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

**HIGH COURT OF SOUTH AFRICA**

**[NORTHERN CAPE DIVISION, KIMBERLEY]**

**CASE NO: 1858/18 & 1860/18**

In the matter between:

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|---|---|
| **THE DEMOCRATIC ALLIANCE** | Applicant |
| v | |
| **O.M. MATIKA** | 1st Respondent |
| **MINISTER OF CO-OPERATIVE GOVERNANCE HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS** | 2nd Respondent |
| **ACTING EXECUTIVE MAYOR SOL PLAATJE LOCAL MUNICIPALITY** | 3rd Respondent |
| **ACTING SPEAKER OF THE MUNICIPAL COUNCIL, SOL PLAATJE LOCAL MUNICIPALITY** | 4th Respondent |
| **ACTING MUNICIPAL MANAGER, SOL PLAATJE LOCAL MUNICIPALITY** | 5th Respondent |
| **ELIZABETH JOHNSON** | 6th Respondent |
| **THE SHERIFF OR HIS DEPUTY, KIMBERLEY** | 7th Respondent |

**Judgment:** Tlaletsi JP *et* Olivier ADJP

**Heard on:** 22 August 2018

**Decided on:** 29 August 2018

**Coram:** Tlaletsi JP, Olivier ADJP

**JUDGMENT**

TLALETSI JP *et* Olivier ADJP

[1] These are two applications brought on urgent basis which have now been consolidated. The first application was launched by the Democratic Alliance ("DA") on 30 July 2018 against councillor O.M. Matika[1] ("Mr Matika") and several other respondents seeking relief on the following terms: -

1.1 A *rule nisi* be issued calling on the respondents to show cause on 15 August 2018, why a final order should not issue that Mr Matika is directed to vacate the post and office of the Executive Mayor of the Sol Plaatje Municipality immediately upon service of this order on him;

1.2 Alternatively, that the third respondent (Acting Speaker) be ordered to call a special meeting of the Council of the Municipality within 5 days from the date of the order and in calling the meeting the motion of no confidence in the Executive Mayor, dated 25 July 2018 be tabled at such meeting.

[2] On 30 July 2018 Mr Matika also filed an application to be heard on 01 August 2018. In Part A of the application Mr Matika sought relief, *inter alia*, in the following terms:

2.1 That pending the determination of the review envisaged in Part B:

2.1.1 The First to Ninth Respondents are hereby interdicted and restrained from continuing to implement the decision taken on the 25th July 2018 removing the Applicant (Mr Matika) from his

[1] Councillor O.M. Matika has been the Executive Mayor of the Sol Plaatje Municipality until the resolution to oust him as such at a meeting held on 25 July 2018.

position as the Executive Mayor of the First Respondent (The Municipality).

2.1.2 That the First to Ninth Respondents be ordered to reinstate the Applicant to his position as the Executive Mayor of the First Respondent with immediate effect;

2.2 In Part B of the application Mr Matika is seeking relief on substantially the following terms:

2.2.1 That the First Respondent's meeting held on 25 July 2018 titled "*Special Council Meeting*" be reviewed and set aside, alternatively declared unlawful and invalid;

2.2.2 That all resolutions reached during the aforesaid meeting be reviewed and set aside, alternatively declared unlawful and invalid;

2.2.3 Any Respondent opposing this application be directed to pay the costs of the application on an attorney and own client scale, *mutatis mutandi* jointly and severally, the one paying the other to be absolved.

[3] On 31 July 2018 this Court (Williams J) granted an interim order by agreement between the parties substantially in the following terms:-

3.1 The two applications are consolidated and are to be heard together on 22 August 2018.

3.2 In the interim, from the date of this order to the determination of the consolidated application:

3.2.1 Mr Matika will vacate the office of the Executive Mayor and will not perform or purport to perform any functions or

exercise or purport to exercise any powers of the office of Executive Mayor;

3.2.2 The current Mayoral Committee will not be reconstituted and;

3.2.3 No personnel in the office of the Executive Mayor will be replaced.

[4] It is significant that the agreed interim order dispensed with Part A of Mr Matika's application and partially gave effect to para 1.1 of the DA's relief above in that councillor Matika vacated the office of the Executive Mayor pending the finalisation of this application.

[5] Mr Matika as well as the Acting Speaker are opposing the relief sought by the DA. In the other matter the DA is opposing the relief sought by Mr Matika. The Acting Speaker does not oppose the application or the relief sought by Mr Matika. The Acting Speaker has filed a composite affidavit in which he explains the events that preceded the alleged council meeting of 25 July 2018 and also answers in opposition to the relief sought by the DA. He is represented by counsel, Mr F Peterson. Mr Matika is represented by Ms A Stanton. The DA is represented by Ms N Mayosi and Ms K Harding.

[6] The Acting Municipal Manager (Ms KR Sebolecwe) as well as the Municipality abide by the ruling of the Court in the consolidated applications. The Acting Municipal Manager has filed an affidavit to provide this Court with relevant information at the municipality's disposal and or under her control regarding the alleged council meeting held on 25 July 2018 so as to enable this Court to make an informed decision. Furthermore, the Acting Municipal Manager has filed the unapproved minutes of the said meeting as well as the transcript of the recordings of the meeting. She has also filed confirmatory affidavits by the officials who provided secretarial services at the aforesaid meeting. Nothing turns on these affidavits save as to confirm the correctness of the recordings and the unapproved minutes.

[7] The Acting Executive Mayor (Mr Thabane), Ms Elizabeth Johnson (former Speaker), the Minister of Co-operative Governance, Human Settlements and Traditional Affairs as well as the Sheriff of Kimberley, who are the second, sixth, seventh and eighth respondents respectively in the DA application are not opposing the application.

[8] The African National Congress (ANC), Economic Freedom Fighters (EFF), Congress of the People (COPE), Freedom Front Plus and Independent councillors who are the fourth, sixth, seventh, eighth and ninth respondents respectively in the application brought by Mr Matika are also not opposing the application.

[9] It is common cause that on 24 July 2018, the Acting Speaker received a written request to convene a special meeting of the Municipal Council at 10:00 on 25 July 2018. The request letter stated that the list of the attached councillors who had requested a meeting to be held on Monday 23 July 2018 are the ones who are requesting that the meeting be held 25 July 2018 at 10:00. The list referred to contained names and signatures of councillors of the Municipality totalling 39. As indicated the list itself requested that the meeting be held on Monday 23 July 2018 at 10:00, and was dated 19 July 2018. Also annexed to the letter of 23 July 2018 was an undated document headed "*Motion of Exigency*" which in essence recommended that Mr Matika be removed as the current Executive Mayor of the Municipality with immediate effect. The Acting Speaker further received another letter dated 23 July 2018 with a heading "*Motion of Exigency*". Both these documents were prepared by councillor Phiri.

[10] On the Acting Speaker's version the discrepancies in the documents raised his suspicion. Upon examination of the documents, he discovered that the document/petition asked for a meeting to be held on 23 July 2018 and not 25 July 2018 as reflected in the request letter to which the list was attached. There was also a duplication of signatures and some were proxy signatures. The Acting Speaker convened a meeting of all the Chief Whips represented in the Municipal Council, (Chief Whips' forum) in order to discuss the request

and the discrepancies. The meeting was convened for 17:00 on the same day. Only two Chief Whips, representing the ANC and COPE attended the meeting. Councillor Phiri who is the DA's Chief Whip in the municipality, acknowledges receipt of a telephone call inviting him to the meeting. He however, could not attend the meeting because it was called on short notice and he had other commitments. He was also not informed that the motion of no confidence brought by the DA would be discussed at the meeting. The Acting Speaker adjourned the meeting and scheduled another meeting for the next morning on 25 July 2018. At this stage the Acting Speaker had already decided not to call the meeting as requested.

[11] Upon inquiry from some of the councillors on the list of signatories, the Acting Speaker learned that they signed a petition for a meeting to be scheduled for 23 July 2018 in order to discuss the safety concerns of councillors and not for a motion of no confidence in the Executive Mayor. At least three of the councillors referred to have provided the Acting Speaker with letters indicating that they were misled and have filed confirmatory affidavits to confirm the averments by the Acting Speaker relating to them.

[12] At approximately 11:00 on 25 July 2018, the Chief Whips forum was convened. Present were the Chiefs Whips for the ANC, COPE, DA and EFF. According to the Acting Speaker he drew their attention to the discrepancies and advised them that he was not going to convene any meeting for that day, 25 July 2018. Copies of the letters from the councillors who alleged that they were misled were also distributed. It was then agreed that the council meeting as called for in the letter of 23 July 2018 should fall away because of *inter alia*, duplication of signatures and proxy signatures.

[13] It is common cause that during the Chief Whips forum meeting, there were councillors who had gathered in the council chamber waiting for the council meeting to start. According to the Acting Speaker the DA Chief Whip, councillor Phiri left the whips meeting and later returned with a new list of signatures totalling 33 and a covering letter dated 25 July 2018 requesting a council meeting for 12:30 the same day. He mentioned that Councillor Phiri

was advised by the ANC Chief Whip that at least 24 hours' notice was required for the special council meeting and that notice should be given to other councillors who were not in the council chamber at the time.

[14] The DA's version is that councillor Phiri did not leave the meeting and return with a new request for the meeting. According to him this was done earlier in the morning prior to this meeting and that the Acting Speaker came to this meeting with copies of the new request and circulated it to all the whips. It is also the DA's version that on 24 July 2018 the Acting Speaker undertook to convene the council meeting as requested but failed to do so, and also that the Chief Whips meeting on 25 July 2018 ended on the undertaking by the Acting Speaker to convene the council meeting as requested or instructed by the new letter.

[15] It is not in dispute that a "*meeting*" in the Council chamber commenced at 13:30 with 35 councillors in attendance. However, the Acting Speaker was not in attendance. The Acting Municipal Manager as well as the Municipality's Legal Advisor were also not in attendance. Councillor Tshite chaired the meeting. One of the councillors, Stout was appointed as Acting Speaker for the duration of the meeting and took over from councillor Tshite. The Executive Director: Infrastructure and Services, Mr B Dhluwayo was appointed Acting Municipal Manager in the position of the serving Acting Municipal Manager. Mr Dhluwayo's acting appointment was made in his absence and he did not turn up for the meeting.

[16] Councillor Phiri addressed the meeting and moved a motion of no confidence in the Executive Mayor, Mr Matika. Without any debate whatsoever the motion was carried unanimously. Councillor Thabane of the ANC was elected as Acting Executive Mayor unopposed. He was thereafter congratulated by councillors representing the ANC, the DA, the EFF and an independent councillor respectively.

[17] Mr Matika refused to accept the outcome of the meeting contending *inter alia*, that the meeting was not lawfully constituted and convened and that the

outcome thereof is invalid and or unlawful. On the other hand the DA contended that that meeting was properly constituted and that its outcome is lawful and binding on Mr Matika. This dispute led to the DA launching its application to have Mr Matika vacate the office of Executive Mayor and that councillor Thabane assume the responsibilities of Acting Executive Mayor. On the other hand Mr Matika brought his application to interdict those that want him to vacate his position of Executive Mayor and to have the proceedings of the meeting reviewed and set aside.

[18] The DA and the Acting Speaker have different versions about what was said during the Whips meeting, and on what note and understanding the Acting Speaker left. On the **Plascon Evans**[2] approach the version of the Acting Speaker should prevail, because it is not untenable or far-fetched. As will be seen, it is also consistent with probabilities.

[19] Mr Matika and the Acting Speaker have raised several irregularities, which they say occurred in the process just described. In view of what follows, it is not necessary to consider all of them, because in our view the irregularities that occurred as regards the convening of the meeting and notice to councillors and that were raised by both Mr Matika and the Acting Speaker are of such a nature that the applications can be disposed of on the basis of those irregularities alone.

**CONVENING OF THE MEETING**

[20] It is common cause that the Acting Speaker never convened a meeting for 25 July 2018, and it is not really seriously disputed that only a Speaker or Acting Speaker would have been competent to do so in the present circumstances.

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[2] **Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd**. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

[21] As already mentioned, it is the version of the DA that the Acting Speaker had, at the Whips meeting that took place during the morning of 25 July 2018, undertaken to take the steps required to see to it that a meeting was convened for 12:30 and that no notice was given of such a meeting. As also already mentioned, the version of the Acting Speaker differs from this, and on his version he left the meeting on the basis that he would not convene a meeting.

[22] The probabilities favour the version of the Acting Speaker:

22.1 Firstly, it is a fact that he did not go to the Acting Municipal Manager, as he had according to councillor Phiri promised to do;

22.2 He also never went to the Council chamber, and this fits in with him having left the Whips meeting on the footing that there would be no meeting, and probably on the assumption that the Chief Whips who had attended the Whips meeting would convey this to the councillors who were present in the chamber;

22.3 These actions are not consistent with the behaviour of someone who had undertaken to convene a meeting and to facilitate notice thereof.

[23] It is clear that, in the present circumstances, only the Acting Speaker could convene the meeting.

23.1 Section 29(1) of the **Local Government: Municipal Structures Act**[3] ("*the **MSA***") provides that

> "*The speaker of a municipal council decides when and where the council meets …, but if a majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request*".

[3] 117 of 1998

23.2 It is common cause that the Sol Plaatje Municipality had, as envisaged in section 160(6) of the **Constitution**[4], adopted the so-called "*Standard Rules of Order for Council and its Committees*" ("*the rules*") as a by-law. Rule 6.1 provides that the "*speaker must determine the date, time and venue of meetings of the municipal council*" while Rule 6.7 provides that the "*speaker … must, after receiving a written request signed by a majority of the members of the municipal council, call a meeting of that council*". It is therefore also clear from a proper reading of the Rules that it is for the Speaker to convene a meeting.

23.3 In **Makume & another v Northern Free State District Municipality & others**[5] it was held that "*the statutory power to convene a meeting of a municipal council is ordinarily the statutory prerogative of a council speaker*". It has not been suggested that the present case was an exception and that anyone else would have been competent to convene a meeting.

[24] Ms Mayosi, counsel for the DA, referred us to the provisions of section 37(a) of the **MSA**, in terms of which "*The speaker of a municipal council … presides at meetings of the council*", and argued that, in the absence of a Speaker or an Acting Speaker, or in the event of the Speaker or Acting Speaker not being available to attend the meeting, councillors would be entitled to elect a councillor to act as Speaker for the purposes of a particular meeting, and to preside over such meeting.

[25] Section 41 of the **MSA** does indeed provide for this, but this would surely presuppose that such election takes place at a properly convened meeting, of which proper notice has been given, but which is then left without a Speaker or an Acting Speaker to preside over it. What transpired in the Council

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[4] **The Constitution of the Republic of South Africa Act** 108 of 1996, which provides:
"*A Municipal Council may make by-laws which prescribe rules and orders for-*
*(a) its internal arrangements;*
*(b) its business and proceedings; and*
(c) *the establishment, composition, procedures, powers and functions of its committees*."

[5] [2007] JOL 21038 (O) para [15]

chamber during the afternoon of 25 July 2018 did not form part of a meeting convened by the Acting Speaker, Mr Springbok.

[26] The argument for the DA was that the councillors who were present at the chamber were left with no other option but to proceed with the meeting, even if it had not been convened by the Acting Speaker. As had in fact been pointed out during the discussions in the chamber leading up to the impugned resolutions, there had been the option of obtaining an interdict to compel the Acting Speaker to convene the meeting.

**NOTICE**

[27] Rule 6.3 requires that a Municipal Manager

"*must give at least five … clear working days written notice of the meetings, together with the agendas …, to all members of the municipal council*".

[28] Where the Speaker or Acting Speaker has, in response to a written request in terms of Rule 6.7, convened or called a meeting of the council, the Municipal Manager is enjoined by the provisions of rule 6.8 to

"*give notice of the meeting stipulating the time, date and venue of the meeting by placing a notice to this effect on a notice board situated at the main administrative office of the municipality, and by placing an advertisement in English in one … newspaper circulating in Kimberley*".

[29] In view of the fact that the sole purpose and business of the present meeting was the removal of the Acting Mayor, the provisions of section 58 of the **MSA** are also relevant:

"*A municipal council, by resolution may remove its executive mayor or deputy executive mayor from office. Prior notice of an intention to move a motion for the removal of the executive mayor or deputy executive mayor must be given*".

[30] Notice to members of the municipal council must be effected by dispatching the notice to the electronic mail address or physical address specified by such member in terms of Rle 6.9.

[31] It is common cause that notice of the meeting of 25 July 2018 did not take place in any of the forms referred to above.

[32] As far as Mr Matika himself is concerned, it was submitted on behalf of the DA that he did

> "*not allege that he did not know of the motion of no confidence against him, only that he did not receive formal notice of it*".

This submission is incorrect. Mr Matika did in fact, in his replying affidavit in the Matika-application, deny having been aware of the motion of no confidence against him[6].

[33] Mr Matika would in any event have needed to be aware not only of the intended meeting, but also of the exact time of the meeting, for it to be argued that the absence of a proper notice to him had no effect on his ability to attend the meeting and to deal with the motion of no confidence against him. In **Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another**[7] it was held (at 486 D-G)) that

> "*a person who is entitled to the benefit of the audi alteram partem rule … must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one*".

[34] Even if Mr Matika had become aware of a request for a meeting on 25 July 2018 at 10:00, there is no evidence upon which it can be found that he had, as a fact, also become aware of the new time of 12:30.

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[6] Matika-application: p342, para 23
[7] 1980 (3) SA 476 (T)

[35] It was submitted on behalf of the DA that :

> "*The motion of no confidence must have come to the attention of the ANC Chief Whip. It follows that it ought to have come to the attention of Mr Matika*".

It is, of course, blatant speculation to say that the ANC Chief Whip would have notified Mr Matika of the motion of no confidence after the Whips meeting of the afternoon of 24 July 2018. Why would he have done so if it is undisputed that the Acting Speaker had left that meeting on the note that the meeting that had been requested for 25 July 2018 would not proceed? This would mean that the meeting of that afternoon dispersed on the basis that the motion of no confidence would not be discussed in a meeting the next day. As regards the second request for a meeting, which was made at some time after 11:00 on the morning of 25 July 2018, the question is when the Chief Whip of the ANC would have had the opportunity to notify Mr Matika that the motion of no confidence would then be discussed at the meeting which would take place at 12:30, and in other words within little more than an hour after the Chief Whip had become aware of that fact himself.

[36] In the circumstances there is nothing to gainsay Mr Matika's assertion that he had been unaware of the motion of no confidence. The fact that the motion had also previously been planned, but had never been moved at earlier meetings, does not mean that Mr Matika would have been aware that a motion of no confidence was going to be moved at a meeting to be held at 12:30 on 25 July 2018. Furthermore, it would be reasonable for Mr Matika, by virtue of being an office bearer elected by the Municipal Council, that he be formally served with a notice of the council meeting when his position as such is going to be a subject for discussion.

[37] Even if it could be speculated that Mr Matika was aware of the existence or the possibility of a motion of no confidence against him, there is absolutely no evidence that he would have been aware of the exact contents of the proposed motion.

[38] Even when the Acting Speaker and the Acting Municipal Manager did not arrive at the chamber, and when it must have been very clear to those present that they were not going to come and that in all probability notice hadnot been given of the meeting, no attempt was made to ensure that at the very least Mr Matika, the target of the motion of no confidence, got notice of the meeting.

[39] In her heads of argument Ms Mayosi made reference to the case of **Mojaki v Ngaka Modiri Molema District Municipality**[8], which dealt with a Municipal Manager who had himself frustrated the attempt to give him notice. The case is clearly not applicable in the present circumstances, because there is no evidence here that Mr Matika had frustrated any attempt to make him aware of the meeting scheduled for 12:30 on 25 July 2018, and of the contents of the proposed motion of no confidence.

[40] It was submitted, on behalf of the DA, that

> "*steps taken by the majority of councillors were effective when measured against the object of the Legislature*",

as far as the issue of notice is concerned.

[41] As far as the objects of the Legislature are concerned, it is apposite, in the first place, to refer to the provisions of section 152(1)(a) of the **Constitution**, which provides that one of the objects of local government is

> "*to provide democratic and accountable government for local communities*".

[42] Furthermore, section 160(8) of the **Constitution** provides that

> "*Members of a Municipal Council are entitled to participate in its proceedings … in a manner that-*
>
> *a) allows parties and interests reflected within the Council to be fairly represented;*

[8] [2015] JOL 32541 (LC)

*b) is consistent with democracy; and*
*c) may be regulated by national legislation.*"

[43] As far as national legislation is concerned, we are of the view that the provisions of section 58 of the **MSA** are indeed intended to facilitate and achieve the objects in the **Constitution**, for the simple reason that the democratic right to participate, as intended in the **Constitution**, cannot be exercised by a member or councillor if he/she is unaware of the fact that the meeting is going to take place.

[44] It is not clear what is meant by the submission that the councillors took steps to achieve this object. There is no evidence, or even suggestion, of any attempt by those present to contact and notify either Mr Matika or any of the absent councillors. There is also no allegation that this was in fact not possible.

[45] Ms Mayosi made reference to cases like **Liebenberg NO and Others v Bergrivier Municipality**[9] and **Weenen Transitional Local Council v Van Dyk[10],** and the principle that**,** even if there had been a failure to comply with statutory provisions, the question would remain whether the object of those provisions had effectively been achieved. In the present case, however, the complete failure to give notice to Mr Matika and any of the other councillors had in our view frustrated the object that decisions must be taken in circumstances where all members of a council had been given the opportunity to participate and to debate before voting takes place and a decision is reached. The need for an opportunity to participate and to debate, and the right thereto, were confirmed in the **Makume** case[11]:

"*… in the absence of a proper notice of the intended motion there could have been no valid council resolution to carry the … motion. No council resolution can be taken in a vacuum. A municipal council is an assembly of divergent political parties. These various political parties had their say when the executive mayor was enthroned by popular vote. Those various political*

[9] 2013 (5) SA 246 (CC)
[10] 2002 (4) SA 653 (SCA)
[11] At para's [17] and [18]

*parties ought to have their say when the executive mayor is dethroned. Logically these various political parties in the local assembly cannot democratically have their say in a meaningful way unless they are timeously notified prior to the relative council meeting by way of a written notice of the intended motion … Any councillor or any political party intending to impeach the executive mayor was legally obliged to timeously inform, not only the mayor, but also each and every member of the municipal council of his or her intention to do so. …*

*Certainly it is not enough to say the executive mayor knew beforehand that he was going to be removed. The fact of the matter is that all the councillors irrespective of their political affiliations were also entitled to know. … Respect for law is as important as clean public administration itself. None of the two should be sacrificed on the altar of the other*".

[46] In **Democratic Alliance and Another v Masondo NO and Another**[12] it was held that "*inclusive deliberation prior to decision making*" is required to give effect to section 160(8) of the **Constitution**. In our view it is clear that even if a single councillor was deprived of the right to debate and to participate, because of the absence of notice, the objects of the **Constitution** and of the **MSA** would have been frustrated.

[47] Ms Mayosi argued, with reference to subsections (a) and (c) of section 160(3) of the **Constitution**[13] and subsections (1) and (3) of section 30 of the **MSA**[14], that those provisions require only that a majority of members be present at a meeting and that decisions be taken by a majority vote, and she argued that these objects have been achieved in the present case, because the majority of the councillors were indeed present and because the decision was taken unanimously.

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[12] 2003 (2) BCLR 128 (CC) para [78]

[13] Section 160(3) –

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

*(b) …*

*(c) All … questions before a Municipal Council decided by a majority of the votes cast."*

[14] Section 30 –

*"(1) A majority of the councillors must be present at the meeting of the council before a vote may be taken on any matter.*

*(2) …*

*(3) All other questions before a municipal council are decided by a majority of the votes cast,… ."*

[48] But section 160(3) of the **Constitution** surely presupposes a properly constituted and convened meeting for members to vote at.

[49] On this line of reasoning a group of councillors could hold a "*meeting*", without having given any notice thereof to the remaining councillors, as long as they constitute a majority of councillors. They could then even, if this argument is drawn to its logical conclusion, at such a "*meeting*" take a decision that directly affects a co-councillor and member, like removing him/her from a position like that of Speaker or Mayor, without prior notice to the specific member. Surely the Legislature could never have intended such a situation. The word "*meeting*" in section 30(3) of the **MSA** must surely have been intended to refer to a properly convened meeting, which in turn would necessarily imply that all councillors had received proper notice.

[50] If subsections (1) and (3) of section 30 of the **MSA** are to be read as argued by Ms Mayosi it would render the requirement of prior notice in section 58 of the **MSA** meaningless and also, more importantly, the object of an opportunity for all councillors to participate in meetings would be frustrated.

[51] In **Van der Linde and Others v Prince and Others**[15] it was held that: " … *whilst it is undisputed that the majority of the council members took decisions on 26 February 2018 and that the meeting was quorate in accordance with section 29(1) of the Structures Act 117 of 1998, the decision cannot be valid and binding simply because the majority of the council members were present when the decision to vote the respective council members out of office and into office as contemplated in section 30(3) of the Structures Act 117 of 1998. As earlier stated, this does not [circumvent] irregularities and non-compliance"*[16]. The facts in that matter were very similar to the facts in the present matter. The "*meeting*" had not been convened by the Speaker or Municipal Manager, notice had not been given to all members or to the public in accordance with the Rules of Order of that council and the period between the request that the meeting be called and the stated time for that meeting

[15] Case no: 3535/18 Western Cape Division, handed down on19 June 2018 by Andrews AJ, Unreported.
[16] Para [16]

would in any event have resulted in much shorter notice than required by those rules.

[52] The **Mojaki** case does not provide support for an argument that a valid decision can be taken without any notice at all. What was considered in that matter was short notice, and not an absolute absence of notice, *because it was found that the applicant in that matter had in fact been "made aware of the action which the Administrator intended taking and ….offered an opportunity to make his presentation*"[17].

[53] Ms Mayosi argued that it was the duty of the Acting Municipal Manager to give notice. This is irrelevant for purposes of considering the validity of the meeting, and the consequences of the absence of prior notice. In any event, the absence of the Acting Municipal Manager and of the Acting Speaker at the Council chamber must have made it very clear to everyone there that notice had in fact not been given, and yet the councillors present there decided to proceed and to take the decisions.

[54] In her heads of argument Ms Mayosi submitted that it is undisputed that the Acting Speaker had informed councillor Phiri that notices would be sent out. This is not correct. In his answering affidavit the Acting Speaker stated that councillor Keetile, the Chief Whip of the ANC, told councillor Phiri that, in the event of urgent meetings, 24 hours' notice was required, and also that councillors who were not in the Council chamber also had to be notified of the meeting. We have already alluded to the probabilities in this regard.

[55] Once again, however, even if councillor Phiri had told the councillors in the Council chamber that the Acting Speaker had undertaken to see to it that notices were sent out (which incidentally also does not appear from the transcribed record of the discussions in the chamber), this would not detract from the fact that, in any event, notice had as a fact not been given by the time that the two decisions were taken.

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[17] **Mojaki v Ngaka Modiri Molema District Municipality**, *supra*, para [32]

[56] The deponent for the DA submitted that the absence of notice to members could, in view of the provisions of Rule 6.4, not affect the validity of the proceedings at the meeting. It reads as follows:

"*The fact that any member(s) has/have not received notice of a meeting in accordance with these rules will not affect the validity of any proceedings of that meeting*".

56.1 In our view it is important to note that it is the receipt of notice that is addressed in the Rule, and not the giving thereof. The importance of this distinction becomes clear when regard is had to the provisions of Rule 6.9:

"*Every member of the municipal council must specify in writing an electronic mail address and/or a physical address within the municipal area of Kimberley, where he/she will receive notice of meetings … .* ***Delivery to this address will constitute proper notice of meetings of the municipal council****."* (My emphasis)

56.2 This means that, once a notice has been dispatched to the designated address, the member cannot be heard to complain that it was not received, because dispatching it to that address will "*constitute proper notice*".

56.3 Rule 6.4 must in our view be read in conjunction with Rule 6.9. If a member has chosen an address and the method by which notices can be sent to that member, and dispatching the notice to that address and in that manner then proves to be ineffective, it will not invalidate the proceedings at the relevant meeting.

56.4 That this must be what the Legislature intended is clear, because otherwise any member could challenge the validity of proceedings at the meeting by simply claiming that notice thereof was not received. It

would be almost impossible to prove the contrary. The Legislature could never have intended such an absurdity[18].

56.5 Even if such a notice was really in actual fact not received, for example because of some problem with the electronic mail address specified or because the notice is not delivered to the physical address by the Post Office, the dispatch of the notice will constitute proper service and the validity of the subsequent proceedings will not be affected by the absence of actual receipt of such a notice. The duty to elect an effective method of communication, and the risk of it failing, is on the individual members.

**VALIDITY OF THE PROCEEDINGS OF 25 JULY 2018**

[57] Ms Mayosi argued, with reference to *inter alia* the case of **Unlawful Occupiers, School Site v City of Johannesburg** [19], and the principle that non-compliance with even peremptory provisions will not necessarily be fatal where the object of the relevant legislation had been achieved, that the Rules are mere by-laws and that neither the Rules not the **MSA** provide that non-compliance with their provisions would result in their invalidity.

[58] As already pointed out, however, the objects of the Legislature have in the present matter indeed been compromised by the failure to give notice to all the members of the council and to Mr Matika; a failure which has also offended the *audi alteram partem* principle of natural justice.

[59] Furthermore, the Legislature could never have intended proceedings which had not been part of a properly convened meeting, and which took place in a gathering of a group of members who knew full well that the provisions of the Rules had not been complied with, to nevertheless constitute valid proceedings of the Council.

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[18] Compare **Ngwenyama v Mayelane and Another** [2012] 3 ALL SA 408 (SCA)
[19] 2005 (4) SA 199 (SCA); [2005] 2 ALL SA (108) para [22]

[60] The Rules have, as already mentioned, been accepted and approved by the Council of the Sol Plaatje Municipality, and members of its Council and its officials are therefore duty-bound to comply with the provisions of those Rules as far as meetings are concerned, failing which the proceedings at such meetings will be unlawful[20].

[61] The provisions of the Rules pertaining to notice include words like "*must*" and "*shall*" and are therefore peremptory in nature[21], and in the present circumstances there is no basis for arguing that non-compliance therewith had not affected the objects of the Rules.

[62] The result is that the proceedings at the "*meeting*" of 25 July 2018 were unlawful and invalid and that the decisions taken there fall to be set aside, which would include the resolutions to remove Mr Matika from his position as Executive Mayor and to appoint Mr Thabane as the Acting Mayor.

**ALTERNATIVE RELIEF**

[63] In prayers 4 and 5 of the notice of motion in the DA application it is prayed that, in the event that it is found that the meeting was unlawful and that the resolutions referred to are set aside, the Acting Speaker is ordered to call a special meeting of the council "*within 5 … days*" of the date of the order herein and to place on the agenda of such meeting the motion of no confidence in Mr Matika dated 25 July 2018.

[64] Ms Mayosi conceded that the first request for a meeting had been superseded by the second request, and it was therefore common cause that the basis for such an order would be the second request.

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[20] **Nala Local Municipality and Another v Lejweleputswa District Municipality and Others** [2005] 3 All SA 571 (O) para [9] and [10]; **Van der Linde and Others v Prince and Others**, *supra*

[21] Compare **Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith** 2004 (1) SA 308 (SCA) para's [31] and [32]

[65] It is trite that a Court "…..*should be slow to assume a discretion which has been statutorily entrusted to another tribunal.I*"[22]. In **Doctors for Life International v Speaker of the National Assembly and Others**[23] it was held[24] that "*courts must be conscious of the vital limits on judicial authority*" and "*should not interfere in the processes of other branches of Government unless to do so is mandated by the Constitution*".

[66] The crucial question will therefore be whether the Acting Speaker was wrong to refuse to convene a meeting in response to the second request.

[67] The case for the DA was that the Acting Speaker had no discretion to decide whether or not to convene a meeting, because section 29(1) of the **MSA** enjoined the Acting Speaker to convene a meeting when requested to do so. Somewhat surprisingly (in view of the criticism of the judgment earlier in the heads of argument for the DA) Ms Mayosi relied on the following passage from the judgment in the **Speaker of Bitou Municipal Council v Mbali**[25]

> "*Even if the (Speaker) held bona fide concerns regarding the motivations of the proposed motion or the applicants' failure to notify the (Municipal Manager)of the intention to propose the motion, she was not authorised to ignore her duty in terms of s 29(1) of the (**MSA**) …* ".

[68] This passage, however, clearly part of the discussion by Davis J of the argument advanced by counsel for the applicant. It therefore forms part of an exposition of the argument advanced on behalf of the applicant in that case, and is not part of what Davis J found and decided. This becomes clear when the particular paragraph is read in the context of the rest of the judgment, and especially the paragraph immediately preceding the one relied upon by Ms Mayosi.

[69] In any event, the word "*request*" in section 29(1) of the **MSA** surely presupposes a valid request, as envisaged in the Rules, and such a request

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[22] **Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd** [2013] 1 All SA 526 (SCA) para [42]
[23] 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399; [2006] ZACC 11)
[24] *Ibid*, para [37]
[25] 2014 JDR 1751 (WCC) para [22]

would have had to provide for at least 24 hours' notice before the time of the meeting, and would have had to motivate why there was a need for an urgent meeting and why the normal minimum of five days' notice would not have sufficed.

[70] This is so because section 37(f) of the **MSA** enjoins a Speaker or Acting Speaker to "*ensure that council meetings are conducted in accordance with the rules and orders of the council*"[26]. Rule 6.6 is also very clear in this respect, when it determines that "*the Speaker or in his/her absence the Acting Speaker determines whether any meeting is urgent or not*".

[71] We have already also referred to the **Makume** judgment, in which it was held that councillors cannot by means of a request "*compel (the Speaker or Acting Speaker) to break the law in the process of disregarding time limits*"[27].

[72] We are in agreement with the *dictum* in the **Bitou** case that a Speaker or Acting Speaker who receives a request to call a meeting, would not have to do so on demand, and would be entitled to consider the issue of time and notice[28].

[73] Ms Mayosi went on to argue, however, that the 24 hour notice period had in any event not been applicable, because the motion was one of exigency, as envisaged in Rule 26, which provides as follows under the heading "*MOTION OF EXIGENCY*":

> "*26.1 A councillor may direct the attention of the council to any matter which **does not appear on the agenda**, and **of which no previous notice has been given**, by stating briefly the subject matter and without comment thereon moving 'that the question to which attention has been directed be considered forthwith as a matter of urgency.'*
>
> *26.2 If such motion is seconded and carried by a majority of the councillors present the mover shall be permitted without notice to bring the matter under consideration by way of motion or question, provided that no motion of*

[26] See also Rule 3.3: "*The Speaker must: ensure that meetings are conducted in accordance with these Rules of Order*".
[27] **Makume & another v Northern Free State District Municipality & others**, *supra*,para [15]
[28] **Speaker of Bitou Municipal Council v Mbali**, *supra*, para [26]

*exigency shall be in order during the consideration of any other matter."* (My emphasis)

[74] The first question to be considered is therefore whether the motion of no confidence against Mr Matika was included in an agenda for the particular meeting. The minutes of the meeting do not make mention of any agenda. However, when regard is had to the transcribed record of the discussions in the Council chamber that afternoon, it appears that councillor Stout made mention of an agenda and pointed out that it erroneously describes the meeting as an "*Ordinary Council Meeting, 1st August 2018*"[29]. It was then "*recorded*" that the motion was in fact one of exigency, and it was then tabled by councillor Phiri.

[75] There are also several other references to an agenda in the transcribed proceedings. After councillor Wesley requested that "*a quick agenda*" be prepared, counsellor Stout remarked that the agenda needed to be "*signed off*" and said that he would "*sign (his) just to keep it safe on record, the agenda*"[30]. At a later stage counsellor Phiri pointed out that his documents were not correct "*in terms of the agenda*". He suggested certain corrections and remarked that he thought that "*the agenda item would then be fine*"[31].

[76] The document that was referred to does not form part of the record of proceedings that has been submitted. It would appear, from the discussion that it may very possibly have included the motion of no confidence as an item of business to be discussed.

[77] In our view the provisions of Rule 26 are intended for a scenario where a meeting had been convened properly, where there is a proper agenda for that meeting and where the specific item is not included in that agenda, but needs to be discussed urgently.

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[29] Matika-application: p179
[30] Matika-application: p 204
[31] Matika-application: pp 215-216

[78] Whether or not there was an agenda that included the motion of no confidence as an item of business, it is very clear that in the present case the meeting had been sought exclusively for the purpose of dealing with the particular motion. This is therefore not a case where the meeting was called or sought for other items of business, and where the motion of no confidence thereafter arose as an urgent issue that needed to be debated and resolved.

[79] Furthermore, the definition of a motion of exigency envisages that there must have been "*no previous notice*" of such an issue or motion. Here the councillors who signed the request for the meeting did, on the DA's own version, prior to the meeting know that precisely this motion was going to be considered. It can in no way, on the papers in this matter, be said that the councillors who were present in the Council chamber did not have notice of the motion of no confidence.

[80] The issue in the present matter is in any event not really about an urgent motion, but rather about an urgent meeting.

[81] Ms Mayosi criticised the **Bitou** judgment insofar as it was found that the provisions of section 29(1) of the **MSA** could not be interpreted to mean that a Speaker or an Acting Speaker would have to convene a meeting "*on demand*", regardless of the period of notice that such a demand would allow for. It was argued that Davis J had conflated the issue of the calling of a meeting with the issue of the scheduling of a motion, and that different procedures apply to the two scenarios. However, in the present matter the request for the meeting and the scheduling of the motion of no confidence coincided, and the demand for a meeting with effectively no notice amounted to a demand for the scheduling of a motion with effectively no notice. Like in the present matter, the "*sole purpose of the request for a meeting*" in the **Bitou** case was also to move particular motions[32]. In our view the **Bitou** case is therefore in point and was correctly decided.

[32] **Speaker of Bitou Municipal Council v Mbali**, *supra*, para [17]

[82] It follows that in our view the Acting Speaker was completely within his rights to consider the issue of notice and to refuse to convene a meeting for a time which would have left less than 90 minutes within which to notify all members of the council and the public.

[83] On this basis alone the alternative relief cannot be granted.

[84] There is, however, in any event the further problem that Rule 6.3 requires "*at least*" five days' notice for non-urgent meetings. Shorter notice would be possible in cases where an urgent meeting is called for by a majority of councillors, but then there would have had to be at least 24 hours' notice[33] and it would be for the Speaker or Acting Speaker to determine whether there is sufficient urgency to deviate from the requirement of "*at least*" five days' notice, as required by Rule 6.6. A period of "*within five days*", as provided for in the prayers seeking the alternative relief, would therefore not comply with the normal period of notice required by the Rules, and no case has been made out that the issue is more urgent than that and that the Acting Speaker or Speaker should be compelled to call a meeting with a shorter period of notice.

[85] In any event it would, as already pointed out, be for the Speaker or Acting Speaker to decide whether such urgency exists, once a request for such a meeting is submitted.

[86] It is also not known to this Court whether the councillors who had called for a meeting to be held on 25 July 2018 for the purposes of the consideration of a motion of no confidence in the Executive Mayor, at this stage still wish that such a meeting be held and that such a motion of no confidence be discussed. There is no evidence to this effect before us.

[87] It follows that we are of the view that there is no reason why it should not be left to the councillors to decide whether such a request should again be submitted and, if so, why it should not be left to the Speaker or Acting Speaker to decide whether such a request should be granted.

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[33] Rule 6.5

**COSTS**

[87] As far as the Matika application is concerned, there is no reason why costs should not follow the result. It has also not been argued that the costs of 31 July should not be costs in the cause.

[88] It was argued that the DA, the only party that opposed that application, should be ordered to pay such costs on the attorney and client scale. The basis of this argument was that it is clear from the transcription of the proceedings in the Council chamber leading up to the two impugned resolutions that there was a realisation that the meeting may be unlawful, and that it was nevertheless decided to proceed.

[89] The fact is, however, that it cannot on the papers be said that this was the attitude of only the DA councillors that were there. So, for example, councillor Stout also said, after the legal pitfalls had been raised,

> "*we must continue with this meeting. Where there is legal stuff, we are here today, we are the majority. So for me it's best we continue now. Whatever legal court and whatever we will see it afterwards*".

Other councillors who were apparently also not DA members and who had also heard the legal concerns raised there, also supported the notion that the meeting nevertheless be proceeded with. In the end it was in fact unanimously decided to do so, and it is common cause that members of all political parties were present. To hold only the DA responsible for that decision would therefore be unfair.

[90] When the contributions of some of the councillors to this discussion are read in isolation, their attitudes could be seen as cavalier and reckless as regards the validity of the meeting and of the decisions that they were about to take, and the possible legal ramifications. However, when they are read in the context of everything that was said there it appears that there was at that

stage a legitimate concern for the safety of Kimberley, its residents and their property.

[91] It was put on record that the "*community out there (was) up in arms*" and were "*already busy starting to come into town*", that the councillors present had taken a risk to be there and that it was urgent that the meeting be proceeded with

> "*in the interest of the communities out there to avoid having another shutdown that will cripple the economy of the Municipality and will not only hurt the Municipality, business out there, children will not be going to school, a lot of people will be affected by this shutdown*" and that the "*community (had) given (them) a deadline of Wednesday, the 25th to come up with a solution and that the Mayor refuses to withdraw or to resign from his position to accommodate the request from the community*".

[92] When the proposals to proceed with the meeting regardless of the legal consequences are seen against this background, it could be argued that they were misguided rather than reckless. For the same reason we are of the view that the DA's opposition in this application, and its own application, cannot be said to have been vexatious or mala fide.

[93] We have therefore come to the conclusion that it would be unfair to award a punitive costs order against the DA in the Matika application. The costs that would be awarded in this matter are costs on party and party scale.

[94] This brings me to the DA application, and its costs. Although the DA did not in its application seek a costs order against the Acting Speaker in the event of him not opposing that application, it did as alternative relief seek an order to compel him to convene a meeting. In view of the conclusion to which we have come as regards the Acting Speaker’s role as seen on the available evidence, he cannot be blamed for opposing the DA application and is therefore also entitled to his costs therein.

[95] It is true that Mr Matika would not have been entitled to ignore the resolutions to substitute him with Mr Thabane simply because he believed them to have been adopted at an unlawful meeting[34]. In our view, however, the fact that Mr Matika had not immediately vacated his office upon becoming aware of the resolutions (a day or two after the meeting) could in all fairness not be seen as him simply ignoring the resolutions. It is clear that he immediately took steps to not only challenge the meeting and the resolutions on review, but also to legalise his continued occupation of that office pending the outcome of the review by means of an interim interdict.

[96] While it is possible that the DA application was prepared and lodged without knowledge of Mr Matika's intended application, the fact is that the DA then persisted with its application even after councillor Matika's application was lodged. In persisting with its application after the agreement of 31 July 2018 the DA was in effect seeking final relief in the form of an order that Mr Matika vacate his office. One wonders if it would not have been wise for the DA to have postponed its application, and the filing of answering affidavits by any respondents who opposed that application, and to await the outcome of the review application. In the circumstances councillor Matika was within his rights to oppose the DA application and is entitled to his costs therein.

[97] It is true that the contents of Mr Matika's answering affidavit are to an extent the same as that of his founding and replying affidavits in the Matika application, but this would be an issue for taxation and not for this Court.

The nett result would be that the DA is ordered to pay Mr Matika's costs in the Matika application on the party and party scale, including the costs of 31 July 2018, as well as the costs of Mr Matika and Acting Speaker in the DA application.

[34] Compare **Merafong City v Anglogold Ashanti Ltd** 2017 (2) 211 (CC)

**ORDER**

[98] In the result the following orders are made:

99.1 The Application of the Democratic Alliance in case no: 1858/18 is dismissed with costs. (The costs referred are for Mr OM Matika and the Acting Speaker).

99.2 The Application of Mr OM Matika succeeds.

i) The meeting held on 25 July 2018 titled "*Special Council Meeting*" is declared unlawful and set aside.

ii) All resolutions reached during or at that meeting are declared invalid and set aside.

iii) The Democratic Alliance is ordered to pay the costs of Mr OM Matika.

LP Tlaletsi
Judge President

CJ Olivier
Acting Deputy Judge President

**APPEARANCES:**

For the Democratic Alliance: N Mayosi and K Harding

Instructed by: Duncan & Rothman Attorneys
Kimberley

| | |
|---|---|
| For Mr OM Matika: | A Stanton |
| Instructed by: | Thomas Kouter Attorneys<br>Kimberley |
| For the Acting Speaker: | F Peterson |
| Instructed by: | Mjila and Partners Attorneys<br>Kimberley |