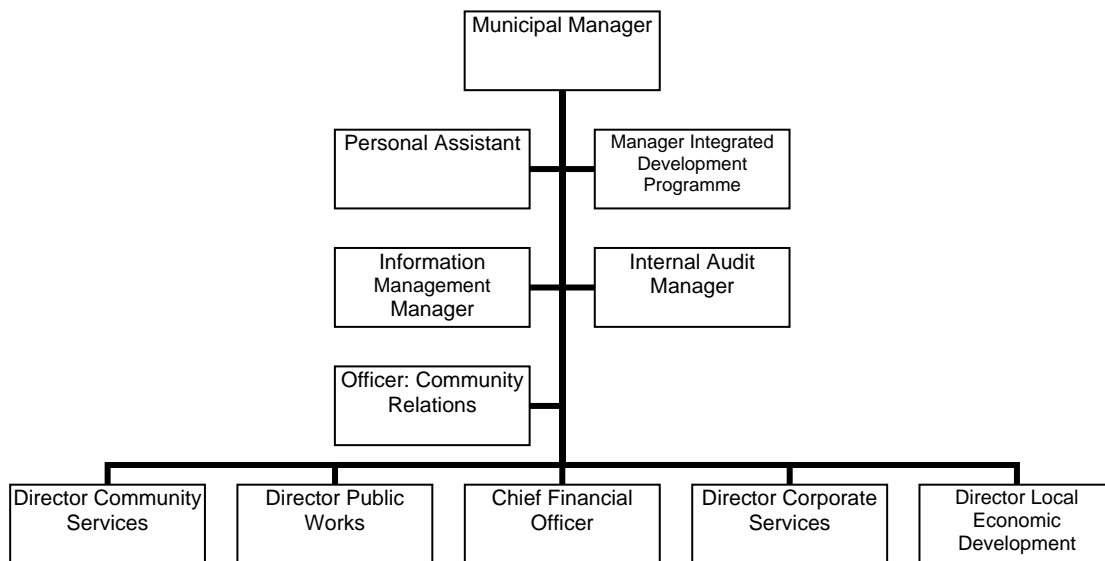
[14] Evans was referred to the code of conduct for councillors contained in Schedule 1 to the Systems Act where paragraph 11 provides:

"A councillor may not, except as provided by law –

- (a) interfere in the management or administration of any department of the municipal council unless mandated by council."

[15] Evans was referred to the so-called Makomota structure, a staff structure which was in place at the applicant during the relevant time which also dealt with the office of the Municipal Manager:

"OFFICE OF THE MUNICIPAL MANAGER



Compiled by Makomota FMS (Pty) Ltd"

Unit Managers do not feature on this structure.

[16] The Municipal Manager is a section 57 appointment. The Directors are also section 57 appointments (record p. 28). It was put to Evans that the Unit Managers were not section 57 appointments and he agreed (record p. 29). He further testified:

"Maar die enigste mense wat direk verantwoordelik is aan die munisipale bestuurders is die direkteure heel onderaan die lysie

van bladsy 28 en daarom is hulle aanstellings in terme van Artikel 57. --- En omdat hulle op 'n kontrakbasis is, ja."

[17] The advertisement for the posts of Unit Managers which 6th respondent caused to be placed in the press, reads as follows:

"3. Unit Managers (Clarens, Fouriesburg, Paul Roux, Rosendal)

3.1 Salary

- Total package: R200 000 negotiable

3.2 Qualifications

- A 3 year post matric relevant qualification or equivalent
- At least 3-5 years experience
- Proven people management problem-solving skills
- Knowledge of municipal services and administration will be an added advantage

3.3 Other competencies

- Customer care and business communication skills
- Finance and budget management
- Human Resources management
- Computer literacy

- Social and economic development
- Housing development

3.4 Duties

- Supervise the day-to-day service delivery in the respective area (cash receipting, enquiries, complaints, water, sanitation and solid waste management)
- Co-ordinate corporate services and finance, as determined by the relevant directors
- Co-ordinate socio-economic and housing development initiatives as determined by relevant directors
- Co-ordinate stakeholder management as determined by the relevant directors"

[18] On 8 November 2004 Council took the following resolution:

"Resolved:

1. That the current structure as adopted by Council remains unchanged for the top levels and that the proposed additions and amendments only apply to the lower levels.
2. That the status quo remains for the existing gradings and that the preliminary gradings apply only to the new positions.
3. That the final gradings be determined by job evaluations."

- [19] Top-level posts were 1, 2 and 3 and the lower levels were from 4 to 8.
- [20] The final staff structure was only approved in November 2005 (Evans p. 55 record). During June/July 2005 there was no staff structure for the lower part of the staff component (p. 55 record). The lower part of the structure was only completed by Council on November 2005 (record p. 62).
- [21] When the advertisements were placed Unit Managers did not feature in a staff establishment. They were only inserted in November 2005. Only then, in November 2005, did the Unit Managers fall in the top structure. Before November 2005 Unit Managers were, as Evans put it, between the ceiling and the roof, no-one was connected to a post. The structure placing Unit Managers in the structure was only approved in November 2005.
- [22] The next witness was **Mrs. Van Rensburg**. She is the personnel administrative officer of the applicant Council.

She is involved with the administration around all the staff matters, including leave. Asked whether there are still town clerks, Mrs. Van Rensburg replied that there were five but after amalgamation the post is that of "Unit Manager". At the top the former town clerk is called the Municipal Manager and the position of town clerk in the smaller towns has been superseded by the Unit Manager. The Unit Manager falls directly under the Municipal Manager for purposes of applying for leave. She referred to several forms relating to leave applications and subsistence and travel allowance claims of the 2nd, 3rd, 4th and 5th respondents. All these applications were approved by the Municipal Manager.

[23] It was put to Mrs. Van Rensburg that Provincial Notice 184 of 2000 only applied until the Systems Act came into operation to which she replied that that is possible. She also conceded that it is possible that section 9 of Notice 184 did not apply to the respondents because they were new appointments, not persons who were transferred from former municipalities. She said she did not have

knowledge of sections 56 and 57 of the Systems Act. She agreed that everything 2nd to 5th respondents did was as prescribed by the relevant directors. She agreed that the respondents were not appointed under section 57 of the Systems Act. Mrs. Van Rensburg agreed that Evans was not a section 57 appointment, and Peachie, the legal adviser, who was also not a section 57 appointment, also had their leave approved by the Municipal Manager.

[24] **Mr. Johan Lodewikus Botha** was the next witness. He is the head of the secretariat of the applicant where he has been since 1990. He works under the director, corporate services. His post is the equivalent of the former city secretary, the person who keeps the minutes.

[25] An important aspect of his evidence, if not the main thrust, was that before a person can be appointed to a post, that post must be on the budget. There is no post described as "labour relations officer/legal assistant". There was also at the time of the appointment of the 2nd to 5th respondent no post on the budget described as Unit Managers.

- [26] The old top-structure remained in place until the changes effected in November 2005/January 2006. Unit Managers were inserted into the structure towards the end of 2005 by Botha (Annexure "R5").
- [27] The 1st to 5th respondents were appointed without the sanctioning of Council and their posts were not on the budget.
- [28] It is important to note that Botha was suspended for long periods, from November 2001 to October 2003 and September 2004 to August 2005. He was on suspension at the date respondents were appointed, namely 1 August 2005. He has no first hand knowledge of what took place at the Council immediately preceding the appointment of the respondents.
- [29] Botha testified that the respondents applied for leave to the Municipal Manager because they were directly responsible to the Municipal Manager. They do not report to anyone

else. They do not have to justify the actions to anyone else. The council said they are “mini Municipal Managers”.

[30] The council resolution at p. 198 of 11 June 2004 that *inter alia* the post of Unit Manager be re-advertised was put to Botha. He maintained that the posts were not on the budget.

[31] Botha said he was unaware of a dispute between counsellors and officials as to areas of responsibility and powers. He was referred to the report of the auditor-general (“MM8”) for the year ended 2003, in which the auditor-general voiced concern over the delegation of executive powers to Council members.

[32] Asked why the advert was placed advertising the posts if there were no funds, Botha said the procedure is to first approve the advertisement. During the budget meeting it is then decided whether there are funds for the posts. Code “241” to which the memo (Annexure “R2”) refers pertained to advertising costs. In practice Botha said this means that

only the advertising costs are covered in such request as in Annexure "R2".

[33] Asked whether Council was not aware of the need to appoint Unit Managers, Botha responded that it was an abnormal situation, people were being suspended left, right and centre.

[34] It was put to Botha that Council was informed as to the posts of Unit Managers and their financial implications by virtue of submissions made to it. His response was that those were recommendations, the decision only comes later. (Page 191 embodies the recommendation of the executive committee to council and p. 186 is the Council resolution.)

[35] It was put to Botha that the resolution of Council on 4 April 2005 which reads: "That it be re-affirmed that the appointment of employees is the prerogative of the Executive Committee and Council", is in conflict with the Systems Act, and that Council appropriated powers to itself

which it did not have. To this Botha responded that the Council is his employer, he cannot say whether the Council is right or wrong.

[36] The letter dated 2nd August 2005, which the 6th respondent wrote to the MEC on the day before his suspension, which letter probably led to his suspension was put to Botha:

"Dear MEC

SELECTION AND APPOINTMENT OF UNIT MANAGERS

Please submit for the MEC's attention, this correspondence.

I refer to the above-cited matter.

Firstly, with respect to the appointment of Unit Managers, I wish to place the following on record:

On the 11 July 2005 we were interviewing Unit Managers; internal applicants as per the attached **long-list (Annexure A)**, internal **short-list (Annexure B)**. The Speaker was informed that I was busy with interviews.

The Speaker: Cnr Motsoeneng left messages with my Personal Assistant that **interviews should be stopped, without any reason, and further that the Provincial Chairperson of the ANC, Mr Ace Magashule should be phoned, in that regard.**

(This was a matter for the Mayor as my political head and not myself, and therefore the Mayor should have been engaged on that score).

The Speaker subsequently, burst into an interview session with a cell phone in his hand and commanded that I should speak to the Mr Ace Magashule, this was in front of the panel and the applicant to my embarrassment.

I however, spoke to Mr Ace Magashule, who said he wants to engage me on Unit Manager appointments.

We agreed that he will phone me after hours that day, as I was tied up the whole day. We further agreed that there will be no appointments until Thursday, but the interviews continue. I had no other, but to manage this embarrassing situation somehow.

The Speaker who at all times stood to listen, subsequently left after I gave back the cellphone.

Mr Ace Magashule never phoned that night, nor any other time. We proceeded on 13 July 2005 (Annexure: C) and finally appointed on 14 July 2005 as per the attached appointment letters:

- Clarens: Mr TD Mhlophe
- Paul Roux: Ms PM Coleman
- Fouriesburg: Ms PG Radebe
- Rosendal: Mr MA Fokane

At about 17h00 on 14 July 2005, the Mayor told me that officials of the PEC and the REC would like to see all ANC deployees in the administration and I should call them. This I did.

At that meeting the PEC officials gave a ruling that Unit Managers will henceforth be deployed by the PEC Deployment Committee. This decision, it was the first time it came to my knowledge. All the time I was told that only the Municipal Manager and directors as strategic executive officers are deployed by the PEC Deployment Committee and the rest is dealt with by the Municipal Manager.

This ends my report.

Mothibedi Matshele

MUNICIPAL MANAGER

cc Mayor"

[37] It was put to Botha that Unit Managers only fell into the top structure from November 2005 according to what Evans had testified (record p 70):

"Eers in November 2005 het hulle in the topstruktuur begin val?
--- Toe het hulle hulle eers gewys waar is die mense eintlik in the struktuur, dit is reg, ja."

[38] The organogram which placed the Unit Managers in the top structure was only finalised by Council in November 2005 (Evans's evidence, record p. 72). The following was said at p 66:

"Nou onder hierdie topstruktuur het die Unit Managers nie gefigureer nie. --- Hulle was nie op daardie stadium deel van

hierdie struktuur nie. Dit is waarom ons by die vorige geleentheid gesê het the Council approved with certain conditions. U sal sien nou in November 2005 het die Raad hulle dan daar bo gaan inskryf by die huidige struktuur.

Verstaan ek u reg wat die Raad gedoen het volgens u is in 2005 besluit hulle hierdie Unit Managers skuif ook nou in die topstruktuur in? Voorheen lyk dit vir my het hulle nêrens ... (tussenbei). --- Hulle het nêrens ... (tussenbei).

Gefigureer nie. --- Hulle was nêrens nie.

Wanneer was hierdie poste, wie het die eerste keer gepraat van die Unit Managers? Die branch of Unit Managers, né? --- Ja. Nee, ek weet nie wie het eerste gepraat van die unit ... nee, ek kan nie daardie vraag antwoord nie, ek is jammer. Al wat ek weet, is toe die advertensie geplaas is toe het ons gesien daar is Unit Managers. Ek weet nie hoe het dit gekom dat daar gepraat word van die unit manager nie, want daar was nie 'n posbenaming nie en niemand het geweet wat gaan die persoon wees nie."

[40] Botha confirmed that the present position of the Unit Managers is that they have to report to their offices daily and then travel to Bethlehem where they sit all day without doing any work.

[41] Cross-examined by Mr. Van Rhyn, who appeared for the 3rd respondent, Botha said in January 2005, Council approved the final organogram. As to how the Unit Managers were placed in the organogram ("R5"), Botha testified that it was his administrative error to omit Unit Managers from that organogram. There was no box in the organogram for them at all. He asked Mrs. Coleman, the 3rd respondent, to help him insert them in that organogram. He had done the preliminary work on his laptop but when he transferred it to her machine the boxes got mixed-up and the work had to be re-done.

[42] Botha testified that Council felt that the Unit Managers should be coupled to the Municipal Manager and that they should be appointed on contract.

[43] Asked how the Council resolution of 11 June 2004 should be interpreted, namely the resolution that the post be re-advertised, he said that in November 2005/January 2006 the Unit Managers were for the first time placed in the system.

[44] Because the advertisement says their salary is negotiable, that means it has to be a fixed term contract of appointment.

[45] It was put to Botha that the 3rd respondent Mrs. Coleman did not have her degree at the time of her application because moneys were outstanding. He could not comment on that.

[46] In re-examination Botha said that the resolution of 20 February 2003, reserved all rights to the Executive Committee. The powers in paragraphs i, j, k, l, m *inter alia* were reserved for Council:

"2. The powers and duties set out hereunder are reserved for the Council by means of resolution by the Council and may not be delegated to any of the Council's other political structures, political office bearers or officials. The Council may also take no decision in respect of these matters, unless it has received and considered the report and recommendations of the executive committee in this regard:

....

- (i) the appointment of a Municipal Manager and deputy Municipal Manager (post levels 0-1) as well as managers (post level 2) who are directly responsible to the Municipal Manager after consultation with the Municipal Manager;
- (j) the determination of a policy framework for staff matters as mentioned in section 66 of the Systems Act;
- (k) adopting an employment equity plan and skills development plan for the municipality;
- (l) approval of the permanent job establishment of the municipality;
- (m) determination of the educational, training, experiential and other attributes for appointment of employees in the Council's service.

...."

[47] Botha re-iterated that the Council resolution to place the advertisements was approved under the advertising costs vote which the "241" indicates. If it had related to staff expenditure the vote number would have ended in 001 or 008. At that time the budget made provision for the former

town clerks and there were no vacant posts which Unit Managers could slot into.

[48] On 4 April 2005 Council held a meeting. According to the minutes the speaker informed Council that the Municipal Manager, the 6th respondent, argued that he was above Council based on the advice he got from the legal adviser:

"In response to a question by Councillor M M Radebe, the Legal Advisor said that the appointment of employees other than section 57 employees was the competency of the Municipal Manager. The Speaker referred to the policy framework determined by the Council in terms of which appointments had to be made in response to which the Legal Advisor said that it was his opinion that policy could never override statutes. The Speaker said that all the contradicting and misleading statements of the Legal Advisor were noted by Council. The Mayor, Councillor M P Jacobs said that a reprimand should be issued whilst a system should be put in place whereby in future appointments of this nature shall be sanctioned by the Mayor."

[49] The resolution contains *inter alia* the following:

- "1. that it be reaffirmed that the appointment of employees is the prerogative of the Executive Committee and Council.
-
4. that the Municipal Manager be reprimanded for disregarding policy directives and that the matter of recovering the salaries paid to the employees in 2 above for the period 1 October 2004 – 31 March 2005 be held in abeyance until the outcome of the intended disciplinary case is known.
5. that in future no appointments shall be made without it having been sanctioned by the Mayor."

[50] Botha was referred to an opinion by the Council's legal adviser stated that Council resolutions made in contravention of sections 55(1) and 66 of the Systems Act would frustrate the objectives of the legislature. The appointment of staff other than section 57 employees by council is null and void. Botha was referred to annexure "R12" in which Mhlambi, the deponent to the founding affidavit informs the MEC that resolutions inconsistent with legislation were repealed. In his evidence Mhlambi stated that the resolution he attached to confirm that statement was the 2003 resolution.

[51] Botha said that if the 6th respondent in his capacity as Municipal Manager, was of the view that Council was acting wrongly he should have employed rule 40 of the Council's Rule of Order to inform them of that fact.

[52] **Sipho Leon Mhlambi** is the Municipal Manager of the applicant and deponent to the founding affidavit. He took over as Municipal Manager on 4 August 2005 after the suspension of the 6th respondent. He started his career in local government and acted as Unit Manager of the Virginia Transitional Local Council. He also acted as legal adviser of Matjhabeng Council. As the old town clerk of Virginia he was directly accountable to the Municipal Manager of Matjhabeng.

[53] The Unit Managers are "mini Municipal Managers". They are strictly speaking the former town clerks of the Transitional Local Councils. They do not report to the directors. They report to their Municipal Manager.

- [54] The Makomota Structure is still in place. Mhlambi testified that since he came to Council it was never repealed. The approval of all grades and salaries has to go to Council. The approval of budget cannot be delegated. It is in terms of the Constitution reserved for Council. At the time the 2nd to 5th respondents were appointed the former town clerks were still receiving their salaries. If Unit Managers were to be appointed there would be double payments.
- [55] Council on 4 April 2005 took a decision that 2nd respondent be transferred and relocated. There is a letter by the 6th respondent wherein he recalls the 2nd respondent and appoints her as Unit Manager in conflict with Council resolution of 4 April 2005.
- [56] The fact that the Unit Manager works in conjunction with the director with the necessary expertise does not mean that the Unit Manager reports to that director.
- [57] The salaries of the Unit Managers which the 6th respondent appointed were not budgeted for and were not part of the

organogram and there was no placement committee. The Municipal Manager is a political appointment.

[58] In cross-examination Mhlambi said that the Makomota structure remained in place. He agreed that the structure referred to in the founding affidavit was only the top structure and said that there was no complete structure in place. The structure “MM1” was only approved by Council in November 2005 after the appointments of the Unit Managers in question (the respondents) had been made in July 2005.

[59] The former town clerks were still there. They still got their salaries. They had to be placed first according to the placement policy “empty the pool first”. Mhlambi was suspended from his post by the 6th respondent on 10 January 2005. His court application to rescind that suspension was granted on 10 February 2005.

- [60] The 6th respondent's suspension was ordered by Council. Mhlambi agreed that he was involved in implementing the suspension but denied that he was behind it.
- [61] Mhlambi, who holds a B.luris degree, said that section 55(1)(e) of the Systems Act does not give a blank cheque. There was no provision in the budget for the posts of Unit Managers. There had to be job evaluations for the posts into which the respondents were appointed. In November 2005 the process was properly followed, but these appointments had been made in July 2005 already.
- [62] Asked how Unit Managers differed from the former town clerks Mhlambi said the names changed. The former town clerks are in charge. They run the administration in that administrative unit. They are accountable to the Municipal Manager. They play a pivotal role.
- [63] Asked about the memo dated 15 June 2004, dealing with advertising the posts of Unit Manager, Mhlambi said the

advertisement never served before Council. Only Council can approve the budget.

[64] It is put to Mhlambi that all the councillors did not want the Unit Managers to which he responded that that was why the matter was in court. Asked whether the reasons why the councillors did not want the Unit Managers was personal and whether that was a proper reason, Mhlambi said that there was no provision in the budget. Regarding the Council resolution on 11 June 2004 to appoint Unit Managers which was based on the Executive Committee recommendation at p. 199 where there was no reference to Unit Managers, Mhlambi was asked how it came about and it was put to him that Council decided that Unit Managers were to be added. It was put to Mhlambi that there was room in the budget because certain posts had fallen away from the staff establishment, so as to make it possible to appoint Unit Managers. He responded that it is the obligation of the Municipal Manager (6th respondent at the time) to tell Council if it is a wrong decision.

[65] On 1 June 2005 the MEC wrote to Applicant:

"01 June 2005

The Municipal Manager
Dihlabeng Local Municipality

Dear Sir,

RE: DELEGATION OF POWERS

It has come to my notice that your council took decisions in 2000, 2001, 2003 and 2004 to delegate powers that are inherently conferred to the Municipal Manager by the System Act as well as the Structures Act, to the Mayor, Speaker and Executive Committee.

The above decisions had the overall effect of compromising good governance and stability in your municipality. The Auditor-general has also in the execution of his functions, both in the management letter and the audit report made sharp references to this irregularity and expressed grave concern about this state of affairs. In 2003 your Council in its resolution noted that such

delegation of powers is inconsistent with enabling legislation that regulates local government.

You are hereby cordially called upon to convene a special Council meeting not later than the 7th June 2005 to rescind the decisions taken in 2000, 2001, 2003 and 2004 relating to the delegation of powers of the Municipal Manager and other related officials.

Please note that the Special meeting should deal with only this item.

Yours faithfully.

MJ Mafereka

MEC: Local Government and Housing"

Mhlambi responded as follows:

"19 September 2005

FAX: 051-405 4193

ATT: ME ZANELE MAGAGULA

Office of the MEC of Local Government and Housing

Free State Province

PO Box 264

BLOEMFONTEIN

9300

Sir

DECLARATORY ORDER

The writer refers to the previous correspondence which dealt with the delegation system and specifically advises that

- * Council previously rescinded resolutions that were apparently inconsistent with legislation and it would appear as if this was not duly communicated to your office. Attached hereto please find a copy of the resolution that confirms this.

The writer trusts that you will find this in order and that this matter can now be regarded as finalized.

Yours faithfully

Sipho Mhlambi

ACTING MUNICIPAL MANAGER"

[66] In evidence Mhlambi said in his letter of 19 September 2005 he referred to the first paragraph of the 2003 resolution. The 2003 resolution withdrew the previous delegation. What remains is the Council resolution of 4 April 2005. Mhlambi testified that he accepted that the MEC was complaining about the resolution of 4 April 2005. Asked during cross-examination whether the MEC was aware of the 2003 resolution, Mhlambi replied that he thought he was not. It is difficult to understand this reply if one has regard to the express reference to the 2003 resolution in the MEC's letter.

[67] In cross-examination by Mr. Van Rhyn Mhlambi was referred to the correspondence with the MEC wherein the

MEC complained of resolutions of Council which appeared to unlawfully usurp administrative powers. Mhlambi responded in a letter dated the 19 September 2005 stating that the resolution had been withdrawn, attaching the resolution of 2003.

[68] The only witness for the respondents was the 6th respondent, **Motibedi Matshele**. He was the applicant's Municipal Manager from 1 December 2003 to 8 December 2005. He was suspended from 4 August 2005 and never returned.

[69] With reference to the policy directives of Council referred to in section 55 of the Systems Act, 6th respondent said it was a decision of Council that the posts of Unit Manager be advertised.

[70] 6th Respondent was tasked by Council to draft a proposed staff structure. This he did ("MM1"). On 8 November 2004 ("MM2") Council dealt with this proposed structure. Council accepted that there was to be Unit Managers and instructed 6th respondent to ensure that there was

uniformity in all the appointments. Asked whether costs were discussed at the meeting, 6th respondent said that if the councillors are not happy, they voice what they are not happy with. Asked about accountability, 6th respondent said that the idea was that Unit Managers will report to the directors who are in charge of the particular area of concern.

[71] 6th Respondent filled the posts because he was under pressure from the municipality for delivery. Council insisted that the posts of Unit Manager be advertised because of service delivery. Council was under-spending on its compensation expenditure budget.

[72] The time lapse from the placing of the adverts in July 2004 up to appointments in July 2005 was due to several factors:

- (i) Adv. Mofokeng, the director of corporate services, resigned.
- (ii) 6th Respondent was under pressure from council to complete the organogram.

- (iii) There was a lot of interference from councillors, especially corporate services wanting to take over.
- (iv) During February/March 2005 6th respondent was not at the municipality.

[73] Where the advertisement required a three year post-matric qualification and three years experience, 6th respondent said that he regarded those as being in the alternative. The 2nd respondent was already acting in the position. She had experience and was an administrator.

[74] Asked whether the Unit Managers were not section 56 appointments directly accountable to the Municipal Manager, 6th respondent replied that the Municipal Manager oversees service delivery. The towns were service delivery units. If there is a problem in a town, the director is called. The towns were directed by the directors. He appointed Unit Managers as permanent appointments to which post there is no performance agreement attached. Council insisted that it, and not the respondent, had to make the appointments of Unit Managers. This was the

point of contention between council and 6th respondent. Council wanted to make the appointment itself. Yet 6th respondent felt that he had a duty to render a service and he made the appointments believing that that was proper.

[75] Regarding the post to which the 1st respondent was appointed namely that of labour relations officer/legal assistant 6th respondent said that they added words:-

“legal assistant” were inserted to stress. The incumbent was to assist the legal adviser who had a backlog to cope with. There was more than enough work for a labour relations officer.

[76] Cross-examined by Mr. Van Rhyn 6th respondent reiterated that the Unit Managers were not section 57 appointments. Previously each town had its own equipment and its own treasurer and the idea of amalgamation was to centralise, also to enjoy the maximum benefits in the area. The need for a town clerk in the smaller towns fell away. In Arlington the person holding the position of former town clerk, is called an administrative clerk. The Unit Managers were

administrators. Decisions are taken at head office. Management is centralised.

[77] There were uprisings in neighbouring areas. They had to strengthen the town by appointing Unit Managers.

[78] Asked why the advertisement said that the salary of Unit Managers were negotiable, 6th respondent said that that allowed for the appointing officer to meet what a suitable candidate was earning elsewhere. It is standard practice. Coleman, the 3rd respondent, was appointed even though she did not have her qualification. They took a holistic view. She had the potential and came from a similar position.

[79] In cross-examination Mr. Claasen, for applicant, put to the respondent that the Systems Act contains no definition of “directly accountable” and that it depends on the facts to which the 6th respondent agreed. Section 9(2)(b) of Provincial Notice 184 of 2000 was a transitional measure

until the Systems Act came into operation, the 6th respondent said.

[80] After amalgamation decisions were taken at a different level. For instance, smaller towns lost the position of town treasure. Many people were moved to the centre. The managerial control was centralised. The role of former town clerks became menial. Rosendal, for instance, used a very junior person to fulfil the role of the former town clerk. "A secretary type person", as 6th respondent put it.

[81] The costs of the former towns were put into the budget of the Municipal Manager as a matter of convenience. The Municipal Manager is accountable for the whole budget. There is no such thing as a mini Municipal Manager. There is only one Municipal Manager. A key element of a manager is decision making. The appointed Unit Managers were merely administrators. They never had sheer managerial authority. The former town clerks lost about 95% of their managerial authority. It was a convenient place in the organogram to place the Unit

Manager under the Municipal Manager. The directors exercise control and are responsible to the Municipal Manager. For their technical support the Unit Managers relied on the director. Like everyone else in the staff establishment, they were to support the Municipal Manager.

[82] It was important from a managerial accounting point of view to see how much the units were costing. That is why their budgets were placed under the respective towns to see what each town was bringing in. The idea of the amalgamation was a pooling of resources. There would be devolution of power. A matrix system was used where an incumbent has more than one superior. One can see the Unit Managers in the context of a matrix which is not an easy structure, but what the 6th respondent wanted to introduce. This was a structure envisaged by him personally. 6th Respondent is a trained job-evaluator.

[83] Asked who decided that the proposed appointments of Unit Managers were section 55 appointments, the 6th

respondent responded, Council did. If Council held the view that those were section 57 appointments, Council would specifically say so in its resolution. There was no Council resolution prior to August 2004 which stated that these were section 57 appointments.

[84] As to the costs involved in the appointment and the budget, 6th respondent said that they were under-spending. They had a budget of R72 million. What he was proposing could fit into the budget. There was adequate provision. There were funds available in the compensation expenditure budget. 6th Respondent explained the position to council committees and workshop led councilors. There was full disclosure. He went through the whole proposed structure with them. On the total compensation budget they were under spending. Adequate funds were also available for the next year.

[85] In re-examination 6th respondent referred to the span of control which a manager should have. Ideally a manager should not have more than seven people reporting to him.

Here he had ten. That places stress on the span of control. He could not add Unit Managers. Unit Managers would go straight to the relevant director.

[86] At Rosendal a lady, who was at the library, is acting as Unit Manager and at Paul Roux a lady, who was an accounting clerk. At Fouriesburg Hennie Venter, the former town clerk, is acting and at Clarens Elaine Meyer, the former town clerk.

IMPRESSIONS OF WITNESSES

[87] **Evans**, Applicant's first witness, has been working in local government for more than 30 years. He acted as Applicant's Municipal Manager from March to October 2001, and again from October 2002 to October 2003. He appeared to have a sound understanding of local government. His view was that Unit Managers are not section 57 appointments.

[88] **Van Rensburg** only really testified about forms handed in in respect of leave and subsistence and travel allowances

by the 1 – 5th respondents. She said that she was unable to comment on the legislative provisions.

[89] **Botha** has a great deal of experience in local government.

He made it clear that Council was his employer; he could not criticise them. The main thrust of his evidence was that the posts of Unit Managers were not on the budget, and therefore the appointments of 2nd – 5th Respondents could not be made.

[90] **Mhlambi** took over from the 6th respondent as Municipal

Manager. He was involved with the suspension of the 6th respondent, although, he said, not instrumental. Like Botha, he also harped on the fact that because the budget did not expressly refer to Unit Managers, such posts could not be filled. Like Botha, his view that Council would authorise the placement of an advertisement without approving that the posts be filled, is hard to believe. The most severe criticism against Mhlambi is probably his evidence that he sent the 2003 Council resolution to the MEC with his letter of 19 September 2005 because he

thought the MEC did not have it. That while the MEC in the enquiry expressly refers to the 2003 resolution. I found both **Mhlambi** and **Botha** unsatisfactory witnesses.

[91] The 6th respondent, **Matshela**, made the best impression of all the witnesses. He is now working for the Provincial Government in a responsible position. His evidence that he was trying to make things work while encountering a great deal of interference for Council, makes sense. It is clear that Council nonetheless decided to appoint Unit Managers, and 6th Respondent's evidence that he satisfied them that there were sufficient funds in the budget (although the posts were not named in the budget) makes sense and must be accepted.

LEGAL SUBMISSIONS

[92] Mr. Claasen, for applicant, submitted that section 56(a) of the Systems Act makes it clear that only council can appoint managers who are directly accountable to the Municipal Manager. According to the following objective facts Mr. Claasen says Unit Managers are directly

accountable to the Municipal Manager. As these he lists the following:

- (a) In every letter of appointment which the 6th respondent sent to the Unit Managers it is expressly stated that they are being appointed in the office of the Municipal Manager.
- (b) The proposed organogram of the 6th respondent where he treats Unit Managers is clear and uncontradictable proof that Unit Managers are responsible, also from a monetary point of view, to the Municipal Manager.
- (c) In Annexure "MM1" Unit Managers are dealt with under par. 5 which deals exclusively with the office of the Municipal Manager.
- (d) Also in "MM1" it is clear that these managers must administer municipal services in line with Municipal Manager's directions.
- (e) The duty sheet of these Unit Managers states: "to support the Municipal Manager in the discharge of his or her duties within a town". They are clearly an

extension of the execution duties of the Municipal Managers in these particular towns (5.8.2 par. 3).

- (f) These Unit Managers manage the provision of municipal services in these towns “so as to contribute to the upliftment of the quality of life of communities in a town, and as determined by the Municipal Manager from town to town”. This makes it clear that their accounting and responsibility lies to the Municipal Manager.
- (g) The staff structure which was later proposed where the 6th respondent again refers to the decentralization of responsibilities of Unit Managers so as to manage the total services on these towns and to be responsible to the Municipal Manager. “Devolution of power to the units closest to the communities for service delivery.” Towns have branch managers reporting to Municipal Manager.
- (h) The organogram of November 2005 which relates to Unit Managers which was accepted by applicant shows that the Unit Managers fall in the top structure.

- (i) There is no definition in the applicable legislation of the words “directly accountable”. The most important indication is however in the notice in terms of section 12 of the Structures Act. The Provincial Notice No. 184 of 2000 as corrected by Notice 201 of 2000 calls the particular towns “administrative units” and clearly provides that heads of these units will be responsible to the Municipal Manager for continued service delivery in the town.
- (j) The particular notice confirms that the old town clerks of these towns now become Unit Managers and this is a further indication that it is only an extension of the Municipal Manager of the main municipality. There are now five towns after the amalgamation within the particular area. Each of these towns has a chief executive officer namely the previous town clerks. Each one of these five towns had as head the former town clerk. The other four town clerks are heads of the remaining units and only the chief executive officer of Bethlehem becomes the Municipal Manager of the new municipality. This means that each, as in the past, is

the administrator of municipal services. The fact that decision-making processes are changed is automatic but does not change the basic principle that all, including the Unit Manager fall under the Municipal Manager. The essential principle is that each unit has an administrative head just as in the past.

- (k) Just as in the past the Unit Managers administer the towns merely as an extension of the Municipal Manager and they are in fact mini Municipal Managers and the alter ego of the Municipal Manager. Each unit has an administrative head just as in the past.
- (l) The most important indication is the budget of the applicant. Each of the former four towns has his own budget which covers each aspect of the administration in the town. This individual budget is placed directly in the responsibility of the Municipal Manager's own budget. The only logical conclusion is that the budgets of these towns and the use thereof falls directly under the Unit Managers. They fall directly under the Municipal Manager and they are directly accountable to him for the administration thereof. In all the years,

even the year 2008, the budget of the applicant shows that the funds of these towns fall under the vote of the Municipal Manager.

- (m) Not one of the departments of the directors contains any reference to any one of these four towns.
- (n) The respondents applied for leave and subsistence and travel allowances to the Municipal Manager. There was never any director involved. There are two types of forms. One type goes directly to the director and the other goes to the Municipal Manager. These persons all use the forms which go to the Municipal Manager.
- (o) It is uncontested that there are prescribed forms for any director and the present forms were completed by the respondents themselves and were never referred to or used a form where a director is involved.
- (p) The advertisement which was placed shows the particular directors but the particular posts of the four respondents resort clearly and without any doubt under the office of the Municipal Manager. The other two posts in the office of the Municipal Manager are the

personal assistant for the Municipal Manager and the secretariat for the Municipal Manager. Clearly all three posts in the office of the Municipal Manager and the persons who hold those posts are responsible to him. There is no person involved in-between or any other directors.

[93] The 6th respondent in his capacity as Municipal Manager was only capable of making appointments “subject to the policy directions of the municipal council”.

[94] Constitution 160(1)(d) and (2) provides that a Municipal Council may employ personnel that are necessary for the effective performance of its functions. Council may delegate certain functions. Mr. Claasen submitted that the Municipal Manager by virtue of Constitution 162(1)(d) only has powers under section 55 of the Systems Act insofar as such powers have been delegated to him by Council. As there has been no such delegation, the Municipal Manager had no authority to appoint staff in Mr. Claasen’s submission.

[95] Applicant adopted a system of delegation on 23 July 2001 in terms whereof powers were given to the mayor to appoint a panel for short-listing, interview and recommendations in respect of the appointment of employees on post levels 0 – 6. On 20 February 2003 that delegation document was repealed and new delegations were decided upon. The 2003 document was considered *ultra vires* by the MEC and Applicant Council in April 2004 took a similar resolution.

[96] Mr. Claasen referred to “policy directions” as contemplated in section 55 of the Systems Act:

(a) The Budget

There was no provision in the budget for the posts. Mr. Claasen says Council only approved the costs in relation to the advertisement and not the posts as contemplated in the memorandum dated 15 June 2004.

(b) The placement policy: “*empty the pool first*”.

(c) There had to be a placement committee.

- (d) The advertisement mentioned a 30 day period which lapsed before the appointments and therefore the respondents could not be validly appointed having applied under the advertisement. The offer had lapsed.
- (e) There was not a staff establishment approved by Council.
- (f) On 4 April 2004 Council decided that no appointments could be made without its approval.
- (g) Unit Managers are political appointments.
- (h) As to second respondent there was a Council decision for her to vacate her post and a possible disciplinary hearing.

[97] Thus Mr. Claasen submitted the appointments of the 2nd to 5th respondents are *ultra vires*.

[98] As to first respondent the same arguments apply as well as the following:

- (a) The first respondent's post does not form part of any accepted staff establishment.

- (b) There is no job description of such post.
- (c) The advertisement does not make provision for such post.
- (d) In fact and in practice the first respondent never acted as a labour relations officer because he never reported to those offices.
- (e) The first respondent only and exclusively worked in the office of the legal adviser.
- (f) There was not a post advertised for further legal advisers.
- (g) This particular post of "*labour relations officer/legal assistant*" does not exist in the budget because it is not part of the structure.
- (i) The 6th respondent never had any authority or delegation of Council to make this appointment.

[99] In the premises Mr. Claasen submitted that the appointments of the 1st – 5th respondents should be set aside.

[100] Counsel for the respondents, Messrs Van Rhyn and Greyling filed joint Heads of Argument. In summary the respondents' case is:

- (i) Section 55(1)(a) of the Systems Act gives the 6th respondent the power to make appointments. Council's consent is not required.
- (ii) In spite thereof Council was approached and passed a resolution that Unit Managers be appointed.

[101] Appointments under sections 56 and 57 of the Structures Act are top management posts. They are the decision-takers. There has to be a performance agreement signed by them annually. Such person's job is permanently uncertain. It is a fixed term contract. When dealing with such type of appointment it must be clear from the outset that one is dealing with a section 56 appointment. It cannot be inferred afterwards. The advertisement makes it clear that the Unit Managers will work under the direction of the directors. The Unit Managers were appointed to post level 4. Once an appointment is

coupled to a post level it is automatically no longer a section 56 or 57 appointment. Appointments under section 56 and 57 are not coupled to a post level or a salary scale. Persons holding such posts could earn double or even more than the highest post level.

[102] As to delegations, the only delegation was withdrawn on the 20 February 2003 because council interfered in staff matters and the MEC complained.

[103] Mr. Greyling referred to the conclusion by Evans that Unit Managers were not section 57 appointments. This was a double concession:

- (1) They were not directly accountable to the Municipal Manager;
- (2) There was no fixed term contract or performance contract.

Mr. Greyling said there is no basis to ignore that evidence. Evans acted as Municipal Manager from March 2001 to October 2001 and October 2002 to

December 2003 which was after the Systems Act had come into operation.

[104] It is for applicant to prove that the appointments were *ultra vires*.

[105] The first respondent was appointed to do more than she asked for. Her appointment cannot be *ultra vires* because she is expected to do more than she applied for. She accepted to do that and therefore is rendering more of a service to Council than was advertised for the same salary.

[106] In his argument Mr. Van Rhyn responded to Mr. Claasen's reliance on the Constitution. He pointed out that there are many statutes which confer rights and duties on municipalities. It has never been alleged that the Systems Act is in conflict with the Constitution.

[107] After amalgamation the role of officials in the smaller towns changed. They no longer had a mayor, or a town

clerk or town treasurer. All decisions are taken in Bethlehem. Even salaries are paid from Bethlehem. In order to be “directly accountable” one has to be in direct contact with the other person. Here are individual persons namely the directors.

[108] The Unit Managers are there to see that everything in the town runs smoothly. They report problems to the directors. They are not important persons. Botha forgot to insert them in the last organogram after the matter had been before Council in November 2004. The 6th respondent tried to keep the municipality on track in spite of a great many frustrations.

[109] In reply Mr. Claasen stressed that the directors assist in technical functions as to administration the Municipal Managers remains the administrative head of the unit.

SUMMARY AND CONCLUSIONS

[110] Two questions should not be confused:

- (i) What the 6th respondent did when he appointed the 1st to 5th respondents;
- (ii) What the 6th respondent was empowered to do under legislation regarding the appointment of Unit Managers.

[111] The evidence makes it clear that the 6th respondent acted under section 55 when he made the appointments. This appears from the letters of appointment. The question remains however whether he was entitled to act under section 55 or whether these should have been appointments under sections 56 and 57.

[112] The Constitutional point taken by Mr. Claasen is without merit. The Systems Act has not been found unconstitutional. The Municipal Manager is a key structure of a municipality (**EXECUTIVE COUNCIL, WESTERN CAPE v MINISTER OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER; EXECUTIVE COUNCIL, KWAZULU-NATAL v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2000 (1) SA 661 (CC)** 2000 (1) SA 661 (CC) paragraph [108]). The nature and extent of

a Municipal Manager's powers are such that they are non-delegable (**MGOQI v CITY OF CAPE TOWN AND ANOTHER; CITY OF CAPE TOWN v MGOQI AND ANOTHER 2006 (4) SA 355 (C)** 2006 (4) SA 355 (C) paragraph [107]).

[113] As to the delegations on which Mr. Claasen relies, Mhlambi made it clear in his evidence that his letter of 19 September 2005 informed the MEC that delegations by Council which were inconsistent with the Constitution had been withdrawn. Insofar as the Council resolution of 14 April 2005 appropriated to Council the right to make appointments which were to be made by the Municipal Manager under section 55 of the Systems Act, that resolution was *ultra vires* and of no force and effect. Section 55 gives the Municipal Manager the power to make appointments (subject to policy directions of Council). Council cannot nullify that right by taking a resolution, which Mr. Claasen calls a "policy direction" which effectively negates this right of the Municipal Manager.

The Systems Act gave the 6th respondent the right to appoint persons such as Unit Managers, and this right remained intact in spite of Council resolutions appropriating the right to appoint to Council. As far as the present respondents 1 – 5 were concerned, Council was aware of their appointments, raised no objection and, according to the evidence of the 6th respondent, knew that there were sufficient funds in the budget to pay these salaries.

- [114] The first issue to be determined is whether the post of Unit Manager is one of a manager who is directly accountable to the Municipal Manager. This raises at least three questions:
- (i) Are the Unit Managers “managers” as contemplated in section 55?
 - (ii) Are they accountable to the Municipal Manager?
 - (iii) Are they directly accountable to the Municipal Manager?

[115] As to accountability it seems that the Unit Manager is in fact accountable to the Municipal Manager and in a sense it could even be argued directly accountable. However, the directors do the work. In this sense the Unit Manager is directly accountable to the Municipal Manager in the same manner that the secretary of the Municipal Manager would also be directly accountable to his/her boss.

[116] Reverting to what a manager is: One's first inclination is to say that because a person is called a manager that person is a manager. According to the New Shorter Oxford Dictionary use of the word "manager" in general sense is now rare. The definition also states:

"A person whose office it is to manage an organisation, business establishment, or public institution, or part of one; a person with a primarily executive or supervisory function within an organisation."

Firstly, one should consider the evidence as to what these people actually did and what their status is. Secondly one

should consider the context of section 55. Having regard to the fact that managers appointed under sections 56 and 57 must have a fixed term contract and an annual performance bonus, it is clear that one is here dealing with a top management position. It would be strange if the town clerk of a disempowered small town all of a sudden has a performance agreement and also a fixed term contract where he or she is merely the eyes and ears of the Municipal Manager in the town to see that the town runs smoothly. The fact that the salaries, according to the advertisement is "negotiable" does not lead to a fixed term contract. The 6th respondent explained that this was inserted so as to meet the current salary of the applicant.

Provincial Notice 184 of 2000 was passed under section 12 of the Structures Act. At the time section 9(2) of Provincial Notice 184 was enacted, there were no Unit Managers. Practice would have to show what their role was to be. The evidence in this case shows that Unit Managers are not executive-style managers who should

be working to meet targets, on a performance bonus system. They are the eyes and ears of the Municipal Manager to ensure the smooth running of their town.

[117] “Manager” as contemplated in section 57 refers to a top manager who has decision-making powers, not a person who takes all instructions from the Municipal Manager and whose moneys are paid centrally. Here one has a central management structure, as the 6th respondent testified. There is no managerial power in the true sense of the word in the Unit Manager.

[118] The essential feature which changes the position and makes the position of Unit Manager not falling within sections 56 and 57 is the fact that there are no decision making powers vested in the Unit Manager, the former town clerk. That person merely has to see to the administration and one knows from the evidence that some of the persons who have been appointed to act in these positions are not managerial material and are not

expected to be such because they take no executive decisions.

It is probably because Council was aware that these persons to be appointed were not to be appointed as top management that they allowed the advertisement to be placed and the appointments to be made without provision having been made specifically for them on the budget. There were funds for administrative purposes and these positions were approved by council.

[119] The applicant has failed on both legs. Firstly, Applicant failed to show that these were not persons who could be appointed under section 55 by virtue of the true core nature of their work, and secondly Council dealt with the matter and allowed the appointments to be made under section 55 although this was not strictly speaking necessary. The applicant has failed to discharge the onus upon it in respect of the 2nd to 5th respondents.

[120] In relation to the 1st respondent the same arguments apply. This was not an executive position. The main thrust of the applicant's objection is that there was no such post and it was not in the budget. The fact is that this person was appointed to do more than the advertisement required and it can never be to the prejudice of applicant, it was really to the advantage of the applicant that there is now a person who does additional duty. Therefore that appointment of the 1st respondent by the 6th respondent can not be faulted.

[121] In the premises the application is dismissed with costs.

A. KRUGER, J

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