CASE NO.: SA 18/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MATTHYS JOHANNES CRONJE **APPELLANT**

And

MUNICIPALITY COUNCIL OF MUNICIPALITY OF MARIENTAL **RESPONDENT**

CORAM: Mtambanengwe, A.C.J., O'Linn, A.J.A., Chomba, A.J.A.

HEARD ON: 02/04/2003

DELIVERED ON: 01/08/2003

APPEAL JUDGMENT

O'LINN, A.J.A.

SECTION A: INTRODUCTION

This appeal is against a judgment by the Labour Court.

In view of the extensive nature of this judgment, I have divided the judgment into the following sections:

SECTION A: INTRODUCTION.

SECTION B: FACTS WHICH ARE COMMON CAUSE OR AT LEAST NOT IN DISPUTE.

SECTION C: FURTHER WRITTEN QUESTIONS ADDRESSED TO COUNSEL SUBSEQUENT TO THEIR *VIVA VOCE* ARGUMENT AND THEIR RESPONSE.

SECTION D: THE IMPLICATION OF COUNSELS' WRITTEN CONCESSIONS IN THEIR SUPPLEMENTARY WRITTEN ARGUMENT.

SECTION E: THE FIRST GROUND OF APPEAL: THE FINDING THAT THE LABOUR COURT DID NOT HAVE JURISDICTION.

SECTION F: THE SECOND GROUND OF APPEAL: THE FAILURE OF THE COURT TO DISTINGUISH BETWEEN THE TOWN CLERKS RIGHT TO HAVE HIS TENURE EXTENDED AND HIS RIGHT TO ALTERNATIVE EMPLOYMENT.

SECTION G: CONCLUSIONS IN SUMMARY.

SECTION H: THE RESPONDENT'S DEFENCE OF WAIVER.

SECTION I: THE QUESTION OF COSTS.

SECTION J: THE ORDER OF COURT.

The appellant is one Matthys Johannes Cronje, a former Town Clerk of the Municipal Council of the Municipality of Mariental and the respondent is the said Council.

In the Court *a quo*, the Labour Court, the appellant was the applicant and the said Municipal Council was the respondent. For the sake of convenience I will in this judgment continue to refer to the parties as in the Court *a quo*. Mr. Heathcote appeared for the applicant in the Court *a quo* and Mr. Smuts for the respondent and both counsel continued to appear for the same parties in this appeal.

The applicant applied in the Court *a quo* on notice of motion for the following relief:

> "1. In the event of this Honourable Court finding that the Respondent did take a *intra vires* decision not to retain the Applicant as its Town Clerk (whether or not that decision was taken on 6 December 1999 or 7 February 2000), ordering that the aforesaid decision/s be set aside.
>
> 2. Declaring that the Applicant's appointment as Town Clerk and/or Chief Executive Officer has been extended by the Respondent until 2 (two) years after the next general election as envisaged in Section 27 of the Labour Act, 6 of 1992.
>
> **ALTERNATIVELY**
>
> 3. Declaring that the Applicant is entitled to be appointed, and ordering the Respondent to appoint the Applicant accordingly, as employee of the Respondent on conditions of employment which are not less favourable than the conditions of employment which applied to the Applicant as on 14 February 2000.
>
> **AND IN ANY OF THE AFOREMENTIONED EVENTS**
>
> 4. Costs of suit.

5. Further and/or alternative relief."

Silungwe, President, presided in the Court *a quo* and made the following order on 28 February 2002, after hearing argument and considering the issues:

"1. The respondent's point *in limine*, namely: that the Court lacks jurisdiction, is upheld;

2. in any event, I would dismiss the application in its entirety on the merits;

3. there shall be no order as to costs."

The applicant duly applied to the Court *a quo* for leave to appeal to the Supreme Court against the whole of the judgment and specified the following grounds:

"1. The learned judge erred in finding that the Labour Court does not have jurisdiction to adjudicate upon prayers 1, 2 and 3 of the Applicant's notice of motion.

2. The learned judge erred in not granting, at least, paragraph 3 of the Applicant's notice of motion and more particularly in that:

2.1 the learned judge failed to distinguish between the Applicant's employment as an employee of the Respondent, and the Applicant's employment in the post of the Town Clerk;

2.2 the learned judge wrongly interpreted the phrase ***"entitled to be appointed",*** and should have held that the Respondent is obliged to appoint and/or continue to employ the Applicant, even in

circumstances where his term in the post of Town Clerk has been validly terminated.

4. The learned judge erred in finding that the Applicant should have instituted proceedings in the District Labour Court, as the District Labour Court, in order to determine whether or not there was an unfair dismissal, has to interpret the provisions of Section 27(6)(b) of the Local Authorities Act (which in turn can only be done by the Labour Court)."

Silungwe, P, rejected the application for leave to appeal.

Thereupon the applicant applied on petition to the Chief Justice for leave to appeal against the whole of the judgment of the Court *a quo* on 28th February 2002. The application was opposed by respondent and an affidavit by Chairperson of the Council and Mayor of the respondent, Ms. Beukes, filed in support of respondent's opposition. The Chief Justice granted leave to appeal to the Supreme Court. The relevant part of the order was formulated as follows:

"It is ordered
1. That leave is hereby granted to the applicant to appeal against the whole of the judgment handed down by Silungwe, J. delivered on 28th February 2002, on the grounds as set out in paragraphs 1, 2 and 3 of the application for leave to appeal." (My emphasis added.)

It must be noted that the appeal was not limited to any part of the judgment of the Court *a quo*, but against the whole of the judgment, even though grounds of appeal were listed only under three heads. Leave to appeal was granted on the same basis.

Although the appeal is stated to be against the whole of the judgment, section 21 of the Labour Act limits the appeal to "questions of law". There is therefore

no appeal against findings of fact. Whether or not an issue constitutes a question of law or a question of fact is often a matter of some difficulty.

SECTION B: THE FACTS WHICH ARE COMMON CAUSE OR AT LEAST NOT IN DISPUTE:

1. The applicant was appointed as Town Clerk of the respondent in terms of the Municipal Ordinance 13 of 1963, with effect from January 1, 1991.

1.1 This appointment was subject to a trial period of 3 months.

1.2 After completing the trial period successfully, the Town Council decided to confirm the appointment as a "permanent appointment with effect from 1st March 1991."

1.3 By virtue of this permanent appointment, the applicant acquired the status of most senior official in the Municipal service, and certain additional vested interests, including the permanence of his employment until retiring age of 60, subject to discharge or termination at an earlier date in terms of Chapter (vi) of the 1963 Ordinance. Under the said Ordinance the applicant would only have retired on 1st December 2009, when he would reach retirement age and when he would be entitled in terms of the Rules and Regulations of the Municipal Pension Fund to a gratification and various other perks.

2. Subsequent to Namibian Independence on 21st March 1990 the said Municipal Ordinance was superseded by the Local Authorities Act No. 23 of 1992, on 31 August 1992.

Applicant was thereupon, in accordance with section 27(6)(a), deemed to have been appointed as Town Clerk in terms of subsection (1)(a) of section 27 of the 1992 Act, but subject to subsection (3)(a)(i)(bb) of section 27.

3. In a letter by the Chairperson of the respondent Council dated 4/9/94, the applicant was notified as follows:

> "In terms of section 27 of the Local Authorities Act, 1992, you are hereby informed that Council resolved to retain you as their Chief Executive Officer, as prescribed in the said Act.
>
> Please inform Council within one month of the date of this letter if you are prepared to take up responsibilities as Chief Executive Officer as in the past."

3.1 This letter was apparently written in purported compliance with subsection (3)(b)(i) of section 27 of the said Local Authorities Act, which provides for 2 months notice to the incumbent or the decision of the Council whether to extend or not to extend his tenure.

4. In a letter dated 19th November 1999, the Chairman of the Management Committee of the respondent addressed a letter to respondent which reads as follows:

"Re: Term of Contract
According to Section 27(3)(a)(i)(aa) of the Local Authorities Act of 1992, your contract as Chief Executive Officer of the Mariental Municipality ends in mid February 2000. As prescribed under the same section (Section 27(3)(b)(i), Council has to notify you two months before your term ends whether your contract will be extended or not.

... Management Committee to make a recommendation to the council on this matter, we would like you to inform the Management Committee in writing whether you want to enter into a new contract with the Council of the Municipality of Mariental or not. If you want a new contract, kindly state why the Management Committee should make a recommendation to council why your contract should be extended.

The next Management Committee meeting is scheduled for November 29, 1999. We would appreciate it if you could give us an answer at that meeting."

4.1 The minute of the Management Committee item 215/11/49 recorded the following Resolution of the Management Committee:

"2.2 <u>The Town Clerk: Resolution 199/11/99(g)</u>

1. Please refer to Item 179/10/99.
2. As page 23 is a request from the Management Committee. The Town Clerk responds as follows:

"No reason came to mind why the incumbent of the post of Town Clerk services should not be retained for the next five years.

During his term of Office, he for example:

a. contributed formally and informally to the development of Mariental;
b. was involved by the GTZ in training councilors and town clerks;
c. functioned as a resource person to Villages in the Region and Rehoboth;
d. executed council resolutions, gave advice and initiated new plans of action;
e. is accepted by the local community at large.

It is the opinion that he is still able to contribute, assist and or ensure that:

a. Council retains a productive workforce and that goals are met; and that
b. Mariental do develop to the benefit of all residing at Mariental.

This however is subject to Council's expectations of the task and role of their Town Clerk as well as goals set for development of the town and the utilization of Council's workforce. This should be embodied in, if needed, an amended duty schedule.

3. For discussion."

4.2 The resolution numbered 215/11/99 on the same day reads as follows:

> "c. The Town Clerk:
> The Chairman will motivate to Council that the post of Town Clerk be advertised after which the present incumbent of the post of Town Clerk may apply for reappointment." (My emphasis added.)

5. Respondent Council dealt with the matter on 6/12/1999 in Resolution 142/12/99.

5.1 The minute of the meeting recorded the resolution taken by the Council as follows:

> "The Town Clerk
> c. The post of Town Clerk be advertised nationally.
> d. Council resolves the appointment of a Town Clerk on or before 7 February 2000.
> e. It be noted that the Town Clerk responded in Item 215/11/99(2.2) why (to his opinion) he should be retained as Town Clerk. He is not going to apply officially to be appointed as Town Clerk as he has responded in writing to a related question by the Management Committee, he has not vacated any post on the establishment; his services was not terminated or was he tasked differently than is expected from Council's Town Clerk. He is further of the opinion that he was not appointed for a five year term but that he has a permanent appointment."

5.2 A letter by Ms. Beukes, dated 7/12/1999 was then addressed to the applicant with the following content:

"TERM OF OFFICE AS CHIEF EXECUTIVE OFFICER

Council resolved at its meeting, held on December 6,1999 not to retain you or your services as Chief Executive Officer for the Mariental Municipality for an extended term. This decision was taken in terms of Section 27 of the Local Authorities Act of 1992.

Your term of office comes to an end on February 15, 2000. Should you have any queries regarding the Council's decision, please do not hesitate to take it up with the Management Committee."

5.2.1 The above letter dealt only with the alleged termination of applicant's services as Town Clerk and not at all with any consideration or decision on alternative employment in accordance with section 27(1)(b) of the Local Authorities Act 23 of 1992.

5.3 The aforesaid minute of the council meeting of 6 December was expressly confirmed as correct by the respondent Council at its next meeting on 7th February 2000, item 002/02/00/R.

5.3.1 On this occasion, applicant was not in attendance and another Town Clerk, or person acting as Town Clerk, prepared the minutes and executed the duties as Town Clerk.

5.3.2 Section 15(3) of the Local Authorities Act 23 of 1992 provides that:

> "The minutes of the proceedings of any meeting of a local authority council shall be submitted at the next ordinary meeting of the local authority council for confirmation under the signature of the Chairperson and the Chief Executive Officer."

It was not contested by respondent in any further affidavit or in the written or *viva voce* argument of respondent's council that a confirmation by respondent council as alleged by applicant, did in fact take place on 7th February 2000.

6. In a letter dated 27th January 2000, applicant addressed a letter to the chairperson of the respondent, which read as follows:

> "TERM OF OFFICE AS TOWN CLERK: M.J. CRONJé
>
> Please refer to your letter 4/6/1 dated 7 December 1999.
>
> It is noted and accepted that my services as Chief Executive Officer at Mariental Municipality, in terms of Section 27 of Act 23/1992, will come to an end on 15 February 2000.
>
> Section 27(6)(b)(i) and (ii) of this Act, in imperative form, compels Council to appoint me in a post at the Municipality on conditions which are not less favourable than the conditions of employment which applied to my appointment presently.
>
> You are hereby kindly requested to inform me urgently and before 6 February 2000, to what post as aforesaid, you intend to appoint me."

7. In a letter dated 7th February 2000, signed by the chairperson of the Council as well as an "Acting Town Clerk" the Council responded to applicant's letter of the 27th January and now stated:

> "Termination of service
>
> Your letter dated 27 January 2000 has reference:
>
> Please note the contents of the following Council Resolution 009/02/00R4:
>
> 'The Town Clerk be informed that the contents of the Mayor's letter dated 2 December 1999 must be interpreted that the services of the Town Clerk is terminated and that the Council is not going to retain him in any other capacity after 15 February 2000."

It will be noted:

(i) that now a further Council Resolution No. 009/02/00R4, purportedly passed by respondent in February is relied on and even quoted wherein not only the termination of service of applicant as Town Clerk is referred to but also, and for the first time, an alleged refusal "to retain his services in any other capacity after 15th February 2000."

(ii) The alleged Resolution 009/02/00R4 was however not presented as reflecting in itself a Council Resolution not to retain the applicant in any capacity, but as a Resolution wherein the Council purported to interpret "the Mayor's letter dated 7 December 1999."

(iii) In applicant's founding affidavit the applicant in par. 6.8 – 6.9 clearly assumed that the letter dated 7th February which referred to an alleged resolution 009/02/00R4, was in fact based on an alleged resolution allegedly passed by the Council on or immediately before the 7th February 2000.

However, in the answering affidavit by Beukes purporting to be on behalf of respondent, there is no mention of or reliance upon an alleged resolution 009/02/00R4. Instead it is explained in par. 17.1 in reply to applicant's par. 6.8:

> "I deny what this deponent refers to as Council's decision dated 7th February 2000. I reiterate that my letter addressed to him on 7th February 2000 reflected the earlier decision taken by the respondent's council on 6th December 1999 and further clarified the position to him. It clarified that his term of office had expired by effluxion of time and that his services to the respondent would come to an end on 15th February 2000, which then occurred."

In the Chairperson's said answering affidavit there is no reference at all to an alleged council resolution 009/02/00R4 and no indication that such a resolution was ever passed. There was also no reference to or reliance upon such a resolution in the written and oral argument by respondent's counsel. There was also no reference to any resolution purporting "to interpret the Chairperson's letter of 7th December 1999".

(iv) In reply the applicant not only denied that any resolution was ever taken not to reappoint him, but furthermore specifically

denied that there was any resolution taken not to employ him in an alternative capacity in accordance with section 27(6)(b)(i) and (ii).

(v) The first intimation by respondent to applicant that the Council has allegedly decided "not to retain him in any other capacity after 15th February 2000" was in the letter by the Chairperson and the "acting town clerk" dated 7th February 2000. It was not mentioned at all in the Chairperson's letter of the 7th December 1999.

(vi) The letter dated 7th February 2000 was only written in response to applicant's letter of 27th January as is admitted by Beukes in par. 16.2 of her answering affidavit.

(vii) In par. 11 of the answering affidavit, the Chairperson *inter alia* stated:

> "I further admit that the respondent was obliged to and in fact gave notice to the applicant two months prior to the expiration of that term of its intention not to retain his services in that position. This it did on 7th December. I am advised and submit that that is the extent of respondent's statutory obligation to applicant.
>
> I can further and in any event state that the respondent's decision not to extend the applicant's services was taken after properly exercising its discretion whether or not to extend his term as town clerk".

(viii) The answering affidavit continued:

> "I deny that the respondent was obliged to place the applicant in an alternative post in doing so and deny the applicability of section 27(6)(b) of the Act to the applicant in the circumstances. I am advised and submit that at the end of his term his services came to an end and there was no obligation to place the applicant in an alternative position."

In par. 20 of the answering affidavit the Chairperson *inter alia* stated:

> "I further deny that section 27(6)(b)(i) of the Local Authorities Act applies to the respondent in the circumstances and deny that the respondent is obliged when not extending his tenure as Town Clerk to appoint him on conditions of employment as are contended for in this paragraph. Further legal argument will be advanced in this regard at the hearing of this application."

The counsels' argument submitted in the Court *a quo* as well as before us on appeal, was in effect that:

The above stated provisions did not apply at all to the applicant because his tenure as Town Clerk had already been extended on one occasion with two years in October 1994. If the tenure had not been so extended, then section 27(6)(b)(i) and (ii) would have been applicable to him on that occasion. However, so the argument ran, once there was an extension, section 27(6)(b)(i) and (ii) were no longer applicable.

8. On 16th February 2000, Messrs. P.F. Koep & Co. addressed the following letter to respondent council on behalf of their client, the applicant:

> "We have been instructed by Mr. M J Cronje, the Town Clerk of the Mariental Municipality, to advise him as to his legal rights following various decisions taken by your Council and/or Management Committee.
>
> Our instructions are that Mr. Cronje was appointed in terms of the Municipal Ordinance, 1963 (Ordinance 13 of 1963) as Town Clerk on the 1st of December 1990. In terms of the Local Authorities Act 1992 (Act No 23 of 1992) [the Act] it would appear as if his term as Town Clerk could be terminated in terms of that Act during February 2000.
>
> On the 7th of December 1999 our client received a letter signed by Ms P M Beukes, Chairperson of Council, informing our client that his term of office as Chief Executive Officer of your Municipality comes to an end on February the 15th, 2000. This decision was not taken in terms of the Act and therefore has no validity.
>
> On the 7th of February 2000 our client received a letter referring to a Council resolution, in terms of which an interpretation is placed by the Council on the letter dated the 7th of December 1999. It is apparent from that letter that the Council in fact took no decision itself. That letter can therefore be ignored.
>
> In terms of the Act only the Management Committee has the power to discharge an officer or employee of the Council (Section 29(1)(b)). The Management Committee has made no decision regarding the discharge of our client. Our client is therefore still legally in the employ of your Municipality.
>
> Our client held the office of Town Clerk on the date immediately before the date fixed in terms of Article 137(5) of the Namibian Constitution by virtue of an appointment made in terms of the Municipal Ordinance 1963 (Ordinance

13 of 1963). In terms of Section 27(6)(b) a Town Clerk whose period of office is not extended shall be entitled to be appointed in terms of Sub-section 1(b), on conditions not less favourable than the conditions of employment which applied to our client on the date of expiration of his appointment. In this regard we are instructed that the positions of Chief of Works and Human Resource Officer are vacant. You have failed to act in terms of the said Section. You have therefore acted contrary to the Act in attempting to dismiss our client as an officer or employee of the Municipality.

You have furthermore contravened Section 45 of the Labour Act 1992 (Act No 6 of 1992) by not following the provisions of that section of the Act. You have therefore transgressed the provisions of this Act as well and your attempted termination of our client's employment is therefore also unlawful in terms of the Labour Act.

Our client has instructed us to inform you, as we hereby do, to call upon you to notify us by no later than 10hOO on Monday the 21st of February 2000, that:

1. your attempt at dismissing our client is withdrawn;
2. our client remains employed by your Municipality on terms not less favourable than the previous terms;
3. recognising that you are bound by the Act and the relevant Sections referred to in this letter;

Our instructions are to apply to Court to set aside the 'decisions', to call for the reinstatement of our client and to ask for a special order of costs against you.

We look forward to hearing from you."

8.1 It must be noted that once again it was pointed out that applicant was entitled to at least an alternative post in accordance with section 27(6)(b) of the Act.

9 Lorentz & Bone, legal practitioners for the respondent, replied in a letter dated 28th March 2000 to the letter of 6th February from applicant's attorneys. The said reply read as follows:

> "RE: MUNICIPALITY OF MARIENTAL // M J CRONJE
>
> We refer to the above matter and previous correspondence herein and confirm that we address you on behalf of the Municipality of Mariental concerning your letter of 16 February 2000; forwarded to us.
>
> Kindly be advised that your client's appointment as Chief Executive Officer or Town Clerk was governed by Section 27 of the Local Authorities Act, 23 of 1992. The tenure of that appointment is set out in Section 27(3) to that Act. It provides that the term of office was to run until 2 years after the general election which followed his appointment. That general election was held on 16 February 1998. His term of office accordingly expired on 15 February 2000. In terms of Section 27(3), our client was obliged to and gave notice to your client two months prior to the expiration of that term of its intention not to retain your client's services in that position. This it did on 7 December 1999.
>
> Your client's position as Chief Executive Officer with our client accordingly expired and came to an end by virtue of effluxion of time and the expiry of his statutory term pursuant to the provisions of Section 27 of the Act. This was also accepted by him in unqualified terms.
>
> Kindly note that any legal action instituted against our client will be defended. In that event, our client reserves the right to place this correspondence before court, not only because of the threat contained in your letter to seek a special order as to costs but to reserve its right to apply for a costs order against your client pursuant to Section 20 of the Labour Act."

9.1 It must be noted that there was no allegation at all in this letter of an alleged proper exercise of discretion not to extend applicant's tenure of office as Town Clerk. The clear impression from the exposition of the Council stand was that the only obligation the

Council had was to give two months notice of its intention not to retain applicant's services as Town Clerk. Furthermore, there was no specific response to the claim that applicant was entitled to alternative employment in accordance with section 27(6)(b) and no allegation whatever that such employment was considered but declined. It clearly appears that the attitude was that once it was decided not to retain the applicant as Town Clerk and notice given to that effect, that was the end of the matter.

10. In terms of the Municipal Ordinance 13 of 1963, the appointment of applicant in terms of the said Ordinance was a permanent appointment, which could only be terminated in terms of Chapter VI of the said Ordinance.

It is not in dispute that there was no complaint brought in against applicant at any stage for misconduct, incompetence, ill-health, or similar cause, justifying his dismissal.

11. The Local Authorities Act of 1992 provided *inter alia* for the tenure of Chief Executive Officers, which comprise in terms of the definition clause, a "town clerk or village secretary". The tenure of such Chief Executive Officer, appointed subsequent to the coming into operation of the said Act, was laid down by section 27(3)(a) as a period from the date of his/her appointment or promotion until two (2) years after the next general election of members of local authority councils, or an election in terms of section 92(2)(b) as the case may be, has taken place.

For those persons however, appointed under Ordinance 13 of 1963 and deemed to have been appointed as town clerk in terms of subsection (6)(a) of section 27, the tenure of office was two years in accordance with subparagraph (3)(a)(i)(bb) and not two years after the next general election as applicable to the case of Chief Executive Officers who are appointed subsequent to the coming into operation of the Local Authorities Act on 31 August 1992.

Whether the two years has to run from the date of the appointment of the Town Clerk in terms of the Municipal Ordinance of 1963 or two (2) years from the date on which the Local Authorities Act came into operation, is not clear from the wording of subsection (3)(a)(i)(bb). Subsection (3)(a)(ii) however, provides that the aforesaid period can be extended for a further period or for successive further period after its initial expiry.

11.1 When regard is had to the letter dated 4th October 1994 by respondent's chairman read with the fact that applicant was originally appointed permanently as from 1st March 1991, it becomes clear that the letter of 4th October 1994 was written to give notice in terms of section 27(3)(b) to the applicant of Council's intention to retain him in the post of Chief Executive Officer.

In view of the fact that he was deemed to have been appointed as "Chief Executive Officer" in terms of subsection (6)(a) of

section 27 of the Local Authorities Act when it came into operation on 31/08/92, the period of his extended tenure was the two years provided for in subsection (3)(a)(i)(bb) and not until two years after the next general election provided for in subparagraph (3)(a)(1)(aa).

11.2 It would appear that the applicant, the respondent, as well as their counsel and the Court *a quo* itself, was under a misapprehension in this regard.

11.3 Subsection (3)(a)(ii) also provided that a period of office referred to in subparagraph (i), may, subject to the provisions of par. (b), be extended at the expiry thereof for further successive periods as contemplated in that subparagraph. This provision applies whether or not the Town Clerk was appointed in terms of the Local Authorities Act, or is deemed to have been appointed in terms of that Act.

12. Subsection (6)(b) of section 27 further provides that if the period of office is not extended, such person is –

"(i) entitled to be appointed in terms of par. (b) of subsection 1 of section 27 as an officer or employee on the fixed establishment or in a post additional to such fixed establishment;

(ii) appointed on conditions of employment which are not less favourable than conditions of employment which applied to such

person on the date of his/her appointment by virtue of par. (a) of subsection 6. This provision once again applies irrespective of whether or not the Town Clerk was directly appointed in terms of the Local Authorities Act, or deemed to have been so appointed.

13. Section 29 of the said Local Authorities Act provides for the discharge of Chief Executive Officers or other officers or employees of a local authority. Again it is not in dispute that applicant was not discharged under section 29.

Furthermore, no misconduct, incompetence or ill-health was ever alleged against the applicant when it was allegedly decided on 6th December not to extend applicant's term of office as Chief Executive Officer.

The respondent also did not allege that applicant was incompetent, or not performing properly or not suitable in any respect for the post and for the retention of applicant in the post.

13.1 The only comment relating to the performance of his duties was that made by applicant before the Management Committee.

14. At the conclusion of the proceedings of the Management Committee the resolution was taken as previously indicated herein, that the Chairman will motivate to the Council that "the post of Town Clerk be advertised after which the present incumbent of the post of Town Clerk, may apply for reappointment." (My emphasis added.)

Although the Chairperson for respondent alleged in her answering affidavit that the applicant did not record the Councils resolution fully and correctly, there was no denial at all of the correctness of the minute of the Management Committee relating to its deliberation and decision.

There was thus no resolution by the Management Committee to recommend that the term of the incumbent Town Clerk should not be extended.

15. The role of the Minister of Local Government and Management Committee is spelt out *inter alia* in section 27(1) and 27(2) of the Act.

15.1 In particular, the town clerk is appointed on recommendation of the Council's Management Committee and after consultation with the Minister of Regional and Local Government and Housing. This would apply to the successor of the applicant, if any.

15.2 The Permanent Secretary of the said Ministry set out in a circular dated 25/8/1994 its interpretation of the legal provisions and its requirements for the appointment of Chief Executive Officers and the requirements in particular if the services of an incumbent town clerk is not to be retained. This circular reads as follows:

> "RE: EXPIRY OF PERIOD OF OFFICE:. CHIEF EXECUTIVE_OFFICERS
>
> The Local Authorities Act, 1992 (Act, 23 of 1992) determines in Section 27(3)(a} that a person who is appointed as a chief executive officer or an officer or employee of a local authority

council who is promoted to the office of chief executive officer, shall occupy that office for a period as from the date of his or her appointment or promotion until two years after the next general election of members of local authority councils, or an election in terms of section 92(2)(b), as the case may be, has taken place and in the case of a town clerk who is deemed to have been appointed as town clerk of a municipal council in terms of subsection (6)(a) which subsection referred to the Municipal Ordinance, 1963 (Ordinance 13 of 1963) shall occupy that office for a period of two years.

This period of office will expire in December this year. To adhere to the stipulations of subsection 27(3)(b)(i) which determines that a local authority council shall in writing inform the chief executive officer concerned at least two calendar months before the expiry of the period contemplated in sub-paragraph (a)(i) or any previously extended period contemplated in sub-paragraph (a)(ii) of its intention to retain him or her in service for an extended term, or not, the council should be informed to do so during the month of September so as to enable. such chief executive officer to adhere to sub-paragraph (b)(ii) which stipulates that the so informed chief executive officer shall in writing inform the local authority council within one month from the date of that communication of his or her acceptance or-not of that extended employment. It has to be stressed that the stipulation contemplated in subsection 27(3) authoritative which shall be carried out at all times. The Ministry will accept no deviations there-of.

Although the Act does not prescribe that the format in which the letter should be conducted it shall be required from the local authority council to give reasons related to the work performance, responsibility, interpersonal relations, perception and supervision of such chief executive officer if his or her service is not retained.

In terms of section 27(i) a municipal council and a town council shall on recommendation of its management committee and after consultation with the Minister appoint a person as the town clerk. To enable the Minister to consider the appointment of a person as the town clerk objectively it shall be required from the local authority council to submit summarized applications of applicants and, if the service of the town clerk in service is not retained, a letter to that effect as why his or her service should be terminated. Such request should also spell out the financial implications attached to such post.

> It has been indicated by Her Honourable, Dr. L. Amathila, that no letter not to retain the service of the chief executive officer now in service will be accepted if not accompanied by written prove that such chief executive officer were informed thrice of any misconduct, negligence or misbehaviour.
>
> It will be appreciated if this letter could be conveyed to the local authority council."

15.3 It is quite clear that the Ministry's interpretation provided, as it should have, for a proper discretion to be exercised, i.e. one on reasonable grounds, in the letter and spirit of articles 8, 18 and 12 of the Namibian Constitution, section 45 of the Labour Act and the many decisions of the High and Supreme Courts in this regard. However, the requirement of written prove (proof) that such executive officer was informed thrice of any misconduct, negligence or misbehaving, seems somewhat overdone.

15.4 There is no indication in the papers before Court that any of the requirements set out on the aforesaid circular were complied with by the respondent council in the case of applicant.

15.5 There is also no indication whatever that the respondent Council expressly resolved not to follow the recommendation of the Management Committee. It was at any event not competent to appoint any candidate, without a recommendation to do so from Management Committee. It is consequently not clear whether the resolution taken by the Council affirmed the Committee's recommendation or dissented from it.

16. There was also no indication in respondent's answering affidavit, nor was any suggestion made in the argument of respondent's counsel, that affirmative action or a balanced structuring of the Municipal services provided for in art 22 of the Namibian Constitution was the reason or one of the reasons for not extending the applicant's tenure as Town Clerk.

17. As a matter of fact, no reason or ground was ever advanced, except the argument that applicant's tenure came to an end by effluxion of time and that the only statutory requirement for not extending the tenure was the notice of such decision at least 2 months before the expiration of the statutory period provided for in section 27(3)(b) read with subsection (3)(a).

18. Although the applicant had an opportunity to make representations why his term should be extended, no opportunity was ever given to reply to any allegation, reason or ground, if such existed, why his tenure should not be extended.

SECTION C: THE FURTHER WRITTEN QUESTIONS PUT BY MEMBERS OF THE COURT TO COUNSEL AND THEIR WRITTEN RESPONSE:

After the Court had heard viva voce argument in this appeal and had retired to consider judgment, members of the Curt became concerned that there are points which were not properly addressed by the parties and their legal representatives. Consequently a letter to this effect was addressed to the legal representatives of the parties where in these concerns were raised and

they were invited to submit further argument in writing on the aforesaid points. Counsel for both sides responded and the Court is grateful for their further contribution.

The said points and the further written argument by counsel will be referred to hereinafter as supplementary argument. It will be dealt with if it constitutes new argument or a changed stand and not where it simply amounts to a repetition of former arguments. The request by Mr. Smuts on behalf of respondent to address further oral argument to the Court to support his argument that subsection 27(6)(b) of the Local Authorities Act "would have absolutely no application to applicant, is not justified at all. In regard to the issue of whether or not there in fact was a further Resolution passed by Council on 7th February 2000 and if so could counsel agree to hand in a certified copy, the attitude of Mr. Smuts was ambivalent. Whilst strongly objecting to the admissibility of such a copy at this stage, counsel nevertheless attached purported copies of the minutes to his reply In such circumstances it is neither appropriate nor wise to pursue the issue.

Consequently I will assume in this judgment that there was a resolution numbered 009/02/00R4 stating:

> "The Town Clerk be informed that the contents of the Mayor's letter dated 7th December 1999 must be interpreted that his services of the Town Clerk is terminated and that Council is not going to retain him in any other capacity after 15th February 2000." (My emphasis added.)

This is not only a conspicuous addition to the chairperson's letter of 7th December 1999, but against all the evidence. It also flies in the face of Mr. Smuts' argument in his aforesaid supplementary argument where he says:

> "This subsection 27(6)(b) thus would have absolutely no application to the appellant and cannot be relied on in any sense by the appellant. It follows that it was not incumbent upon the respondent to consider the provision. Had the respondent done so, as is sought by the appellant, it would be clearly acting *ultra vires* its powers as it would not be authorized nor required to give effect to it to a town clerk thus extended like the appellant had been."

The conclusion is inescapable that an alternative position in accordance with section 27(6)(b) was never considered, because council apparently believed, as is also reflected in the attitude of their legal representatives, that the incumbent had no right to such an appointment and also no right to have such alternative position considered.

The grave question arises why respondent council seeks to represent to the Court in its alleged Resolution 009/02/00R of 7 February 2000 that it had in fact considered and decided this issue when it passed its Resolution No. 142/12/99 on the 6th December 1999.

Both counsel however, conceded that applicant's tenure in terms of subsection (6)(a) of section 27 was two years and not two years after the next general election.

SECTION D: THE IMPLICATION OF COUNSELS' WRITTEN CONCESSIONS IN THEIR SUPPLEMENTARY WRITTEN ARGUMENT THAT THE CORRECT TENURE OF OFFICE FOR PERSONS DEEMED TO BE APPOINTED AS TOWN CLERKS IN TERMS

OF SUBSECTION (6)(A) OF SECTION 27 OF THE LOCAL AUTHORITIES ACT 23 OF 1992, IS "TWO YEARS", AND NOT TWO YEARS AFTER THE NEXT GENERAL ELECTION"

1. I have no doubt that the tenure of office of such a category of Town Clerks is in fact and in law two years and not two years after the next general election.

2. Although counsel on both sides were invited in writing by members of the Court to also consider and comment on the consequences of such a finding, both counsel, after making the aforesaid concession, nevertheless continued to assert their respective previous submissions as to why they should succeed in the appeal.

3. In my respectful view, the fact that the said tenure is "two years" and not "two years after the next general election" radically affects the correctness of the procedures followed and the consequences.

4. A related question which immediately arises is the date from which the tenure of two years must run. It seems to me that the only reasonable inference is that the tenure of two years will run from the date the Local Authorities Act became law.[1] It was promulgated in GN 118/92 dated 31/8/1992. The Act consequently became law on that date. It follows that the first date of expiry of the first period of the tenure of applicant then was 31/08/1994.

[1] Law of South Africa, Vol. 25, Part 1, first reissue, pp. 344/349, par 329, the presumption that a statute does not apply with retrospective effect.

5. Notice was however, not given by respondent council on or before two months before 31/08/1994 as required by subsection (3)(a)(b)(i) of section 27 of the Act. The council however, gave notice of extension on 4th October 1994 instead of two or more months on or before 30/08/1994. There is no evidence on record whether or not applicant responded as required by subsection (3)(b)(ii).

6. Although the provisions of sections 27(3)(b)(i) and (b)(ii), were not complied with, it is common cause that the applicant's tenure continued *de facto* with the consent and cooperation of both applicant and the council until the purported attempt by council on 6/7th December 1999 to terminate the tenure of applicant as town clerk.

   In my respectful view, applicant's tenure must therefore be deemed to have been tacitly extended for successive two year periods running from 31/08/1992 and continuing <u>at least</u> until 7/12/99 when a purported notice was given in the chairperson's letter of 7th December 1999 of the termination of the applicant's services as town clerk as from 15/02/2000.

7. The next question is whether applicant's services were properly terminated by the said letter even if it was preceded by a proper consideration of the issue whether or not to extend the tenure and even if an unequivocal decision followed thereon not to extend.

   In my view, the notice was, even then, not a legal notice because it was not given at least two months before the expiry of any of applicant's

aforesaid two year terms of office. After the initial period of tacit renewal, the council could only conceivably decide not to renew, if it decided to do so and then gave the appropriate notice at least two months before the expiry of the then current two year period of tenure.

It follows that both the consideration of whether or not to extend the tenure for another two years and the giving of the notice must take place at least two months before the expiration of the two year period. Applicant's 4th two year period expired on 31/08/2000 and the decision whether or not to extend the tenure and the giving of the notice therefore had to be accomplished at least two months on or before 31/08/2000, not on 6/7 December 1999.

The fact that the notice given was not such a notice as required, meant that the applicant's services did not terminate on 15/02/2000 and must be deemed to have been extended until 31/08/2002 and thereafter at least until 31/08/2004. Such deeming or tacit extension during the period 5th October 1994 (the first "permanent" appointment) – 22/12/2000, (the date when the Local Authorities Act of 1992 was amended by the Amendment Act 24 of 2000), is based on the inference that the Legislature intended by implication that if a proper decision is not taken and notice not given in accordance with section 27 of the 1992 Act read with the provisions of the common law and the Namibian Constitution relating to administrative justice, then it must be implied that the tenure is not terminated and will continue until the term of office is terminated according to law.

As from 22/12/2000 however, such extension at the conclusion of each of the aforesaid two year periods of provisional tenure, must be based on the amendments to the Act which became operative on 22/12/2000. These amendments provided inter alia that:

(i) The period of notice will be three (3) months instead of two (2) months;

(ii) If the local authority council fails to give notice of three months as required of its decision to extend the tenure or not to extend the tenure, then "it shall be deemed that a notice had been given to the chief executive officer that he or she is retained in service for an extended term".

8. In view thereof that the opportunity for such consideration, decision and notice was not utilised in the period preceding the notice of this appeal – it follows that the next opportunity to do so will only come in future three or more months before 31st August 2004.

The purported consideration, decision and notice on 6/7 December 1999 must consequently be regarded as an abortive and invalid process which is contrary to law, invalid and of no force and effect.

SECTION E: THE FIRST GROUND OF APPEAL: THE ISSUE OF JURISDICTION

1. The learned judge erred in finding that the Labour Court had no jurisdiction to adjudicate upon prayers 1, 2 and 3 of the applicant's notice of motion.

It is necessary to deal *seriatim* with the Court *a quo's* reasoning in regard to its finding in regard to jurisdiction. For this purpose I will quote the passages from the judgment relative to this issue but numbered by me to facilitate my comment on every distinguishable ground:

(i) The Court's reasoning:

> "A point *in limine* has been raised by Mr. Smuts, namely: that the relief the applicant seeks in paragraphs 1, 2 and 3, though 'dressed up as declaratory orders' fall outside the jurisdiction of this Court, adding that one should look at the substance rather than the form of what is claimed. Amplifying the point *in limine,* Mr. Smuts contends that the relief contained in paragraph 1 of the notice of motion to set aside the respondent's decision of December 6, 1999, is essentially a common law relief in respect of which the High Court of Namibia (but not this Court) has inherent jurisdiction. He cites section 18(1)(c) of the Labour Act which confers upon this Court exclusive jurisdiction "to review the proceedings of any District Labour Court brought under review on the grounds *mutatis mutandis* referred to in section 20 of the High Court Act (Act 16 of 1990)'. Apart from subsections (1)(e) and (1)(g) of section 18 of the Labour Act which, it is submitted, have no application to paragraph 1 of the notice of motion, the Legislature has seen it fit to confer upon this Court review powers only in respect of proceedings of the District Labour Court. It is, however, indicated by Mr. Heathcote that he places reliance upon section 18(1)(e) of the Labour Act.
>
> On a proper reading of paragraph 1 of the notice of motion, besides the other papers in the matter, I have no difficulty accepting Mr. Smuts' argument that this Court has no jurisdiction to entertain the relief sought. By approaching the Court to set aside the respondent's decision not to retain him as its Town Clerk, I am satisfied that the applicant is essentially seeking a review of that decision which can only be done in terms of section 18(1)(c) of the Labour Act. This he cannot achieve by bypassing the District Labour Court since the only jurisdiction of review conferred upon this Court by section 18(1)(c) is a review of proceedings of a District Labour Court (as opposed to a decision of an employer which

> happens to be the case here). In any case, this relief is in no way related to the application or interpretation of any provision of the Labour Act or the Local Authorities Act, in conformity with section 18(1)(e) of the Labour Act.
>
> In the circumstances, the applicant has approached the wrong court because, this Court being a creature of statute, has no inherent jurisdiction in the matter. The result is that the respondent's objection in this regard must be upheld."

My comment: AD 1(i):

At the outset, it should be stressed that prayer 1 of the applicant's notice of motion is ineptly drawn and ambiguous. It reads as follows:

> "1. In the event of this Honourable Court finding that the respondent did take an *intra vires* decision not to retain the applicant as its Town Clerk (whether or not that decision was taken on the 6th December 1999 or 7th February 2000) ordering that the aforesaid decision be set aside."

The allegation in applicant's founding affidavit does not help to give a clear meaning to the prayer.

Mr. Heathcote's heads of argument and *viva voce* argument before us did not assist in making this prayer intelligible.

The Court *a quo* did however not deal with this problem and proceeded with the jurisdiction issue. For this purpose it apparently assumed that what applicant intended by prayer 1 was the setting aside of the respondent's decision of 6th December; that such relief was in substance "common law relief" and as such a review proceeding; that only the High Court had

jurisdiction to grant such relief and that the Labour Court had no jurisdiction to do so.

I do not agree with the Court *a quo's* reasoning for the following reasons:

(a) It was correctly argued by counsel for applicant that section 18(1)(e) of the Labour Act provides adequate jurisdiction for the Labour Court to deal with an issue such as raised in the prayers, including prayer 1, which involves the question whether or not a decision was taken on the 6th of December 1989 not to extend the tenure of office of the Town Clerk, and whether or not, if such decision was taken, it was *ultra vires* the provisions of the Local Authorities Act or invalid for same other reason, e.g. because no proper discretion was exercised by respondent as required by section 27 of the Local Authorities Act, read with art. 12 and 18 of the Namibian Constitution.

Section 18(1)(e) provides:

> "The Labour Court shall have exclusive jurisdiction to issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment. (My emphasis added in regard to those parts of the section particularly applicable to the issues in dispute between the parties.)

(b) The outcome of the application depended on the decision on several questions of law as well as questions of fact.

The simple point however, is that by the time the applicant approached the Labour Court, a dispute had already crystallized on all or most of these issues and the applicant's only reasonable remedy was to approach the Labour Court to declare what his rights were in the circumstances of this case.

(c) It must also be mentioned that the Court a quo failed to realize, as appears from point 1(ii) hereof that the applicant had to be regarded as a person "in service of the State" in terms of the definition clause, i.e. section 1, which includes specifically "any local authority" in the definition of "State".

(d) In my respectful view the Court a quo wrongly avoided a binding decision on the merits by classifying the applicant's case as a "review" under the "common law" and then arguing that the only "review" allowed by the Labour Act is that of proceedings in the District Labour Court on grounds which are the same as those provided for in section 20 of the High Court Act No. 16 of 1990.

The applicant never relied on the type of review specifically provided for in section 18(1)(c) of the Labour Act.

Neither applicant nor his counsel regarded his case as a common law review. But if the relief claimed amounts as a whole or in part to a common law review, that would not necessarily oust the Labour Court's jurisdiction in the light of the provisions of

subsection 18(1)(g), read with 18(1)(f). Subsection (g) specifically provides for a power to deal with all matters necessary or incidental to its functions under the Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.

(e) The argument by the Court *a quo* that the Labour Court, being a creature of statute, has no inherent jurisdiction in the matter is correct as a general statement, but must be seen in this instance in the context of the very extensive and wide powers given in section 18 itself in order to realize the objects of the Act.

(f) The Court *a quo* clearly took too narrow a view of the concept of a "declaratory order", the "application" of a law, the "interpretation of a provision of this Act" or "any law on the employment of any person" or "any contract of employment as used in section 18(1)(e) of the Labour Act. At any even the Court a quo found it necessary and in fact purported to apply, interpret and declare provisions of the Labour Act such as section 18 thereof; the Local Authorities Act, section 27 thereof; the contract of employment between the parties.

(g) Subsection (f) and (g) of the Act further enlarge on the already wide powers of the Labour Court. Subsection (f) provides:

> "The Labour Court shall have exclusive jurisdiction to make any order which it is authorized to make under any provision of this Act or which the circumstances

> may require in order to give effect to the objects of this Act." (My emphasis added.)

Subsection (g) provides:

> "The Labour Court shall have exclusive jurisdiction generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.

It should be noted however, that the term "objects of this Act" referred to in subsection (f) is in itself a term with wide import. Those objects would at least include the aim to ensure that the Rule of Law is maintained in industrial and labour relations and activities; that constructive cooperation between employer, employee and the government of the day takes place; that countrywide stable conditions are maintained for investment and economic development and for increased social benefits for all the rôle players.

The words – " its functions under this Act" in subsection (g) are similarly words of wide import and contributes to the need for a relatively wide interpretation of the jurisdiction clauses.[2]

I conclude that the finding that the Labour Court had no jurisdiction to consider and decide the issues raised by prayer 1 cannot be upheld.

(ii) The Court's reasoning:

[2] President of the Republic of Namibia & Ors v Vlasiu, 1996 NR 36 at 49C – 50B.

“This brings me to the respondent's preliminary objection in connection with paragraph 2 or the notice of motion wherein the applicant seeks a declaration to the effect that his appointment as Town Clerk ‘has been extended by the respondent until 2 (two) years after the next election as envisaged in section 27 of the Labour Act 6 of 1992’. Obviously, the reference to section 27 of the Labour Act is a product of inadvertence in that the section has no bearing whatsoever upon the applicant's terms of employment, as it serves to regulate maximum daily ordinary working hours of ‘day workers’. It is obvious that the intention was to refer to section 27 of the Local Authorities Act which governed the applicant's appointment as Town Clerk.

The pith of Mr. Smuts' argument is that the declaratory order sought by the applicant in paragraph 2 of the notice of motion does not relate ‘to the application or interpretation of any provision of’ section 18(1)(e) of the Labour Act, ‘or any law on the employment of any person’ in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment. (Section 18(1)(e)). The basis of the argument is that the paragraph under discussion is dependent upon, and flows from, an attempted review under paragraph 1 of the notice of motion, and that as the court has no jurisdiction to entertain the relief contained in that paragraph, it would similarly have no jurisdiction to make a declaratory order which would amount to a review but dressed up as a declaratory relief.

In order for the applicant to succeed in obtaining a declaratory relief in this Court, it is necessary to show that such relief falls within the parameters of section 18(1)(e) of the Labour Act which provides that:

> ‘18(1) The Labour Court shall have exclusive jurisdiction –
>
> (e) to issue any declaratory order in relation to the application or interpretation of any provisions of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;’ (Emphasis is provided)
>
> In deciding whether the relief sought is within the confines of the section aforesaid, two points, in my view', fall to be decided:
>
> 1. whether such relief relates to the application or interpretation of any provision of the Labour Act or the Local Authorities Act (which regulated the applicant's employment); or
>
> 2. whether the applicant was in the service of the State?

> With regard to the first point, it is plain that the relief that the applicant seeks is wholly dependent upon whether or not the respondent took a valid decision not to extend his employment as Town Clerk or in any other suitable capacity at the expiry of his term of employment on February 15, 2000. To this extent, paragraphs 1 and 2 of the notice of motion are interlinked. If the Court were to uphold the respondent's decision, the relief sought in both paragraphs 1 and 2 of the notice of motion would inevitably fail. This scenario serves to illustrate that, to all intents and purposes, the relief contained in paragraph 2 does not rest upon, or relate to, the application or interpretation of the Local Authorities Act; on the contrary, it is first and foremost factual, namely: did the respondent decide not to extend the applicant's term of office or not? It is thus evident that the relief contained in paragraph 2 of the notice of motion is merely camouflaged (or as Smuts puts it: dressed up) as a declaratory relief. Consequently, the relief sought does not meet the test as it falls outside section 18(1)(e) of the Labour Act. Hence, the respondent's point *in limine* cannot be faulted.
>
> Further, I have given consideration to paragraphs (f) and (g) of section 18(1) of the Labour Act but found them to be inapplicable not only to paragraph 2 of the notice of I motion but also to paragraphs 1 and 3 thereof.
>
> In the light of the foregoing finding, it becomes unnecessary to decide the question whether the applicant was a 'person in the service of the State'. In any event, this issue was, in my view, neither fully researched nor ventilated in argument."

My comment: AD 1 (ii):

The argument and finding that the Labour Court had no jurisdiction to consider and decide on the relief claimed under par. 2 of the notice of motion is even less convincing that than in regard to prayer 1.

In prayer 2, a declaratory order was specifically requested.

When considering whether the Labour Court had jurisdiction to consider and decide on prayer 2, the question of jurisdiction must be separated from the merits of the prayer. The reasons I set out for disagreeing with the Court *a quo* under point 1(i) *supra*, are also applicable in regard to prayer 2 and are repeated for the purposes hereof.

In any event, even if prayer 1 was defective and prayer 2 "interlinked" with prayer 1 as contended by the learned judge *a quo*, the basic issues calling for adjudication by the Labour Court remained for the purposes of prayer 2. These issues are *inter alia*: What was the decision actually taken by the respondent on 6th December 1999; was that decision *ultra vires* the Act or not; was it invalid for other reasons such as e.g. that no proper discretion was exercised; was there a valid notice given that respondent had declined to extend the applicant's tenure.

The learned judge *a quo* concluded his reasons for holding that the Court had no jurisdiction to adjudicate on prayer 2, by mistakenly declining to decide whether the applicant was a "person in the service of the State", when as I have pointed out *supra*, the definition clause of the Labour Act puts this aspect beyond doubt by providing that "State" includes any local authority contemplated in art 111 of the Namibian Constitution.

In my respectful view there was therefore no justification whatever to decline to consider and decide in a binding judgment the issues raised

and in particular to decline to consider and decide in a binding judgment, the relief claimed under prayer 2.

(iii) The Court's reasoning:

"In so far as the alternative relief is concerned, the applicant is asking the court to declare that he is entitled to be appointed and, as such, the court should order the respondent to appoint him on conditions of employment which are not less favourable than the ones he enjoyed as Town Clerk. Here, Mr. Smuts maintains that the applicant seeks an order for a form of reinstatement in a position with the respondent, although it is dressed up as a declaratory order. Such a situation, Mr. Smuts continues, is covered; by section 46(4) of the Labour Act which specifically vests in the District Labour Court the power to order an employee's reinstatement. Once again, he urges the court to look at the substance rather than the form of what is sought.

I find myself in agreement with Mr. Smuts. The relief sought amounts, in substance, to an application for reinstatement with the respondent, though in a different capacity. This Court is not clothed with such power, but the District Labour Court is. In any even, the relief sought has no bearing upon the application or interpretation of any provision of the Local Authorities Act and therefore, falls outside section 18(1)(e) of the Labour Act. In this instance, too, the respondent's *in limine* objection succeeds.

In essence, this is an application for unfair dismissal and for the reinstatement of the applicant either as Town Clerk or in any other cognate capacity but on conditions that are not less favourable than those he had previously enjoyed as Town Clerk. On this basis, the District Labour Court was the proper forum in which to bring the application.

In any case, and applying the principle that *abundans cautela non nocet,* it is evident, on a close scrutiny of the papers as well as learned counsel's argument, both written and oral, that the applicant's claim in paragraph 6.5 of his founding affidavit which reads:

> '6.5 while I was unaware of the factual and legal position in relation to the so called decision as set out herein, I accepted that my services as Chief Executive Officer would not be extended and addressed a letter dated 27 January 2000 to the Chairperson of the Council of the Respondent.'

is, to my mind, devoid of substance.

On the contrary, the applicant was fully aware of the factual situation for not only had he been timeously invited by the respondent to make representations regarding his position at the expiry of his term of office on February 15, 2000, which he did, but he also attended the respondent's meeting on December 6, 1999, at which it was decided that his services would not be retained at the expiry of his term of office in mid February 2000. This decision was then formally communicated to him by the respondent on the next day, as is evidenced by annexure MJC6 to the applicant's founding affidavit.

It is to me disingenuous for the applicant to claim that the relevant resolution of the respondent's meeting in question merely reflects that:

> ‘council resolves the appointment of a Town Clerk on or before 7 February 2000.’

As Chief Executive Officer, he was obviously responsible for maintaining a proper record of the proceedings at the meeting. The critical uncontroverted fact is that the applicant was present throughout the meeting and that, about fifty days following the respondent's notice in writing to him, he responded to the notice by his letter dated January 27,2000, in which he explicitly stated, *inter alia:*

> ‘It is noted and accepted that my services as Chief Executive Officer at Mariental Municipality, in terms of section 27 of Act 23/1992, will come to an end on 15 February 2000.’

It is not in dispute that the applicant was given a proper statutory notice.

I find that the respondent met on December 6, 1999, and validly resolved not to retain the applicant's services at the end of his term of office on February 15, 2000, and that the applicant was fully aware of the import of his position. He knew that his services with the respondent were not going to be extended in any shape or form.”

My comment: AD 1 (iii):

I respectfully disagree once more with the learned judge *a quo*. The clearest case for a binding declaratory order is contained in prayer 3 of the notice of motion.

In this instance, the Court once again agreed with the argument of Mr. Smuts for the respondent, that the relief claimed "seeks a form of reinstatement in a position with the respondent, although dressed up as a declaratory order. Such a situation, Mr. Smuts continues, is covered by section 46(4) of the Labour Act which specifically vests in the District Labour Court the power to order an employee's reinstatement. Once again, he urges the Court to look at substance rather than the form of what is sought."

In my respectful view, the relief claimed is not a form of reinstatement as envisaged by section 46 of the Labour Act of 1992. Section 46 deals with "unfair dismissals" and "unfair disciplinary actions".

The relief claimed by applicant is a declaratory order, in view of the dispute not only regarding the facts, but regarding the interpretation and application of the provisions of the Local Authorities Act, particularly section 27 thereof, read with the Municipal Ordinance of 1963 and to the extent that a discretion is vested in the respondent, the legal requirements for such an exercise and whether or not the notice given on 7th December was a valid notice and whether or not the respondent was compelled by law to provide an alternative position on the fixed staff with no diminution of conditions and privileges.

The Court *a quo* found that "the relief sought has no bearing upon the application or interpretation of any provision of the Local Authorities Act and

therefore, falls outside section 18(1)(e) of the Labour Act". In my respectful view, this finding, in conjunction with the finding that the application was one of "unfair dismissal" falling under the exclusive jurisdiction of the District Labour Court, has no basis in law or logic and cannot serve as justification for the Labour Court to decline to give a binding judgment on prayer 3.

2. AD: GROUND 3 OF THE NOTICE OF APPEAL

Before concluding this aspect, it is convenient to deal at this junction also with ground 3 of the grounds of appeal.

This ground reads as follows:

> "The learned judge erred in finding that the applicant should have instituted proceedings in the District Labour Court, as the District Labour Court, in order to determine whether or not there was an unfair dismissal, has to interpret the provisions of section 27(6)(b) of the Local Authorities Act (which in turn can only be done by the Labour Court".

I agree also with the argument contained in and in respect of ground 3 of the notice of appeal as an alternative ground on which the Labour Court must be found to have jurisdiction.

A similar point was made in the decision of the Labour Court in President of the Republic of Namibia v Vlasiu[3] where the wide nature of the Labour Courts jurisdiction was discussed and it was held *inter alia*:

[3] 1996 NR 36 at p 49 J – 50 B

> "An order for reinstatement is incidental to a declaratory order that the employee was wrongfully dismissed. It would be absurd to expect an employee to go back to the district labour court with its declaratory order from the Labour Court, and there in the district labour court to apply for reinstatement and payment of salary unpaid because of a wrongful dismissal.
>
> The district labour court also has jurisdiction to order reinstatement, but such jurisdiction is not exclusive.
>
> Furthermore, the jurisdiction to grant a declaratory order is exclusive to the Labour Court.
>
> In my respectful view, it must be clear from the aforesaid provisions that the Labour Court has the jurisdiction to make an order for reinstatement."

In my respectful view, the Vlasiu case sets out the law correctly in this regard.

In the present case, the argument by the Labour Court and by respondent's counsel was that only the District Labour Court can consider and grant reinstatement and therefore the applicant must institute proceedings in that Court. That as I have shown, is a wrong approach, even if applicant's case was exclusively or partially one for reinstatement. In view of the necessity to make a declaratory order on the disputed legal questions, the dispute as to the legal rights of the applicant, the Labour Court was the obvious Court of first instance and also to decide on any relief incidental to its functions, such as "reinstatement", where appropriate.

In the High Court and Magistrate's Court such a problem caused by a reference back, can be overcome by ordering that the matter be heard by another judge or magistrate. In the case of the Labour Court however, the position is not quite the same because the judge presiding, is also the President of the Labour Court.

A further problem is that an appeal to this Court is restricted to appeals on question of law. The merits of the case and the merits of appeal are also dependant on the facts. Such facts include the facts not in dispute as well as the facts as found by the Labour Court in regard to the facts in dispute.

The question of whether an issue is a question of law or fact, is a difficult and contentious issue, in particular where it is a question of mixed law and fact.[4]

The question is further complicated where as here, the Labour Court's findings of fact in regard to the facts in dispute, are findings made in the course of the expression of what amounted to *obiter dicta* or what the Court itself describes as findings made "*abundans cautela non nocet*". The difficulty is that when a Court expresses opinions which amount to *obiter dicta* in regard to the facts, the Court may not have been as meticulous, cautious and thorough as it would be and has to be when it accepts that it must decide and does in fact decide issues of fact, necessary for its judgment. Nevertheless, I believe that in the circumstances the most practical, less costly and fairest course would be for this Court to decide the merits of the case on appeal.

SECTION F: THE SECOND GROUND OF APPEAL: THE FAILURE OF THE COURT TO DISTINGUISH BETWEEN THE TOWN CLERK'S RIGHT TO HAVE HIS TENURE EXTENDED, AND HIS RIGHT TO ALTERNATIVE EMPLOYMENT:

[4] President of the Republic of Namibia and Others v Vlasiu, 1996 NR 36, at pp 41G – 49C.
Magmoed v Janse van Rensburg & Ors, 1993(1) SA 777 AD at 806I – 811G

1. I have already dealt with grounds 1 and 3 under Section E of this judgment *supra*. Only ground 2 remains to be discussed and decided upon.

It is convenient to repeat the contents of ground 2. It reads as follows:

> "2. The learned judge erred in not granting, at least, paragraph 3 of the Applicant's notice of motion and more particularly in that:
>
> 2.1 the learned judge failed to distinguish between the Applicant's employment as an employee of the Respondent, and the Applicant's employment in the post of the Town Clerk;
>
> 2.2 the learned judge wrongly interpreted the phrase ***"entitled to be appointed",*** and should have held that the Respondent is obliged to appoint and/or continue to employ the Applicant, even in circumstances where his term in the post of Town Clerk has been validly terminated."

The above ground of appeal must be read with par. 3 of the notice of motion which I repeat for the purposes hereof:

> "3. Declaring that the Applicant is entitled to be appointed, and ordering the Respondent to appoint the Applicant accordingly, as employee of the Respondent on conditions of employment which are not less favourable than the conditions of employment which applied to the Applicant as on 14 February 2000."

In this regard the learned judge *a quo* gave the following reasons for declining the relief requested. (I have marked the points made as (i) – (v) to facilitate my comments.)

(i) "I find that the respondent met on December 6, 1999, and validly resolved not to retain the applicant's services at the end of his term of office on February 15, 2000, and that the applicant was fully aware of the import of his position."

(ii) "He knew that his services with the respondent were not going to be extended in any shape or form. This case is consonant with Municipality of Walvis Bay v Du Preez 1999 NR 106 at 115 E-I." (My emphasis added.)

(iii) "The claim in paragraph 3 of the notice of motion is based on section 27(b)(i) and (ii) of the Local Authorities Act. It is contended by Mr. Heathcote that a Town Clerk whose period of office is not extended 'shall be appointed' as an officer or employee of the Town Clerk. The respondent, Mr. Heathcote continues, has no discretion 'once a lawful decision has been made not to extend the Town Clerk's tenure.' It is argued, therefore, that the applicant 'shall be appointed' as an ordinary employee: he cannot suddenly find himself without a job; he remains an employee.

The argument that a Town Clerk whose tenure of office is not extended 'shall be appointed' is clearly flawed in that section 27(6)(b) explicitly states that such an employee shall be:

"(i) entitled to be appointed in terms of paragraph (b) of subsection (1) as an officer or employee of such municipal council in a post on the fixed establishment of such municipal councilor in a post additional to such fixed establishment;" (Emphasis is added).

In my view, the meaning of the term 'entitled' in the context in which it is used includes: to be 'eligible' or to have a 'claim' to be appointed. There is thus no obligation on a municipal council to make such an appointment. In other words, a municipal council concerned is entitled to decide whether or not to appoint such a person, taking into account certain relevant factors, such as whether its budget would accommodate an additional employee on similar conditions of employment, as he/she previously enjoyed; the availability or lack of office space, etc."

(iv) "Although at first blush one gets the impression that section 27(6)(a) of the Local Authorities Act is a transitional provision, a reference to subsection (3)(a)(ii) in paragraph (b) of subsection (6) at once dispels such impression. In other words, a person employed under subsection (6)(a) is as much entitled to be appointed as anyone employed in terms of subsection (3)(a)(i) is."

(v) "As previously indicated, I accept the respondent's version that it- decided against retention of the applicant's services either as Town Clerk or in any other capacity, as it was so entitled to do."

2. MY COMMENT:

2.1 AD POINT (i), (ii) and (v) OF THE JUDGMENT IN SO FAR AS IT RELATES TO GROUND 2 OF THE GROUNDS OF APPEAL AND PRAYER 3 OF THE NOTICE OF MOTION:

I point out at the outset that in the aforesaid quoted and numbered passages, the Court *a quo* stated its findings and made its comments pertaining to both the question of the validity of the purported termination of applicant's tenure as Town Clerk and the issue of the right or otherwise of the applicant to be appointed at least in an alternative post and whether or not such an alternative post was considered and decided upon by the council. (My emphasis added.)

I will deal in this section first with those passages in so far as it relate to the alternative post as referred to in ground 2 of the notice of appeal. In my respectful view, there was no evidence, and/or provisions of the law, on which a Court could reasonably have found that:

(a) The respondent validly resolved on 6th December 1999 *inter alia* not to appoint and/or employ the applicant in an alternative post as provided by section 27(6)(b) of the Local Authorities Act.

(b) Applicant knew that his services was not to be extended in any shape or form, including in the form of an alternative position in accordance with section 27(6)(b) of the Local Authorities Act of 1992.

The contention that there was no evidence and no legal grounds on which a reasonable Court could make the findings it did as

stated under points (i), (ii) and (v) in so far as it relates to the aforesaid alternative post, is also born out by the undisputed facts stated in subparagraphs (c), (d) and (e) of par. 2.2 of my discussion, *infra*. These facts indicate that the respondent Council itself never discussed the issue and never took a decision on this issue.

2.2 AD POINT (iii)

Point (iii) is clearly a question of law and refers exclusively to prayer 3 of the notice of motion and ground 3 of the grounds of appeal.

I respectfully disagree with the argument relied on by the learned judge *a quo* in this regard, *inter alia* for the following reasons:

(aa) The interpretation that the term "entitled to be appointed" means "to be eligible to be appointed" or "to have a claim to be appointed" is a strained meaning which is certainly not the plain meaning of the words. The plain meaning of the terms "entitled to be appointed" is that the person has a right to be appointed. Mr. Heathcote referred in support of his argument to a decision of the South African Appellate Division in Commissioner for Inland Revenue v Pretorius[5] where the following was said:

[5] 1986(1) SA 238(AD)

> "What does 'entitled thereto' mean? The Oxford English Dictionary, so 'entitle' ascribe the following meanings to 'entitle' viz:
> 1. From title = superscription, designation.
> 2.
> 3. ..
> 11. From title = 'right to possession.'
> 4. To furnish (a person) with a 'title to an estate. Hence gen to give (a person or thing) a rightful claim to a possession, privilege, designation, made of treatment etc.'
> According to its ordinary sense the expression 'entitled thereto' as used in the context of s.9(4)(b) means 'having a rightful claim thereto.'"

I have no doubt that the said Court correctly interpreted the words as they appear in section 9(4)(b) of the Transfer Duty Act 40 of 1949 and that the said interpretation is *mutatis mutandis* applicable to the interpretation of the same words in section 27 of the Local Authorities Act.

The Oxford Advanced Learners Dictionary of the English Language, by Hornsby gives the meaning as "have as a title" "give as a right to".

Against this, the learned judge does not refer to any dictionary at all supporting his interpretation.

(bb) The learned judge failed to consider the <u>intention</u> of the Legislature and the presumptions in that regard. As Mr. Heathcote correctly argued, "he cannot

suddenly find himself without a job; he remains an employee".

The simple point is that any Town Clerk, first appointed under the Municipal Ordinance of 1963, had a vested right to a permanent appointment on the fixed establishment. (See Section B, point 1.3 *supra* of this judgment.) Although the Local Authorities Act of 1992 superseded the Municipal Ordinance of 1963, it must be interpreted in favour of the continuation of existing vested rights, except where the language of the later legislation unequivocally shows an intention to remove or diminish such rights. Where a diminution of the said vested rights are clearly intended, the later law must nevertheless be strictly interpreted that the later law does not in the sense change, remove or diminish rights to a greater extent than is clearly intended and unequivocally stated.

There are a number of presumptions relevant and applicable to the interpretation of section 27 of the Local Authorities Act. These are *inter alia:* The Legislature does not intend that which is harsh, unjust or unreasonable; the least possible burden should be imposed upon persons affected by a statutory provision; in cases of doubt, the most beneficial interpretation should be adopted; the Legislature

intends to treat all persons affected by its laws on the basis of equality; there is a presumption in favour of the principles of natural justice; the Legislature does not intend to change the existing law more than is necessary.[6]

The Local Authorities Act has been careful to incorporate the protection of vested rights in subsection (6)(a) of 27 where persons first appointed as town clerk in terms of the Municipal Ordinance 13 of 1963 and deemed to be appointed in terms of subsection (6)(a), read with subsection (1)(a), shall be appointed "on conditions of employment which are not less favourable than any conditions of employment which applied to such person immediately before the date so fixed". This provision is however subject to subsection (3)(a)(i)(bb) to the introductory proviso in subsection (6)(a) that the provisions of the subsection is subject to the provisions of subsection (3)(a)(i)(bb) which provides that the period of office of such town clerk shall be for a period of two years. This proviso is again subject to (3)(a)(ii) which provide that such office "may be extended at the expiry thereof for a

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[6] Cockram, Interpretation of Statutes, pp 52/55
Devenish – Interpretation of Statutes, 159 – 222.
Transvaal Investment Co v Springs Municipality, 1992 AD 337 at 347
The Law of South Africa, Vol. 25, Part 1 – Statute Law and Interpretation, par. 315, p. 310 – par. 329, p. 349

further period or successive periods as contemplated in that subparagraph".

The intention clearly was to recognize the vested rights and ensure that the encroachment on such rights are limited in a reasonable matter. It is completely illogical that the vested rights of all the employees on the fixed establishment are protected but not those of the most senior executive officer, the Town Clerk, renamed as Chief Executive Officer. That is even more absurd when it is kept in mind that of one category of Town Clerks appointed under section 27(3)(i)(aa) of the Local Authorities Act are those promoted from the existing fixed establishment.[7] There is a presumption against an intention so to discriminate.[8]

It is inconceivable that the Legislature would have intended so to speak to throw the most senior official on the street when such official has completed his term – other than in cases provided for in section 29 of the Act.

Such an interpretation would also mean that officials other than the Town Clerk, are in a much better position as the Town Clerk. Such a result would also be a serious affront to the dignity of such Town Clerk and probably also a

[7] Cockram, Interpretation of Statutes 51/52
Devenish 177
[8] R v Abdurahman, 1950(3) SA 136
Devenish 173

contravention of article 8(1) of the Namibian Constitution, providing that: "The dignity of all persons shall be inviolable."

An interpretation such as given by the Court *a quo*, would also mean that the Legislature acted in an extremely unreasonable manner not consonant with the letter and spirit of the Namibian Constitution.

There is also a legal presumption that such unreasonableness was not intended by the Legislature.[9]

I have no doubt whatsoever that although the Legislature in enacting section 27 of the Local Authorities Act intended to allow Local Authorities some reasonable scope for renewal of Town Clerks other than the "discharge" provided for under section 29, it at the same time intended to safeguard to the greatest possible extent the vested rights of the Town Clerk. That is precisely why subsection (6) of section 27 provides for entitlement to another or alternative post on the fixed establishment, "on conditions of employment which are not less favourable than the conditions of employment which applied to such person on the date of the expiration of his or her appointment by virtue of par. (a) of this subsection. The same concern for the safeguarding of existing vested rights also applied in

[9] Cockram – Interpretation of Statutes, p.50 – 51, Devenish, 161

the case when these was a transition from Walvis Bay, as part of South Africa and Walvis Bay, incorporated into Namibia. The parallel situation and similar legislative solution is dealt with in the Namibian Labour Court decision of Municipality of Walvis Bay v Du Preez[10]

(cc) It is noteworthy that counsel for the respondent, Mr. Smuts, did not at any stage in his argument before us rely on the interpretation of the words "entitled to..." as interpreted by the Court *a quo*.

In actual fact he accepts that the applicant would have been entitled to such alternative position, on the first occasion in November 1994 when it had to be decided whether or not to extend his tenure as Town Clerk.

Smuts further stated:

> "Only if this were not to have occurred, then the second alternative would have applied, namely being appointed to another position in terms not less favourable than before that date.
>
> Subsection 27(6)(b) accordingly did not then apply to him as his period of office had thus been previously extended. Had his position not been extended in 1994, he would <u>then in 1994</u> have been entitled to appointment in an alternative post as set out in subsection 27(6)(b). That entitlement fell away after being extended as contemplated under section 27(3)(a)(ii) in 1994.

[10] 1999 NR 106 (LC) 113 E – 114 C

> After the appellant's tenure of office was extended as contemplated in subsection 27(3)(a)(ii), it is clear that the transitional provision embodied in section 27(6)(b) would not and did not apply to the appellant in the circumstances in 1999 and 2000 and that he would not then have been or now be entitled to the appointment on the fixed establishment on the respondent in the terms sought."

This argument was also apparently relied on before the Court *a quo*. In this regard the Court *a quo* apparently dismissed this part of the argument of Mr. Smuts where the Court held: "Although at first blush one gets the impression that section 27(6)(a) of the Local Authorities Act is a transitional provision, a reference to subsection (3)(a)(ii) in par (b) of subsection (6) at once dispels such impression. In other words, a person employed under (6)(a) is as much entitled to be appointed as anyone employed under subsection (3)(a)(i) is."

This rejection by the learned judge of this part of the argument of counsel for respondent, was entirely correct.

Subsection (6)(b), providing for the alternative employment of the Town Clerk, includes in the persons entitled, those referred to in subsection (6)(a) who are deemed to have been appointed in terms of subsection (1)(a) and whose tenure is two (2) years in terms of subsection (3)(a)(i)(bb). The Town Clerk who is deemed to have been appointed may also in terms of subsection (3)

(a)(ii), have his tenure extended for successive periods of two (2) years at a time. Such Town Clerk, even when his tenure has been extended for successive periods, remains entitled to the alternative employment provided for in subsection (6)(b) of section 27, whenever his period of tenure is not extended. This follows clearly from subsection (6)(b) itself which provides that the person deemed to hold the office in terms of subsection (6)(a) whose tenure is not extended as contemplated in (3)(a)(ii) shall be entitled to the alternative employment provided in (6)(b)(i) and (6)(b)(ii). Subsection (3)(a)(ii) again is not restricted to the case of town clerks where tenure is not extended on the expiry of the first term but also to those whose tenure has been extended on more than one occasion in the past.

The conclusion is that the Court *a quo* was wrong in its interpretation of the words "entitled to" and Mr. Smuts was wrong in claiming that appellant had no right to be employed in the alternative position, because according to him, that could only have been done in November 1994, if his tenure was not then extended.

(dd) It must be noted that it is clear from the replying affidavit of the Chairperson of the Council, Ms. Beukes, that respondent Council shared and indeed relied upon the view of law put forward by Mr. Smuts as set out under point (c)

supra. (See Section B point 7(vii) and (viii) referring to par. 11 and 20 of the Beukes answering affidavit.) This view was also confirmed in the correspondence between the attorneys for the parties, where Messrs. Lorentz & Bone, on behalf of the respondent, in a considered response to the claim set out in the letter of P.F. Koep & Co, for an alternative post, denied any obligation to appoint applicant in an alternative position and still made no mention at all of a consideration of and decision on such alternative employment.

(ee) It is clear from (dd) above, that respondent did not consider at all whether or not to offer to appoint applicant in an alternative position, simply because there was, in its opinion, no obligation at all to do so.

That is also why no mention at all of such an important consideration was made in the Beukes letter of 7th December 1999 where you would have expected mention of such an important consideration and decision if in fact there was such a consideration and/or decision. The fact that an attempt was made belatedly in the letter of 7th February 2000 to represent that the matter had been considered was clearly due to the need at least to respond to applicant's letter of the 27th January, wherein he pertinently claimed such an alternative post. In this respect the alleged *ex post facto* interpretation of the

chairperson's letter of 7th December, which was in itself an interpretation of the decision to advertise the post of town clerk, was clearly an afterthought and an attempt to beef up and fill in a defective resolution which did not at that time go far enough to constitute an unequivocal resolution not to extend the applicant's tenure as town clerk and furthermore not to appoint him to any alternative position in the service of the Town Council.

3. It follows from the above that if applicant's term of office was validly terminated, he would have been entitled to, in the sense of having a right to, an alternative appointment and/or employment in terms of section 27(6)(b) of the Local Authorities Act. That would mean in effect that the appeal must at least succeed on ground 2 of the notice of appeal, if it is found that the applicant's employment as Town Clerk was validly terminated.

4. It is now opportune to discuss further whether or not there was a valid termination of applicant's tenure as Town Clerk, because applicant's right to the alternative relief in terms of the aforesaid section 27(6)(b), only becomes available if the respondent had validly decided not to extend his tenure as Town Clerk., irrespective of whether or not he has waived any right to the extension of his term of office as Town Clerk.

In this regard I have to keep in mind the findings of the Court *a quo* as quoted above under points 1(i), (ii) and (v) of Section E, *supra*, in so far as it refers to the extension of applicant's term of office as Town Clerk.

The following further argument and findings, relied on by the Court *a quo*, must also be considered:

> "In any case, and applying the principle that *abundans cautela non nocet,* it is evident, on a close scrutiny of the papers as well as learned counsel's argument, both written and oral, that the applicant's claim in paragraph 6.5 of his founding affidavit which reads:
>
> > '6.5 while I was unaware of the factual and legal position in relation to the so called decision as set out herein, I accepted that my services as Chief Executive Officer would not be extended and addressed a letter dated 27 January 2000 to the Chairperson of the Council of the Respondent.'
>
> is, to my mind, devoid of substance.
>
> On the contrary, the applicant was fully aware of the factual situation for not only had he been timeously invited by the respondent to make representations regarding his position at the expiry of his term of office on February 15, 2000, which he did, but he also attended the respondent's meeting on December 6, 1999, at which it was decided that his services would not be retained at the expiry of his term of office in mid February 2000. This decision was then formally communicated to him by the respondent on the next day, as is evidenced by annexure MJC6 to the applicant's founding affidavit.
>
> It is to me disingenuous for the applicant to claim that the relevant resolution of the respondent's meeting in question merely reflects that:
>
> > 'council resolve the appointment of a Town Clerk on or before 7 February 2000.'
>
> As Chief Executive Officer, he was obviously responsible for maintaining a proper record of the proceedings at the meeting. The critical uncontroverted fact is that the applicant was present throughout the meeting and that, about fifty days following the respondent's notice in writing to him, he

responded to the notice by his letter dated January 27,2000, in which he explicitly stated, *inter alia:*

> 'It is noted and accepted that my services as Chief Executive Officer at Mariental Municipality, in terms of section 27 of Act 23/1992, will come to an end on 15 February 2000.'

It is not in dispute that the applicant was given a proper statutory notice."

Before I deal with these findings, it is convenient and perhaps even necessary, to first set out the applicable law relating to these issues.

The only reported Namibian decision of the Labour Court in this regard prior to the decision of the Court a quo in this matter, was the decision of Du Preez of Municipality of Walvis Bay v Du Preez[11], already referred to herein and referred to by the Court *a quo* and by both counsel in that Court and before us. The decision was given by me in my capacity as President of the Labour Court at that stage. Mr. Smuts argued before us that part of that decision was in the form of *obiter dicta*. He however, did not at any stage indicate which part constituted *obiter dicta* and which part not. It must be stated however, that this Court is not bound to follow as a binding precedent, any decision or judgment of a lower Court, whether that decision was wholly or in part *obiter dicta* or not. The previous decisions of lower Courts, including the Labour Court, only have the status of persuasive authority, which this Court will give weight to, according to various criteria, including the soundness of the reasoning in the view of the Supreme Court.

[11] 1999 NR 106

Mr. Smuts however, did not contest the decision in so far as it dealt with the requirements of the law relating to the exercise of a discretion by the Local Authority in accordance with subsection 27(3)(a)(ii) read with subsection 27(6)(a) and (b). Both the Court *a quo*, Mr. Smuts and Mr. Heathcote accepted that a proper discretion had to be exercised as also required in the du Preez decision.

Unfortunately the argument by Mr. Smuts, as well as that of the respondent and the Court *a quo*, was qualified by another argument namely that the employment of the Town Clerk as Town Clerk constituted or was analogous to a "fixed term contract". The analogy is misplaced.

Furthermore Mr. Smuts restricts the contents of the term "proper discretion" to the rules of natural justice and only a limited application of the *audi alteram partem* rule as I will show in due course.

What section 27 of the Local Authorities Act, read with the Municipal Ordinance of 1963 has in substance provided for is permanent employment with the Municipality subject to:

(1) Discharge as provided by section 29 of the Local Authorities Act;

(2) The provisions in section 27 of the latter Act which provide that in the case of a Town Clerk or Chief Executive Officer – his/her appointment, status and function as Town Clerk will

be reconsidered after the lapse of a statutory determined fixed, but provisional period. The Council will then have to decide on such occasion whether or not to extend the Town Clerk's tenure as such for a further period and if it is decided not to extend such period, the Town Clerk shall be retained on the fixed establishment of the Council, on conditions of employment not less favourable than that he enjoyed under the status quo.

In exercising its discretion, the Council must at least apply its mind properly to the facts and the law. Furthermore, it must comply with the provisions of art. 18 read with art. 8(1) of the Namibian Constitution, and the principles and guidelines as interpreted and applied by the Courts of Namibia.

In exercising its aforesaid discretion it must also, as an integral part of the exercise of its discretion, take into consideration that if it does not extend the Town Clerk's tenure as such, it will be compelled to retain or appoint the said Town Clerk in another post on the fixed establishment, on condition of employment not less favourable than those enjoyed under the *status quo*.

The Labour Court in the aforesaid case of The Municipality of Walvis Bay v Du Preez, held *inter alia*:

> "It is important to note that even if section 27(3) of the Local Authorities Act applies to the status and conditions of employment of a town clerk, that does not mean that the position of the said town clerk lapses *ipso iure* two years after the appointment or two years after the next general election, because section 27 itself provides in ss (3)(i) that a 'period of office referred to in subparagraph (i) may, subject to the provisions of par. (b) be extended at the expiry thereof for a further period or periods as contemplated in that paragraph … the correct legal position was and still is:
>
> (a) The Local Authorities Act does not provide for such a *de iure* termination.
>
> (b) What its provisions read in context provide for, is a proper discretion to be exercised by the Council, whether or not it will extend the term of office. In exercising such a discretion the Council had to consider, *inter alia*, what alternative post could be offered to the respondent in accordance with the provisions of ss (6)(b) of the Act…'
>
> The respondent was never offered a post as contemplated in the aforesaid ss (6)(b).
>
> The decision of the Municipal Council dated 25th March 1997 as conveyed to the respondent in the letter dated 1 April 1997 was therefore fundamentally flawed and in itself ultra vires the Act."

The above finding of the Court in that decision was based on the logic that unless the Council consider the availability of an alternative post when it considers and decides whether or not to extend the town clerk's tenure as Town Clerk, it will create for itself a dilemma if in fact there is no available post or if the expense involved in creating an additional post as required by

section 27(6)(b) would be beyond the resources of the Council.

The Court *a quo* argued that the Council would have a discretion in this regard whether or not to make such an appointment, "taking into consideration certain relevant factors, such as whether its budget would accommodate an additional employee on similar conditions of employment as he or she previously enjoyed; the availability of lack of space etc."

I have already indicated, *supra*, that there is no such discretion and in any case such a discretion was never exercised because Council was of the opinion as advised by its legal representative, that no obligation whatever existed.

However, the discretion which the Council obviously has to exercise, is whether or not the tenure of the Town Clerk should be extended or not. It follows from that, that unless it, in its exercise of the "proper discretion", consider the factors mentioned by the Court *a quo* relating to the alternative post, it would find itself in the dilemma that it has decided not to extend the tenure of the Town Clerk but is now compelled to appoint the incumbent in an alternative post on the fixed establishment which does not exist,

or if it exists, is not vacant or that the Council cannot afford to create an additional post as required.

In the exercise of a proper discretion in regard to the question whether or not to extend the tenure of the Town Clerk, the Council has only two alternatives, being to extend the tenure or provide for an alternative post for the incumbent in terms of section 27(6)(b). If it has no alternative post as contemplated, or cannot provide it, the Council will be limited to extend the tenure of the incumbent, unless it can lawfully discharge him on the grounds stated in section 29 of the Act. If it however, has such an alternative post available or can create an additional post as required by section 27(6)(b), then the option not to extend the tenure of the Town Clerk will be open to the Council, provided of course that its discretion is properly exercised in other respects.

Local Authorities, which include Municipalities, are established in accordance with art. 111 of the Namibian Constitution, read with art 102 and the Local Authorities Act 23 of 1992. As such the Municipal Councils, together with their Management Committees, are the governing Tribunals of Local Councils and as such qualify as “Administrative Bodies” and “Administrative Officials” as envisaged by

article 18 of the Namibian Constitution dealing with "administrative justice", when taking decisions such as those provided for in section 27(3)(a)(ii), read with 27(3)(b)(i) and 27(6)(a) and 27(6)(b). None of counsel appears to have referred to or relied on article 18 of the Namibian Constitution. Mr. Heathcote it seems, restricted himself to an argument based on a common law review, being that the Council did not apply its mind to the issue and did not comply with the provisions of the Local Authorities Act and the Labour Act, in taking its decision.

Art. 18 of the Namibian Constitution under the heading "Administrative Justice" provides as follows:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

The ambit and impact of this article was again recently dealt with in the decisions of this Court in Chairperson of the Immigration Selection Board v Frank and An.[12], the

[12] SA 8/1999 delivered on 5th March 2001 NmS at 22 of the minority judgment not yet reported.

Government of the Republic of Namibia v Sikunda[13] and Mostert v Minister of Justice[14].

In the Sikunda case the Court quoted with approval from the decision in the Frank case the following passages:

> "… The Article draws no distinction between quasi judicial and administrative acts and administrative justice whether quasi-judicial or administrative in nature, 'requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent.' (Aonin Fishing v Minister of Fishing and Marine Resources, 1998 NR 147 HC.) Article 18 further entrenches the common law pertaining to administrative justice and in so far as it is not in conflict with the Constitution. …"
>
> "This rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion. (See Baxter: Administrative Law, p. 535ff and Wiechers: Administrative Law p. 208 ff)."

Although the decisions aforesaid did not deal with a Municipal Council as such, the decisions dealt *inter alia* with adverse information which must be given to an applicant before a decision and the reasons for a decision once taken. Such reasons, if not given before litigation, must at least be provided in the course of litigation by an applicant who turns to a Court for relief. The following

[13] SA 5/2001 delivered on 21/2/2002, not reported.
[14] Mostert v Minister of Justice, NmS SA 3/2002 delivered on 28/01/2003, not reported pp. 28 - 29

passages setting out the principles in this regard are also applicable *mutates mutandis* to the instant case.

> However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration. If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such person to deal therewith and to rebut it if possible…
>
> Furthermore, it seems to be implicit in the provisions of article 18 of the Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided. This also bears relation to the specific right accorded by art. 18 to persons to seek redress before a competent Court or Tribunal where they are aggrieved by the exercise of such acts or decisions. Art. 18 if part of the Constitution's Chapter on fundamental rights and freedoms and should be interpreted .'…broadly, liberally and purposively…' to give to the article a construction which is '…most beneficial to the widest possible amplitude' (Government of the Republic of Namibia v Cultura 2000, 1993 NR 328 at 340 B – C.) There is therefore no basis to interpret the article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing such as state security, that option would still be open."

In the case before us, there is no question of security involved and consequently no qualification of the principle regarding the provision of information and reasons.

The respondent in this case correctly state that the applicant was given the opportunity before the Management Committee as well as before the Council itself on 6th December 1999 when it considered whether or not to extend the tenure of the applicant as Town Clerk.

What the respondent and its Management Committee however, failed to do, is to provide any information adverse to applicant, to enable him to exercise in a meaningful manner, his rights under the *audi alteram partem* rule.

Furthermore, the only reasons for the decision provided by respondent are that the statutory term of the tenure of applicant expired and that the Council gave notice of its intention on 7th December 1999. This was the gist of the reply of respondent's legal representative in its letter of 28th March 2000 in reply to the letter by P.F. Koep & Co., applicant's legal representative dated 16th February 2000. There was also no allegation whatever in the said letter of 28th March, that the question of extension or not, was duly considered.

In respondent's answering affidavit, Ms. Beukes on behalf of the respondent, followed the same line as the Council's legal representatives. See e.g. par 5, 11, 14 and 17 of the answering affidavit.

In par 11 Beukes stated on behalf of respondent:

> "I admit that applicant's tenure in terms of section 27(3) was to run until 2 years after the general election, which followed his further appointment on 4th October 1994. I further admit that those elections were held on 16th February 2000. I further admit that the respondent was obliged to and in fact gave notice to the applicant two months prior to the expiration of that term of its intention not to retain his services in that position. This it did on 7 December. I am advised and submit that that is the extent of the respondent's statutory duty to the applicant."

In par 14 of the answering affidavit it was further stated: "His representations were duly considered by both the Management Committee in making its recommendation and fully, carefully and thoroughly considered by the Respondent's Council in making its decision which was thereafter conveyed to him on 7th December in giving notice to him pursuant to section 27(3)(b)." (My emphasis added.)

The alleged full, careful and thorough consideration, did not allege or disclose any information adverse to applicant and still gave no reasons or grounds adverse

to the applicant why his tenure was not extended. The allegations as it stands, in the absence of any such information, reasons or grounds, must be regarded as a mere label or description produced by respondent and not any information, facts, grounds or reasons which enabled the applicant to respond before the Council or in seeking relief in the Court. On the other hand, it is clear from the undisputed allegations by applicant, that no complaint of incompetence, misconduct or the like was ever brought against him or referred to.

Furthermore, it is noteworthy that there is also no indication whatever that the requirements of the Ministry of Regional and Local Government, as expressed in its aforesaid circular letter to "All Local Authority Councils" were complied with in regard to the reasons to be given, if the Council intends not to extend the tenure of the incumbent. The relevant part of the circular reads:

> "… It shall be required from the local authority council to give reasons related to the work performance, responsibility, interpersonal relations, perception and supervision of such chief executive officer if his or her service is not retained."

The above requirement enumerate the type of reasons to be considered and given in the view of the Minister and the

Ministry. The above circular clearly demonstrates how the considerations for not extending the tenure of the incumbent are interlinked with the appointment of a new town clerk. The circular continues:

> In terms of section 27(i) a municipal council and a town council shall on recommendation of its management committee and after consultation with the Minister, appoint a person as town clerk. To enable the Minister to consider the appointment of a person as the town clerk objectively it shall be required from the local authority council to submit summarized applications of applicants and, if the service of the town clerk in service is not retained, a letter to that effect as to why his or her service should be terminated. Such request should also spell out the financial implication attached to such post.
>
> It has been indicated by Her Honourable, Dr. L. Amathila, that no letter not to retain the service of the chief executive officer now in service will be accepted if not accompanied by written proof that such executive officer were informed thrice of any misconduct, negligence or misbehaviour...." (My emphasis added.)

The capacity of the Minister in regard to the interlinked questions of whether or not the term of the incumbent must be extended and a new town clerk be appointed, rest in the first place on subsection 1 of section 27 of the Local Authorities Act which specifically deals with the appointment of town clerks, renamed chief executive officers.

Section 148(4) of Ord. 13 of 1963, (the Municipal Ordinance) provided as follows:

> "The council shall not remove the town clerk and any head of a department from their posts or reduce their emoluments without the prior approval of the Administrator and of any other authority in accordance with the provision of any other law governing the appointment of employees."

The Administrator-General was substituted for the Administrator before independence and the appropriate equivalent position after independence is that now held by the Minister of Regional and Local Government. The provision of the said section 148(4) is perpetuated and authorized by subsection (6) of section 27 of the Local Authorities Act, where it provides for the position of town clerks and other officers or employees who are deemed to be appointed under section 27(1)(a) or (1)(b), "on conditions of employment which are not less favourable than any conditions of employment which applied to such person immediately before the date so fixed".

The circular manifests a correct appreciation of the need for fair procedures and decisions and attempted to provide the essential guidelines to give effect to the aforesaid provisions of section 27 of the Local Authorities Act, provisions of the Labour Act and the letter and spirit of the provisions of the Namibian Constitution.

When the procedures used by the respondent council and the decisions taken by it are measured against these principles and guidelines contained in the said circular, it must be obvious that the respondent failed to proceed and resolve accordingly.

In so far as the dispute between the parties as to what was decided by the Council is concerned, the version by the applicant, as crystallized in the resolution as formulated by the minute drawn by applicant and again confirmed by the respondent Council at its meeting on 7th February when applicant was apparently not present, is consistent with the Resolution of the Management Committee, in that the Management Committee resolved that the chairman will motivate to the Council that the post of Town Clerk be advertised after which the present incumbent of the post of Town Clerk may apply for reappointment." (My emphasis added.)

The implication of this resolution was clearly not that the Council decided not to extend the tenure of the Town Clerk – rather it should advertise for applications and allow the applicant to also apply. The Council Resolution as recorded in the minutes, also went no further than resolving to advertise and thereupon to "resolve the issue of the

appointment of a Town Clerk on or before 7th February 2000."

If the Council's version that it decided on 7th December 1999 not to extend the applicant's tenure is true, it would have been a radical departure from the resolution of the Management Committee which was required by the Management Committee itself to be a motivated proposal. No reasons or explanation were given in respondent's aforesaid answering affidavit why, if it did so, it decided not to follow the recommendation of the Management Committee. If it refused to follow the Management Committee's recommendation without indicating any reason, that would be an additional reason why the decision of the respondent council as alleged by it, was unreasonable and fell short of the requirements of art. 18 as set out above. If the Council however, intended to follow the recommendation of the Management Committee, then the minuted version of the resolution of 6th December 1999, could not have been or could not have amounted to a decision by the Council not to extend the applicant's tenure. The immediate result would in that event be that the notification letter of the 7th December would for the reason above be *ultra vires* because of the lack of a supporting resolution by the respondent Council.

The alleged counter proposal by Grobler which does not appear in the confirmed minute however, does not take the matter further because the main proposal – was that the post be advertised and that the appointment of a town clerk be resolved on or before the 7th February 2000.

But even if there in fact was such a counter proposal, that did not refer to an alternative post in accordance with section 27(6)(b) but as a counter proposal to the main proposal that the post be advertised and a decision taken on the issue of the appointment of a Town Clerk on or before 7th February 2000

The respondent alleged in its answering affidavit, in par 14.2 as proof that there was a valid consideration, that there were two resolutions proposed before the council after a lengthy discussion and debate on the question. "It was expressly stated that that the post of Town Clerk be advertised, which would in effect mean that the services of the Town Clerk will not be retained and that a new contract will not be entered into with him at the end of his term." (The emphasis by underlining the above words are those of Beukes, not mine.)

The statement continued as follows: "this proposal was put to the vote and carried by 4 votes to 1 with 1 abstention. Another proposal which proposed that Council

decide to offer the respondent that his services continue at the end of his term by Councilor Grobler did not have a seconder and then fell away."

The following observations must be made:

(i) It is significant that it was not alleged that a resolution was passed that the tenure of office would not be extended, but only that "the post of Town Clerk would be advertised". Respondent's comment which was underlined by Beukes on behalf of respondent, that such a decision "would in effect mean that the services of Town Clerk will not be retained and that a new contract will not be entered into with him at the end of his term" is not the resolution as stated, but the Beukes interpretation of the Resolution to advertise. Such interpretation cannot be regarded as the resolution.

It must be remembered that the Management Committee's Resolution before the Council was precisely that the post be advertised but that the applicant be allowed to apply. Just as the resolution of the Management Committee cannot be equated with a resolution not to extend the applicant's tenure, so the Council's admitted resolution does not

amount to a resolution not to extend applicant's tenure.

It must further be observed that Beukes nowhere denies that a further part of the Resolution was that "Council resolve the appointment of a town clerk on or before 7 February 2000." No wonder that with such a predicament, a letter was written, dated 7/02/2000, purporting to be another interpretation contained in an alleged further council resolution.

It must further be kept in mind that the minute of the resolution of 6th December as minuted by applicant, was confirmed in a council resolution of the 7th February. There was no dispute that such confirmation in fact took place.

SECTION G: CONCLUSIONS IN SUMMARY

1. I am not convinced that it was proved that an unequivocal decision was ever taken by respondent Council on 6/12/1999 or at any time thereafter not to extend the tenure of applicant as town clerk.

However, even if such a decision was taken, then in my respectful view such decision was not a proper and valid decision *inter alia* for the following reasons:

1.1 It was taken in the course of an abortive process, contrary to the provisions of the law as I have shown in Section D, *supra*, and as such a nullity and without legal force and effect.

1.2 The deliberations were not in compliance of articles 18, 12 and 8 of the Namibian Constitution in that there was no deliberations on the merits, the *audi alteram partem* rule was not complied with in essential respects and generally the decision was not a fair and reasonable decision based on reasonable grounds taken in the course of a fair procedure.

2. The refusal to extend the tenure of applicant in conjunction with the refusal to appoint applicant in an alternative position as provided by subsection (6)(b) of section 27 of the Local Authorities Act, amounted in effect to a purported dismissal from the permanent employment applicant enjoyed with the respondent prior to the purported termination of his employment on the 5/6th December 1999 and as such also amounted to an unfair dismissal in terms of section 45 of the Labour Act no. 6 of 1992.

SECTION H: THE RESPONDENT'S DEFENCE OF WAIVER

The requirements in our law for such a defence to succeed, have been spelt out repeatedly in our case law. In a recent decision of this Court B.K.

Opperman v The President of the Professional Hunting Association of Namibia[15] this Court held:

> "To succeed in such a defence the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that affect to the first respondent."

The respondent attached several documents to its answering affidavit on which it relied for its defence that the applicant had waived any claim for being retained as town clerk as well as a claim for his appointment in an alternative position on the fixed establishment. These documents were in addition to applicant's admitted letter dated 27th January 2000. These documents were:

(i) A completed form 19 dated 10/02/2000 used to claim death benefits from the Social Security Commission "in respect of an employee who reties or had become permanently disabled".

(ii) A form MSD 18 from the Chief Executive Officer, of the Social Security Commission with a memo containing the following request: "Please send me a medical report from the doctor which indicate that you are totally unfit for work".

(iii) A letter, undated, by the Mariental Municipality to the applicant stating:

[15] SA 4/2000, NmS, 28/11/2000 not reported
See also: Mostert v Minister of Justice, NmS SA 3/2002 at p15 where this decision is quotated with approval.

> "Sir,
> Final Remuneration
> Your final remuneration has been paid into your bank account no 01129281501 at Bank Windhoek, Mariental on the 10th April 2000.
> Attached hereto the remuneration as per memo to the Accountant."

(iv) A notice of cession of Sanlam-policy/policies from the Mariental Municipality to Cronje, the applicant, which is a mere English translation of the notice under (i) above.

(v) The only document that explicitly purported to accept the termination of applicant's tenure as town clerk was applicant's own letter dated 27th January. This letter however, is clearly restricted to the position of town clerk and clearly claims entitlement to an alternative position in accordance with section 27(6)(b).

Applicant deals in his replying affidavit with each of the aforesaid four documents relied on by Beukes in her answering affidavit and denies that any of them indicate any waiver of any of his vested rights. None of the said four documents, taken separately or collectively, constitute unequivocal evidence of waiver of all the rights of the applicant.

There is no proof at all that the applicant ever accepted the legality of the procedure and of the decisions and actions of the respondent. Even though the applicant accepted in his letter of 27th January 2000 that his services as

town clerk will come to an end on 15th February 2000 in terms of section 27 of the Local Authorities Act, that does not clothe the actions, procedures and decisions of the respondent Municipal Council with legality and does not prevent applicant from relying on such illegality in a court of law and claiming some relief. Even if applicant has purported to waive his remedy to be reinstated as Town Clerk on the ground of the illegal procedure followed and decisions taken, he has not waived his contingent right to be appointed in an alternative position on the fixed establishment on conditions which are not less favourable than the conditions of employment which applied to him before the expiration of his term as Town Clerk.

On appeal, counsel for applicant/appellant reiterated his stand that he does not insist on reinstatement as Town Clerk even if he would otherwise have been entitled to such reinstatement.

What applicant persisted in is his appointment in an alternative position as provided in subsection (6)(b) of section 27 of the said Act.

The issue is complicated by the fact that both parties and their legal representatives were under a misapprehension throughout in regard to the period of "statutory tenure" of the applicant and as shown in section "D", *supra*, the whole process of consideration of the issue whether or not to extend, the following decision and notice, must consequently be regarded as a nullity.

A purported waiver of his rights or some of it by applicant cannot give life and legality to a process which is a nullity.

I find therefore that the defence of waiver must fail.

SECTION I: THE QUESTION OF COSTS

I also find that this case could have been settled at an early stage if there was goodwill from both sides. The applicant at all times was willing to accept an alternative post as provided for in subsection (6)(b) of the Local Authorities Act in lieu of the extension of his tenure as town clerk, but the respondent throughout, and in an arbitrary fashion and without following correct legal procedures, was determined to terminate applicant's formerly permanent employment. This is thus a case where respondent's conduct can be described as frivolous and vexatious in terms of section 20 of the Labour Act and thus make respondent liable to pay the costs of applicant, not only on appeal, but also that in the Labour Court.

SECTION J: THE ORDER:

In the result the following order is made:

1. The appeal succeeds.
2. It is declared that:

    2.1 The Labour Court had the necessary jurisdiction to consider and grant the relief claimed in the applicant's notice of motion.

2.2 The applicant's tenure as Town Clerk is deemed to have been extended to 31 August 2004 and will be deemed to be further extended after that date for further periods of two (2) years at a time unless:

(i) Applicant's tenure as town clerk is terminated as provided for in section 27 of the Local Authorities Act of 1992, in which case applicant shall be retained on the fixed establishment of the Municipality in accordance with subsection (6)(b) of section 27 of Act 23 of 1992, on conditions of employment which applied to applicant on the date of the expiration of his appointment by virtue of par. (a) of subsection (6) of section 27 of Act 23 of 1992.

(ii) Applicant's tenure is terminated by death or in terms of section 29 of Act 23 of 1992.

2.3 If respondent is unable to comply with par. 2.2 of this order, because of the appointment of another town clerk in the place of applicant as from 15/2/2000, respondent shall be liable to pay the applicant an amount of damages calculated to place applicant in the position he would have been if respondent had not purported to terminate his employment with the Municipality of Mariental in an illegal manner.

2.4 The parties are given leave to approach the Labour Court within a period of six (6) months from the date of this judgment and as

arranged with the Registrar of such Court in order to make any agreement which may be reached between the parties pertaining to such damages, an order of Court.

2.5 If no such agreement is reached in settlement, the parties may enroll the case for the determination of the said *quantum* of damages, payable to applicant by respondent.

2.6 The respondent is ordered to pay applicant's costs of appeal as well as those before the Labour Court.

_____
O'LINN, A.J.A.

I agree.

_____
MTAMBANENGWE, A.C.J.

I agree.

_____
CHOMBA, A.J.A.

/mv

COUNSEL ON BEHALF OF THE APPELLANT:	Mr. R. Heathcote
INSTRUCTED BY:	P.F. Koep & Co.
COUNSEL ON BEHALF OF THE RESPONDENT:	Mr. D.F. Smuts
INSTRUCTED BY:	Lorentz & Bone