

IN THE HIGH COURT OF LESOTHO

Held in Maseru

CIV/APN/275/2019

In the matter between:

MPHO MOLOI	1 ST APPLICANT
THOLANG SEFOJANE	2 ND APPLICANT
LEBOHANG RAMATHE	3 RD APPLICANT
NTHABELENG NTSASA	4 TH APPLICANT
TLALI LEBESA	5 TH APPLICANT
THABO HLEHLISI	6 TH APPLICANT

AND

MINISTER OF LOCAL GOVERNMENT	1 ST RESPONDENT
HON. LITSOANE LITSOANE	2 ND RESPONDENT
P.S MINISTRY OF LOCAL GOVERNMENT	3 RD RESPONDENT
MASERU CITY COUNCIL TENDER BOARD	4 TH RESPONDENT
ATTORNEY GENERAL	5 TH RESPONDENT
BUSETSA KHUTLISI	6 TH RESPONDENT
VUYANI MACHABA	7 TH RESPONDENT
METSING MOTHETSI	8 TH RESPONDENT
MATSOLA MASENKANE	9 TH RESPONDENT
NTJANA NKOBO	10 TH RESPONDENT
MPONTSENG KONOTE	11 TH RESPONDENT
THATO KHECHANE	12 TH RESPONDENT
MAMPHO LIBATE	13 TH RESPONDENT
TEBELLO LETHOLA	14 TH RESPONDENT
LEBOHANG KARALA	15 TH RESPONDENT
CHIEF HLATHE MAJARA	16 TH RESPONDENT
MABOHLOKOA MAJARA	17 TH RESPONDENT
MATAELO MATSOSO	18 TH RESPONDENT

JUDGMENT

Coram : **Honourable Justice E.F.M. Makara**
Date of Hearing : **1st October, 2019**
Date of Judgment : **1st October, 2019**

SUMMARY

Applicants seeking for an order that a disbandment of the Maseru City Council (MCC) Tender Board by the Minister be declared illegal for his lack of legal authority to do so and unlawful for not giving the hearing before reaching a decision adversely affecting their status as members of the Board. Respondents maintaining that the Minister was statutorily authorized to do so and due to the exigency on the ground he had a discretion to dispense with the *audi altera partem* principle. Held:

1. The Minister had no legal authority to dissolve the Board and by so doing infringed the common law principle of legality;
2. There were no averments in his answering affidavit that there was an emergency that he was addressing such that he was justified to dispense with the hearing of the Applicants before disbanding the Board and, therefore, ending their status therein.
3. Some of the prayers allowed while others were disallowed for their defectiveness on both form and content

ANNOTATIONS

CITED CASES

1. **Nthunya Ramabanta v Magistrate Mohale & Another** Civ/ Apn/ 452/2010
2. **Thabiso Molikeng v Maseru City Council & Another** Civ/ APN/343/97
3. **Makoala v Makoala** (C of A (Civ) 04/09)
4. **Teboho Mojapela v The Attorney General** CC/07/18
5. **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** CC/07/18

STATUTES & SUBSIDIARY LEGISLATION

1. **The Local Government Act** No. 6 of 1997
2. **Local Government Service Act** No. 2 of 2008
3. **The Urban Government Act** No. 3 of 1983
4. **Local Government Regulations 2005** Legal Notice No. 48 of 2005

MAKARA J

Introduction

[1] The applicants have through a Notice of Motion sought for an urgent intervention of this Court by ordering that: -

1. That the rules of this Honourable Court relating to normal modes and periods of the service be dispensed with on the basis of the urgency of the present application.
2. That a rule nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why an order in these terms shall not be made final: -
 - a) That pending finalization of these proceedings the first, second and third respondents be interdicted from interfering with the applicants in respect of any of their rights and privileges which include but are not limited to right to earn monthly salary, occupation of houses they currently occupy, use of premises assigned for executing normal duties in the course of appointment as Councillors.
 - b) That pending finalization of these proceedings the first, and second respondents be interdicted from proceeding with the disciplinary case against the first applicant in respect of the events covering the period of 30th July to the 4th August, 2019 with holding a press conference on the 30th July, Meeting of the 1st August, exercise of freedom of speech in a public meeting in Mafeteng on the 4th August 2019.
 - c) That pending finalization of these proceedings The first, second and third respondent be interdicted from appointing people to be members of the Tender Board of Maseru City Council.
 - d) That the investigation process intended against the first applicant and which are instigated by the first respondent or his Ministry be reviewed, corrected and set aside.
 - e) That the first respondent be interdicted from proceeding with the investigation process based on letter dated 5th August 2019

which invites the first applicant to a disciplinary hearing on the 12th and 13th August 2019.

- f) That the provisions of Regulation 23 of the Local Government Regulations 2005 be declared null and void for providing ground for violation of the cardinal rule against bias.
 - g) That it is declared that the Minister of Local Government made the decision to disband the applicants' composition as members of the Tender Board of Maseru City Council without a hearing.
 - h) That the decision of the Minister of Local Government to disband applicants' composition as members to the Tender Board of Maseru City Council is null and void *ab initio*.
 - i) That the applicant be reinstated to their position as members of the Tender Board of Maseru City Council with all related benefits.
 - j) That any decision made by the "Tender Panel" of Maseru City Council established in terms of the external Circular No.21 of 2019 dated 26th July 2019 is null and void *ab initio*.
 - k) That the applicants have a right to occupy the houses they have been in occupation of as proper members of the MCC.
 - l) That Regulation 23 of the Local Government Regulations 2005 read with Clause 11 (7) be reviewed, corrected, set aside and struck off from Legal Notice No. 48 of 2005.
 - m) That the respondents should pay costs of suit in the event of opposition.
3. That Prayers 1, 2 and 2 (a), (b) and (c) be granted and should operate with immediate effect as an interim relief.

[2] At the commencement of the hearing of the matter on the 13th August 2019; the Court suggested to the parties to consider exploring prospects for a settlement. In that respect, emphasis was laid on the imperativeness of maintaining mutuality of respect,

discipline and order within the Maseru City Council (MCC) for it to peacefully and efficiently execute its statutory mandate. They undertook to persuade the parties to amicably resolve the impasse. Consequently, in that commendable spirit, they logically agreed that in the meanwhile, some of the immediately pertinent interim prayers for the maintenance of the *status quo* be granted and the Court accordingly ordered thus:

1. 1st and 2nd respondents will not proceed with the disciplinary case against 1st Applicant *pedente lite*;
2. 1st Applicant will continue to occupy the house which she occupies by virtue of her being Mayor of the MCC.
3. All the benefits pertaining to the Applicants will not be disturbed until finalization of this case; and,
4. The case be postponed to the 20th August 2019 for further considerations.

[3] On the 20th August 2019; the parties told the Court that they were still considering prospects for settlement and that they would provide information on the progress on the 21st August 2019 which was the following day and the rule was extended thereto. On that day the counsel for the parties respectively advised the Court that regrettably the parties have ultimately agreed to disagree on all the material issues. Then, the Court set the times for each party to file the remaining papers and the hearing date was rescheduled for the 11th September 2019.

[4] On the said 11th day, Counsel for the Applicants alerted the Court that the Applicant has complained to him that whilst this matter is pending, there is a move for a passing of a vote of no confidence against her as a Mayor. He told the Court that he responded to the information by writing a letter to the Town Clerk and all members of the Council alerting them that such a move would be unlawful since it would undermine the *sub judice* principle.

[5] He, nevertheless, lamented that the members of the Council ignored his letter and proceeded on with a successful passing of a vote of no confidence against the 1st Applicant. Resultantly, she was succeeded by Chief Hlathe Majara who purportedly according to her, substituted her as a Mayor. He stressingly demonstrated that this development is relevant for consideration since it is effectively intended to frustrate and defeat the ends of justice in the matter.

[6] Mr. Poopa for the 3rd and 4th Respondents reacted to the above charge connected with the *sub judice* principle by contending that there is no nexus between those developments and the present matter. The Court interjected by appealing to both counsel to reflect profoundly on the polemics concerning the nexus between the development and the *sub judice* rule in the matter. Side by side with that, the Court impressed it upon both counsel to be guided by their ethics and oath of office as lawyers since they

primarily owe their duty to the Court and secondarily, to their clients. To complement its concern, it invited the counsel to file supplementary affidavits over the matter in order to facilitate for the argument on the same.

[7] The Court appreciates that the counsel for the applicants made reference to the passing of a vote of no confidence against the 1st Applicant in order to raise a point of law which can be formally raised at any stage. It is on that account that it allowed them an opportunity to file relevant affidavits regarding that point and to prepare arguments on it. This would be subsequently addressed in the appropriate part of this judgment.

[8] It should at this juncture, be projected that the 3rd and the 4th Respondents never filed their answering affidavits but only raised points of law which were all dismissed by the Court. It was on that account that Counsel for the Applicants vehemently argued that by operation of Rules 8 (10) (a) (b) and (c) of the Rules of this Court, they have lost *locus standi* to interrogate the merits of the case. In support of the proposition, he made reference to the case of **Nthunya Ramabanta v Magistrate Mohale & Another**¹. The Court upheld the point. So, reference to the Respondents shall, save where the contrary is indicated, apply to the 1st and 2nd Respondents.

¹ Civ/ Apn/ 452/2010

[9] In synopsis terms, the case of the Applicants is primarily that the 1st Respondent who is a Minister of Local Government, had no legal authority to have disbanded the Tender Board in which the Applicants are members; the lawfulness or legality of the disciplinary hearing against the 1st Applicant, the lawfulness of the disbandment or dissolution of the Tender Board and the validity of Regulation 23 of Local Government Regulations 2005 read with Clause 11 (7) thereof².

[10] A subsequent corresponding complaint raised by the Applicant was that the Minister had reached the decision without having accorded the Applicants a hearing yet it had an adverse impact upon their rights to remain members of the Tender Board.

[11] In response, counsel for the Respondents counter argued that the Minister has the powers to have dissolved the Tender Board and to have initiated a process towards a disciplinary hearing against the 1st Applicant. He in support of that argument, attributed the powers and authority of the Minister to Section 92 and 93 of the Local Government Act³ read with Section 12 of the Local Government Service Act⁴.

² Legal Notice No. 48 of 2005

³ No. 6 of 1997

⁴ No. 2 of 2008

[12] Another salient point advanced for the Respondents was that there was no need in the circumstances for the Minister to accord the Applicants the *audi alteram partem*. The reasons presented were that the Applicants have not acquired any status by virtue of their membership of the Board since it was unlawfully constituted and that what the Minister intended to do was merely to regularise its composition and constitution. In addition, he cautioned that the law allows for a dispensation from compliance with the requirement of hearing a person before a potentially adverse decision could be taken against him where the exigency of facts on the ground so justifies. It was then submitted that this is a typical case which justifies a departure from the principle rule since a mere fact that the Board was not lawfully comprised and established would expose the MCC to a litigation regarding its actions. In conclusion it was explained that the intervention by the Minister was intended to avert a potentially dangerous eventuality.

[13] In rhythm with the identified key controversy concerning the legal authority of the Minister to have dissolved the Tender Panel, the Court has thoughtfully addressed its mind to the provisions of sections 92 and 93 of the Local Government Act⁵ read with Section 12 of the Local Government Service Act⁶. It should be remembered that this are the provisions which according to the counsel for the Minister, empowers him to have exercised the powers. It would at

⁵ No. 6 of 1997

⁶ No. 2 of 2008

this stage be appropriate to cite their provisions in *seriatim*. Section 92 provides:

All proclamations, orders, notifications and by-laws of, or affecting, any Council and published under any enactment repealed by this Act, and subject to section 74 all posts, offices, appointments, contracts, assessments, valuations, documents, licences, created or made or granted, rates and taxes imposed by any Council under any enactment shall so far as they are not inconsistent with the provisions of this Act, continue in force and to be deemed for all purposes to have been published, created, made, granted, imposed, as the case may be, under this Act.

While Section 93 stipulates:

In connection with the preliminary arrangements necessary for bringing this Act into operation, and for such other period as the Minister may deem necessary, either generally or with reference to any special matter or matters either throughout Lesotho or in any specified place or area, the Minister, by Notice published in the Gazette, may issue all such directions as he may deem necessary with a view to providing for any unforeseen or special circumstances, or to determining or adjusting any question or matter for the determination or adjustment of which no provision or no effective provision is made by this Act.

And, Section 12 of the Local Government Service Act is configured:

- (1) Subject to provisions of the constitution and of this Act or any other written law relating to the Service the Minister may (subject to prior concurrence of the minister responsible for finance in respect of any matter involving the expenditure of public funds) do what in his or her opinion is necessary or expedient for giving effect to the object of this Act or for enabling effect to be given thereto.
- (2) Without limiting the generality of sub section (1), the Minister may make provision for all or any of the following matters:
 - (a) Policy on the establishment or abolition of department, sub department or office and transfer of functions from one council to another;
 - (b) Employment policy and other policies that relates to human resources, including but not limited to promotions, training and development, offices, relations, retirements, control and organization of councils and departments;

- (c) Policy for effecting administration, remuneration and benefits, job evaluation and job creating;
- (d) Policy for effecting economics of scale and promoting responsiveness and provision of quality service in the Service;
- (e) Policy for local government service transformation and reforms;
- (f) Policy on norms, standard and matters relating to conditions of employment and general welfare of officers;
- (g) Policy determination with regard to code of conduct, performance management, discipline and other career incidents of the officers including any other matter which relates to the promotion of harmonious relationships between the employer, officers, officer's representatives and management within the Service;
- (h) To declare fixed establishment with the concurrence of minister responsible for finance;
- (i) To classify into classes or grades posts in the service and to determine qualifications necessary for appointment to any such post or to post of any class or grade and to revise or adjust with effect from such date as may determine any scales so fixed.

[14] Sections 92 and 93 do not either expressly or impliedly radiate an interpretation that they bestow authority upon anyone including in particular the Minister of Local Government. To be more specific, they do not in any manner, whatsoever, give the Minister the authority to disband the Council. It is inconceivable how the counsel for the Respondents assigned such a construction to it while it does not by any stretch of imagination do so.

[15] *Prima facie*, Section 12 could superficially be interpreted to entrust upon the Minister powers to exercise over a plethora of matters of the MCC ranging from formulation of policies covering a wide spectrum of its statutory terms of reference, operations, performance assessment, innovations etc. This notwithstanding, its profound reading reveals that its foundation is that these powers are excisable where there are financial implications involved. It is

for that reason that in that respect the Minister must secure concurrence from his counterpart responsible for the Ministry of Finance. This is a mandatory procedural imperative which the Minister should have complied with in terms of the section.

[16] A corresponding substantive problem is that in any event, the section does not empower the Minister to exercise the powers envisaged therein, to dissolve the Tender Board. The latter is not an office, officer, management, department etc. If indeed in disbanding the Tender Board he executed his authority pursuant to powers under the section, he acted *ultra vires* its parameters.

[17] Consequently, mere finding by the Court that the Minister dissolved the Board without a convincing reference to any legal provision that sanctions the measure, is indicative that he also violated the common law principle of legality. This is one of the integral elements of the rule of law since it requires that there must be a law that constitutes basis and justification for an act or decision which could impact adversely against the existing or prospective rights of a person.

[18] The Court dismisses as *non scripto* the submission for the Respondents that the Applicants have not acquired any status and the rights thereof because according to them the Board itself was illegally constituted and composed of unqualified people. It is

instead, found that they had for whatever period of time they held the membership, assumed status of membership of the MCC Tender Board unless a court of competent jurisdiction had declared otherwise. The conclusion is made well conscious of the position maintained by the Respondents that the membership of the Applicants is illegal. Even if the Respondents entertained such a conviction, they ought to have lawfully disbanded the Board and thereby lawfully dissolved it. The Court considered the subject against the backdrop of the common cause fact that the Applicants had assumed the membership of the Board by virtue of the practice that had previously and at all material times obtained within the MCC. It should simultaneously be realized that there is no charge whatsoever, that the Applicants had employed any criminal methods to become members of the Board. Even if that was so, the matter would still have to be lawfully approached since criminals as well have rights.

[19] The multi-dimensional meaning of the status ascribed to by this Court receives support from the British Dictionary definitions of status. It reveals it as:

1. a social or professional position, condition or standing to which varying degrees of responsibility, privilege, and esteem are attached
2. the relative position or standing of a person or thing
3. a high position or standing; prestige: *he has acquired a new status since he has been in that job*
4. the legal standing or condition of a person

5. **a state of affairs**⁷ (Court's Emphasis)

[20] The underwriter here is that although the term is used for high or low standing, it is mainly used to imply a position of prestige.

[21] It would suffice to be cautioned that the dictionary definition referred to in the preceding paragraph, does not envisages remuneration as a requirement for one to be considered to have attained status. Noticeably, it has proven difficult to locate a case where a definition of status became a legal controversy for adjudication. This is because there has hardly ever been a need for a debate on that otherwise quite understandable phenomena.

[22] The Respondents totally misconceive what constitutes *status* and the different context in which the concept is employable. The orthodox meaning is ascribed to achievement of a position through qualifications of different types including academic credentials, experience, appointment on merits, political appointment, recognition of achievements in life etc. A different dimension of status is the one attained through a function or role performed by a person as an individual or by a group of officials or ordinary people.

⁷ <https://www.dictionary.com/browse/status>

[23] It is further an incorrect proposition of law by the Respondents that the Applicants did not attain status because they were not remunerated or paid allowances for their membership of Board. This is immaterial since what is of significance is the membership. This *per se*, enhanced their personal dignity and a sense of achievement. In a nutshell, they enjoyed a sense of being trusted and, thereby, augmenting their *curriculum vitae* for being considered for appointments to the membership of similar boards in future. A reality is that there are few people all over the world who ever become members of a Board or function in that capacity either by default as in the instant case or through a substantive appointment that lasts for a long period.

[24] It emerges from the papers before Court that it was never originally the case of the Respondents that there were exceptional circumstances which warranted the Minister to dispense with compliance with the rules of natural justice in reaching his decision. This featured for the first time in the arguments. It had never been pleaded in the answering affidavit. Most significantly, there are no expressly pleaded facts demonstrating that there were exigencies which by operation of a specified legal provision justified a disregard of the God given blessing upon every mankind that a person should be heard before any adverse decision is taken.

[25] It became difficult for the Respondents to identify a paragraph in which they had **explicitly** stated in their answering

affidavit that the Minister dispensed with the natural justice procedure to have accorded the Applicants a hearing due to a clearly stated exigency on the ground. Instead, they wanted the Court to infer that from a number of paragraphs in which there was no specific identification of a state of emergency they pleaded which justified the Minister to dispense with the *audi alteram partem* right of every human kind.

[26] Now the Court addresses the point of law introduced by the Applicants that the MCC has undermined the Court order through which by consent of the lawyers for both sides, it was ordered that the *status quo ante* pertaining to the Counsellors and the Mayor be reinstated pending finalization of this case. The charge was premised upon a common cause development that after the order was made, the Counsellors passed a vote of no confidence against the Respondents. It is in that context that the counsel for the Respondents maintained that the 1st Applicant has since the incidence seized being Mayor and that there is no nexus between the passing of a vote of no confidence against the 1st Applicant and the said order of Court. A consequent suggestion is that the Court has not been undermined by the voting.

[27] The Counsellors who passed a vote of no confidence against the 1st Respondent are an integral component of the MCC. They in that capacity ought to have been aware of order reinstating the 1st Applicant to her Mayoral office inclusive of the antecedent rights

and privileges and then withheld whatever power they believed they had pending finalization of this case. They should further have realized that the move would resultantly frustrate the proceedings before a court of law. It is of cardinal importance for the maintenance of the rule of law that the judgments of the courts should be respected and honoured. Here a fear is that the Counsellors simplistically sought to circumvent the interim judgment of the Court. As leaders they should be exemplary in respecting decisions of the courts since tomorrow they may in the event of change of fortunes, find themselves in a similar situation as the Applicants and seeking the intervention of the courts. They would certainly not be happy if after the judgment is entered in their favour, their adversaries resort to unorthodox tactics calculated towards rendering it impotent. Wise men have inscribed that we must all be slaves of the law in order to be free⁸.

[28] Perhaps, it would be wise for the Respondents to receive guidance from a decision in **Thabiso Molikeng v Maseru City Council & Another**⁹. A relevant part of that judgment is where Ramolibedi J (as then was) laboriously cautioned that the laws of the MCC, do not provide for a *vote of no confidence* motion against a Mayor and that where the move succeeds, it has no binding effect upon the incumbent. It was concluded that a concerned Mayor could only vacate the seat if his/ her conscience dictates so¹⁰.

⁸ Marcus Tullius Cicero www.statusMind.com

⁹ Civ/ APN/343/97

¹⁰ *Ibid* @ page 31

[29] The Learned Judge further pontificated that it is only under the conditions prescribed under Section 10 (1) of the Urban Government Act¹¹ that a Mayor could vacate office. The intention of the Legislature is therein well stated in the heading of the section which is expressed in these terms, “**Disqualification for election or appointment as councillor**” The words render it clear that it is dedicated for providing for the exclusive basis upon which a Mayor should mandatorily leave office. To elucidate that, it provides:

Subject to sub-sections (2) and (3), a person shall be disqualified from being elected or appointed or from continuing in office as a councillor if he –

- (a) holds any office or place of profit,
 - (i) under or in the gift or disposal of the council or is the spouse of a person holding any such office or place of profit; or
 - (ii) under the Government, unless he has the written approval of the head of the Government department in which he is serving;
- (b) is the spouse of a councillor;
- (c) is an unrehabilitated insolvent;
- (d) has been certified or otherwise adjudged to be of unsound mind;
- (e) has been convicted of an offence –
 - (i) relating to corrupt or illegal practices at an election under the provisions of this or any other law, or
 - (ii) under Sections 25, 26, or 94 within five years immediately preceding the date of election or appointment, as the case may be, or since his election or appointment;
- (f) has been convicted of an offence under this or any other law and sentenced to imprisonment, without option of a fine, for a period of twelve months or more, within three years immediately preceding the date of election or appointment, unless he has obtained a pardon;
- (g) is in default of payment of any rates, charges or other debts due to the council for a period exceeding three months after the same shall have become due;
- (h) is debarred from membership of the council as provided 30 in Section 80 (3) (b); or
- (i) himself or his spouse, partner or business associate, has a direct or indirect pecuniary interest (whether by way of

¹¹ No. 3 of 1983

participation in the profits or other benefits or otherwise) in any contract with the council or work being done or to be done for the council.

(2) Sub-section (1) (i) shall not apply in respect of –

(a) any contract entered into or work undertaken by a company, co-operative company, or co-operative society incorporated or registered as such under any law, merely by reason of the fact that such a person or his spouse partner or business associate is a director, shareholder; stockholder, employee or agent of such company, co-operative company or co-operative society, unless such company is a private company as defined in the Companies Act, 1967, or such person either by himself owns, or together with his spouse or minor children or both control, more than one half of the shares or stock of such company, co-operative company or co-operative society;

(b) the purchase of anything sold by the council by public competition;

(c) the purchase by the council of anything at a public auction;

(d) the supply of goods or services commonly supplied or rendered by the council to the public at a charge fixed by the law or resolution of the council; or

(e) the purchase or holding of council stock.

(3) The Minister may, if satisfied that it is desirable in the public interest, exempt a person from sub-section (1) (i)."

[30] It is clear from the section referred to in the preceding paragraph that there is no provision that the Mayor could be caused to vacate office by reason of a passing of a vote of no confidence against him/her. The common law principle of *exclusio unis exclusio alterius*, clearly has a telling effect on lawfulness or otherwise in a move to unseat a Mayor through a passing of a vote of no confidence.

[31] At this juncture, it is worthwhile for the Court to pronounce itself on the effect of the decision by the 3rd and 4th Respondents not to

file their answering affidavit but only raise the points of law which were dismissed by the Court. By operation of the law, a party that has elected to raise points of law without filling the answering affidavit responding to the allegations in the founding affidavit, becomes barred from addressing the merits of the case. This is attested to by the Rule 8 which is schemed:

Any person opposing granting of any order sought in the Applicants Notice of Motion shall –

- (a) Within the time stated in the Notice give the Applicant a notice in writing that the intends opposing the application.
- (b) Within 14 days of notification to oppose the Respondent shall file answering affidavit any other documents he wishes to include.
- (c) If the Respondents intends to raise any point of law without any affidavit, he shall deliver a notice of intention to do so within the time aforesaid setting forth such question.

[32] Thus, by operation of the provisions of the above rule, the 3rd and the 4th Respondents are rendered disqualified from interrogating the merits of the case. The analysis is fortified by that of Majara J (as then was) in **Nthunya Ramabanta v Magistrate Mohale**¹² that:

Where a Respondent in motion proceedings elects to raise a point of law without filing opposing affidavit answering the application, the content in the founding affidavit must be accepted as true since its contents remain unchallenged and must be taken as true¹³.

[33] The Court takes the opportunity to acknowledge the professionalism exhibited by counsel for the 3rd and 4th Respondents

¹²Civ/ Apn/ 452/10

¹³ Ibid paras 6 & 7

Mr. Poopa who conceded the point without unnecessary polemics thereon.

[34] Regarding a point of the non-joinder of the Town Clerk, it was ordered that he be served with the papers for him to consider his reaction. This was directed on the strength of a decision of the Court of Appeal in **Makoala v Makoala**¹⁴ that the Court has discretionary power to order that a person who *ex facie* the papers features to have a direct and substantial interest be served with the papers for him to consider joining the proceeding or otherwise. The Town Clerk was accordingly served with same. Nonetheless, he did not file any counter papers or join the litigation. The end result is that his inertia is indicative that he elected to abide by any decision of the Court.

[35] The Court in considering the prayers to be allowed and those to be disallowed has finally received guidance from the common law notion of Judicial deference which cautions courts not to interfere with the decisions of the Executive where such matters intrinsically belongs to that branch of Government. This applies for instance where the Executive intends to mount investigations against an officer. The court would only refuse such a move where it has been established that it is in pursuit of an ulterior motive. This could be so where there is evidence of a prior utterance or threat

¹⁴ (C of A (Civ) 04/09) [2009] LSCA 3 @ para 6

against the officer concerned under unwarranted circumstances. To illustrate the point, in **Teboho Mojapela v The Attorney General**¹⁵ this Court refused an Application by the Applicant to interdict the Commissioner of Police and/ his subordinates from calling him for questioning at the police headquarters. This was in recognition that the police have an inherent authority to call anyone for questioning where they suspect some criminality. To protect his rights, it was only ordered that he be lawfully treated.

[36] It is of paramount importance that there be understanding why the Court has in its final order decided to refuse prayer (b) but granted prayer (d) in the Notice of Motion. The former has been disallowed because it seeks to unjustifiably deprive the 1st and 2nd Respondents from disciplining any officer who commits a misconduct. It is worthwhile to over emphasize that the Court cannot frustrate the exercise of disciplinary powers entrusted upon relevant authorities of the MCC. If, otherwise, this would unwarrantably undermine the principle of judicial deference as illustrated above. This was well explained in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**¹⁶ that:

[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual

¹⁵ CC/07/18

¹⁶(CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 46

rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.

[37] On the contrary, the Court granted prayer (d) because unlike prayer (b), it strives to uphold compliance with the natural justice maxim against one being a judge in his own cause expressed in Latin words as *nemo iudex in causa sua*. The relevancy of the maxim is that the 1st Respondent is intended to feature in the contemplated investigatory process as its initiator, complainant, potential witness as per Annexure "MM8", and appointing authority of the investigator who would report to him for his final decision. Appreciably, the roles would undermine objectivity and his impartiality which are the essential requirements in Administrative Law justice.

[38] In the premises, the Court concludes that the Applicants have on the balance of probabilities, made a case for the granting of the following prayers in the notice of motion:

- (a) The 1st, 2nd and 3rd Respondents are interdicted from interfering with the applicants in respect of any of their rights and privileges which include but are not limited to right to earn monthly salary, occupation of houses they currently occupy, use of premises assigned for executing normal duties in the course of appointment as Councillors;

- (b) The 1st, 2nd and 3rd Respondents are interdicted from appointing people to be members of the Tender Board of Maseru City Council;
- (c) The investigations process intended against the 1st Applicant which are instigated by the 1st Respondent or his Ministry be reviewed, corrected and set aside;
- (d) It is declared that the Minister of Local Government made the decision to disband the Applicants' composition as members of the Tender Board of Maseru City Council without a hearing;
- (e) The decision of the Minister of Local Government to disband Applicants' composition as members to the Tender Board of Maseru City Council is null and void ab initio;
- (f) The Applicants are reinstated to their positions as members of the Tender Board of Maseru City Council with all related benefits;
- (g) Any decision made by the "Tender Panel" of Maseru City Council established in terms of the External Circular No.21 of 2019 dated 26th July 2019 is null and void ab initio;
- (h) The Applicants have the right to occupy the houses they have been in occupation of as proper members of the MCC;
- (i) The Respondents should pay costs of suit;

E.F.M. MAKARA
[JUDGE]

Counsel for Applicants: Adv. M. A. Molise instructed by
Mukhawana & Co.

Counsel for 1st, 2nd and 5th Respondents: Adv. P.T. Thakalekoala of the Chambers of the Attorney General.

Counsel for the 3rd and 4th Respondents: Mr. C. T. Poopa of Poopa Attorneys.