

A MISTRA Policy Paper

TWO CITY MANAGERS, ONE MUNICIPALITY: WHY REFORMS ARE URGENT

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To the memory of Nkosohlana 'Gege' Mbikanye

ABSTRACT

The appointment of city managers has been a contentious issue in municipalities in South Africa. It has made coalitions even more precarious. The source of this controversy is the manner of appointing city managers and their accounting lines. The Municipal Systems Act (Regulation No 21 of 2014) affirms that mayors and councils are appointing authorities, to whom city managers are accountable, and have powers to fire or re-appoint. Politicians have abused this power to get city managers, either coercively or willingly, to enable their financial interests in council through improper contracts or financial irregularities.

Having city managers as instruments for financial gain has become an entrenched part of political culture amongst local political elites. This explains why the Nelson Mandela Bay (NMB) municipality in early 2022 has two city managers, elected by feuding groupings within council. Each is unyielding in its choice. The reason for this intransigence is the financial benefits that accrue to politicians dependent on the choice of city manager. Government has come to a halt, and the governing coalition at NMB may even collapse over the disagreement. This impasse highlights the need to change selection procedures by taking the process outside of council to an independent and professional body. Using the NMB municipality as a case study, this paper underscores this urgency, drawing from policy proposals that were first made more than ten years ago.

INTRODUCTION

Up to the events of last week, the coalition government was functioning at the best of its ability. Through its components it was determined to serve the interests of all the citizens of the Metro ... Things started to change for the worst when the issue of the appointment of a permanent MM¹ [came up]. In effect the elephant in the room was the appointment of the MM. It was at this point that I noticed lapses of political morality and integrity from some outsiders who were running parallel political and administrative roles.

Mkhuseli Jack, 23 March 2022²

In the subsequent days, it would also emerge that Nelson Mandela Bay (NMB), where Mkhuseli Jack is a Member of the Mayoral Committee (MMC), was not the only municipality plagued by ructions over the appointment of a city manager. The coalition that governs eThekweni, which is dominated by the African National Congress (ANC), was also threatening to unravel. The ANC's coalition partner, who is also a deputy mayor, Philani Mavundla from the Abantu Batho Congress, voted against the choice of the ANC for city manager. He felt the decision had been pre-determined elsewhere, only to be imposed on him to rubber stamp it.³ In a twist of irony, the ANC at the City of Johannesburg (CoJ) municipality, where it sits on opposition benches, accused the Democratic Alliance(DA)-led coalition of similar machinations.

Together with the Economic Freedom Fighters (EFF) and ActionSA, the ANC in Johannesburg charged the DA mayor, Dr Mpho Phalatse, of backroom manoeuvring to have their favourite candidate, Johann Mettler, appointed city manager. Phalatse admitted to having met with Mettler before the interviews. Mettler topped the list of three recommended candidates. The EFF and ActionSA preferred a different candidate, Floyd Brink. He is the current city manager, appointed by ActionSA's leader, Herman Mashaba, when he was CoJ mayor with the backing of the EFF, which has historical ties with the man. Brink was once charged in 2013, whilst manager at the Limpopo Department of Roads and Transport, in a case of corruption that

1 Municipal Manager.

2 Social media post.

3 *Daily News*. 5 April 2022. 'ANC/ABC coalition in eThekweni on the rocks after debacle over hiring of new city manager'.

involved the EFF president, Julius Malema. Brink was subsequently acquitted, and the case has gone quiet.⁴ The disagreement regarding the Mettler versus Brink candidacy has shaken the coalition. Without the support of both the EFF and ActionSA, the DA coalition will fall.

It is not inevitable that the coalitions, both in Johannesburg and eThekweni, will collapse. They may eventually agree on a common candidate for city manager, thereby keeping the coalitions intact, at least for now. That there are disagreements over the choice of city managers, to a point of threatening the stability of coalitions, however, shines a spotlight on a long-established fact that parties, across the board, have vested interests in who occupies this post. At the NMB the disagreements are such that, even though the coalition has not collapsed, the administration has just ground to a halt, with demonstrable disruption in the provision of services. The stand-off has even yielded what the Eastern Cape High Court Judge, Glen Goosen, calls an 'utterly bizarre' situation in which the 'municipality is suing itself'.⁵

This paper focuses on the controversy that shrouds appointments of city managers. The purpose is twofold: both to highlight the underlying causes, and to explore the impact thereof on municipal administration. My argument is that the fault lies in the legislative framework that guides the appointment process. The overall aim of the paper is to underscore the urgency to change this appointment process.

I use the NMB municipality as a case study. The municipality is governed by an ANC-led coalition, which includes eight other parties. The ANC has 48 seats and its partners a combined total of 12 seats. For a council of 120 seats, the balance of power is relatively even, with a slight advantage to the ANC coalition. The speaker is part of the coalition and thus, in instances of a tie, can cast a deciding vote in favour of the coalition. My selection of the NMB derives from the fact that connivance between politicians and administrators for self-serving ends has been a historical conundrum in the municipality. The very intractability of this issue underscores the entrenchment of the interests of the political elite in who becomes city manager. This has engendered reluctance to change the appointment process.

Following below are three sections. The first is an account of how the NMB ended up with two city managers, appointed by feuding coalition partners, with each claiming to be the legitimate authority. Thereafter, attention shifts to why the various factions in council are insistent on their differing choices of candidates. The focus stretches beyond contemporary events to an historical account to illustrate the origin of the problem. Following the review of how the NMB arrived at its current impasse, the paper turns attention to a possible legislative remedy. Here the paper draws from the ten-year-old National Development Plan (NDP),⁶ and the recently published draft policy document, A National Implementation Framework Towards the Professionalisation of the Public Service,⁷ for its policy proposals.

4 *Daily Maverick*. 9 March 2022. 'DA, EFF, ActionSA – Joburg council set for showdown over city manager appointment'.

5 G.G. Goosen, High Court of South Africa – Eastern Cape Gqeberha, 5 April 2022, Case No: 862/2022.

6 National Planning Commission. 11 November 2011. National Development Plan: Vision for 2030.

7 National School of Government. 24 December 2020. A National Implementation Framework Towards the Professionalisation of the Public Service. Government Gazette No 1392.

Opposing council meetings: Each yields a city manager

Just hours before the scheduled council meeting of 10 March 2022, there was a flurry of text messages to councillors cancelling the sitting. The meeting agenda had included the appointment of a permanent city manager. It has now been more than three years since the metro last had a permanent appointee in that position. Even then, the appointee's position was terminated prematurely, prompted by ill intentions. By March, making the appointment had become more than urgent. The National Treasury repeatedly expressed its displeasure, alongside the Auditor General, and had even punished the NMB for the lack of a permanent appointee.⁸ Even with all that pressure and possible (fiscal) punishment, councillors simply could not go ahead with the meeting.

The hindrance to the meeting were disagreements, among the coalition partners, over the choice of city manager. Three candidates were recommended to council for appointment: Noxolo Nqwazi, Lonwabo Ngoqo and Anele Qaba. The first and last candidates are currently employed in the municipality, whilst Ngoqo is an outsider. In addition to the ANC, which has 48 seats, the coalition is made up of eight other parties (which refer to themselves as the Bloc, and are hereafter referred to as such) with a combined 12 seats.⁹ The coalition, with a total number of 60 seats (out of 120), has signed an agreement,¹⁰ binding coalition partners to a collaborative relationship with structures both within and outside the council. This agreement is intended to ensure constant interaction to facilitate coordination. This explains why it was easy for the council meeting to be cancelled once coalition partners deadlocked: the speaker, Gary van Niekerk, a Northern Alliance (NA) councillor, is part of the coalition. Only the speaker can convene and cancel a council meeting.

A council meeting was eventually convened on 16 March 2022. Whilst the interviewing panel had rated the candidates in order of performance – Nqwazi, Ngoqo and Qaba – council was free to appoint any of the three through voting. The proceedings of the meeting, however, showed that coalition partners had still not reached consensus on a common candidate, despite having had five more days to deliberate. The ANC proposed Nqwazi. Rather than go along with their coalition partner, the rest of the partners, together with other parties in council, moved that she be suspended and subjected to a disciplinary hearing. Their motion was based on the findings of the investigative body, the Special Investigative Unit (SIU). The PAC's Bassie Kamana had insisted earlier, when the deadlock first surfaced, that council 'must appoint an incorruptible city manager ... We cannot appoint someone who will be influenced by political parties'.¹¹

8 Repeated interim appointments disrupt the administration. New appointees take a long time to familiarise themselves with the requirements of their position. Once they are relatively settled, they are reluctant to take decisions with long-term effects, since they know that they will not be in that position for long.

For the financial year 2020/21, National Treasury withheld grants and transferred only after the Municipality had presented a plan to make the appointment. But the municipality never stuck to the plan and, as a result, Treasury refused the request to roll-over funds that had been committed to 2020/21 to the following financial year (2021/2022). Interview with Mandla George, former COO and acting city manager, 8 April 2022.

9 The other parties are: GOOD, African Independent Congress (AIC), Northern Alliance (NA), Pan Africanist Congress of Azania (PAC), United Democratic Movement (UDM), Defenders of the People (DoP) and Abantu Integrity Movement (AIM). The Patriotic Alliance (PA) is a signatory to the local agreement, but also signed an agreement with the ANC at national level facilitating co-operation in all municipalities where both parties are present. Even though it is not signed by local signatories, the national agreement binds the PA to collaborating with the ANC locally.

10 The Government of Local Unity Agreement for the Governance of the Nelson Mandela Metropolitan Municipality, November 2021.

11 *The Herald*. 10 March 2022. 'Coalition partners scrap over city manager post'.

In a report released in February 2021, the SIU had found that Nqwazi, in her capacity as acting city manager in April 2020, had contravened procurement rules in order to secure the (irregular) appointment of a Welkom-based company, HT Pelatona Projects, to provide 2 000 toilets to informal settlements. Not only was the contract irregular, but the company was also paid for work not done. The motion on Nqwazi passed by 67 votes. It got support from both the Bloc – i.e. NA, DoP, PA, AIM, PAC, GOOD – and other parties in council – i.e. DA, EFF, ACDP, FF+. The ANC is the only party that voted against the motion, unsuccessfully defending Nqwazi. Following that motion, a new acting city manager had to be appointed. Council rules require that there be a city manager all the time, especially during council proceedings, even though the next item on the agenda was the appointment of a permanent city manager. The voting on this item is important for our purpose here, as it sparked what would be the peculiarity that characterises the NMB.

The speaker, Gary van Niekerk, miscounted the votes cast on each of the two candidates – Qaba and Luvuyo Magalela¹² – that were nominated for acting city manager. He announced that each got 59 votes, and went to cast a tie-breaker in favour of Magalela. But the 59-59 split was impossible since the total number of councillors who voted was 117 (two were absent and one abstained). When this was pointed out to the speaker, he insisted on being right and refused to do a recount.¹³ This prompted a walk-out by some councillors in protest.

It was during the walk-out that the vote on the appointment of a city manager happened.¹⁴ The number of councillors present, because it determines if the meeting was quorate or not, became the point of contention that eventually led to the stand-off. Of the three recommended candidates, the ANC nominated Nqwazi, on whom the speaker proceeded to call for a vote. What followed the voting became a matter of dispute between the ANC mayor, Eugene Johnson, on the one hand, and the speaker, on the other. They seemed to agree on the number of hands – i.e. 50 – raised in support of Nqwazi, but disagreed on whether the motion carried. The speaker maintained that he simply ‘confirmed the number of hands in support of the appointment of Dr Nqwazi but did not confirm that the item had passed’. The reason for not passing the motion, the speaker was adamant, was because ‘there were less than 61 Council members present in Council’;¹⁵ and he then adjourned the meeting. The mayor, Eugene Johnson, responded to the speaker’s explanation registering her ‘shock and surprise that you now try to suggest that Dr Nqwazi was not appointed by council’. When the counting of votes happened, Johnson insisted, ‘there were more than 61 councillors in council, despite some shuffling to leave the council venue at the time’. Because there was nothing amiss, according to Johnson, the Speaker ‘expressly announced that the motion to appoint Dr Nqwazi carried’.¹⁶

12 Luvuyo Magalela is the executive director for electricity and energy at the NMB.

13 *The Herald*. 17 March 2022. ‘Coalition chaos in council’.

14 Walk-outs are not uncommon, especially in coalition councils. It is a tactic that parties, across the aisle, have adopted to render a council meeting inquorate in order to block a motion from passing. Parties often employ this tactic when they do not have numbers on their side.

15 Memorandum from Speaker of Council, Cllr GS van Niekerk, to Cllr Lawrence Troon, ‘Re: Illegal Appointment of City Manager’, 18 March 2022.

16 Executive Mayor, Cllr E Johnson, to Council Speaker, Cllr G van Niekerk, ‘Re: Memorandum/Illegal Appointment of City Manager’, 18 March 2022.

Johnson effectively accused Van Niekerk of falsifying the outcome of the 16 March council meeting. The mayor considered the speaker partisan. And, for these reasons, the mayor went ahead, on the same day, to offer Nqwazi the position of city manager. Nqwazi accepted and promptly signed the contract. Conversely, and because he had adjourned the 16 March meeting, Van Niekerk considered the matter unresolved. He called another meeting, for 23 March, to complete the business of the 16 March meeting. Amongst the items to be concluded was the appointment of a city manager.

Re-opening the vote on the appointment of the city manager threatened Nqwazi. The vote was likely to go against her. The Bloc had already expressed themselves against her appointment. Only the PA's two councillors, because of their national pact, were likely to vote with the ANC. That assured Nqwazi of 49 votes,¹⁷ which fell far short of the required 61-vote majority. The only way the item would not be re-opened, Nqwazi appears to have calculated, was if Van Niekerk was no longer the speaker. There had been rumblings in Van Niekerk's party, the Northern Alliance (NA) – a party he founded and was president of. Some within sought to expel him, which would instantly prompt his removal as councillor (and Speaker). One Haylee Gee, who purported to be the party's secretary, had actually written to Nqwazi earlier in January, demanding the removal of Van Niekerk and two other NA councillors, saying that was the decision of the party. Nqwazi declined Gee's request, citing legal wrangling over the matter as the primary reason. 'Please be advised', she further noted in her correspondence,

that no further administrative actions can be undertaken by this Office until such time as the court application is finalized as the outcome will determine such actions. The municipality will abide to the decision of the court and this is necessary to ensure that the interests of the Municipality are protected.¹⁸

Amongst the recipients of Nqwazi's letter replying to the one from NA's Gee was the regional manager of the Electoral Commission of South Africa (IEC), Crosby Bacela. In including the IEC in the exchange, Nqwazi presumably intended to reassure Gee that her decision was above board. If it were not, then she would not have responded in such a transparent manner, including someone who would have objected if the decision were wrong. Hardly a month later, Nqwazi adopted a different tune. Reacting to a repeat of the same directive on 21 March 2022,¹⁹ Nqwazi complied. The following day, she wrote to the IEC, informing them that they needed to replace the three NA councillors.²⁰ It is the IEC that does the replacement based on the order of names in the party's candidate's list (which would have been submitted prior to the election day of that term). The odd thing about Nqwazi's reaction was that circumstances had not changed from what they were when she initially declined the directive. The matter was *still* caught up

17 The ANC contingent was down by 1, owing to the recent killing of one of its councillors, Mzwandile Booi. He was killed by a hail of bullets in what looked like an assassination. *News24*. 14 February 2022. 'ANC devastated by murder of Nelson Mandela Bay ward councillor in a second shooting'.

18 N.L. Nqwazi, Office of City Manager. 'Vacancies iro Vacancies Proportional Representation (PR) Councillors', 26 January 2022.

19 Haylee Gee, Secretary General, Northern Alliance, letter to The City Manager: Nelson Mandela Bay Municipality, Gqeberha, 21 March 2022.

20 Noxolo Nqwazi, Office of City Manager. 'Declaration of PR Vacancies Northern Alliance'. 22 March 2022.

in the legal wrangling which she had cited as the basis for declining the instruction, but she ignored it this time around. The difference now was that Nqwazi considered Van Niekerk a nemesis in the way of her occupying the position of city manager.

The IEC's regional official, Bacela, however, was circumspect in his response to Nqwazi's correspondence. Cognisant of parties' propensity towards in-fighting, the Commission does not act hastily on such matters. It allows for the possibility that what are communicated as party decisions may be invalid or have been arrived at irregularly. The Commission is wary of being entangled in intra-party squabbles, thereby exposing itself to accusations of bias. For this reason, regulations grant the IEC 15 days within which to act on a directive to make replacements. During this period, the election body does a background investigation to ascertain that the instruction is valid, and does not act whilst the decision is a subject of legal dispute. And so, the IEC did not proceed with replacements until the matter was finalised (which the court scheduled for 5 April 2022).²¹

The council meeting eventually reconvened on 23 March 2022.²² The previous day, the mayor's office had tried to stop the meeting, issuing a message purporting to have cancelled the meeting on account that Van Niekerk was no longer speaker, and thus could not convene the meeting. The mayor's attitude meant that she, together with her party, was unlikely to recognise resolutions of the meeting chaired by Van Niekerk. On the day of the meeting, councillors even found the earmarked venue – Feather Market Hall – locked. They were similarly unrelenting, and found an alternative venue.

Unsurprisingly, the ANC did not attend and the council made the exact decisions that the mayor and her city manager had tried to fend off. With 68 councillors present, the meeting decided, among other matters, to revoke Nqwazi's appointment, reconfirmed that she be put through a disciplinary process, and appointed Anele Qaba as acting city manager.²³ Predictably, Nqwazi dismissed the meeting as 'informal' because 'it was not called and presided over by a lawful Speaker of Council but by Mr Van Niekerk ... who was a member of the public and not even a member of the Northern Alliance (NA) since he was expelled'. In the same communication to staff, Nqwazi was adamant that van Niekerk's 'vacation was accepted by the IEC on 22 March 2022'. According to Nqwazi, therefore, the proceedings of the 'informal meeting' had no bearing on her. In fact, on the same day of the meeting, Nqwazi wrote to Qaba informing him of his suspension and instructed him to 'vacate his office immediately'. She warned staff that anyone taking instructions from Qaba will be charged with 'insubordination, with the requisite disciplinary procedures attached thereto. Further, fruitless and wasteful expenditure will also be investigated, as a result of such non-compliance, if any'.²⁴

The next day, following his appointment, and having been supposedly suspended by Nqwazi, Qaba issued his own letter to Nqwazi. In the letter, he invited her to state 'the reasons as to

21 Conversation with Crosby Bacela, 31 March 2022.

22 Council could not sit on the day – 10 March – for which it was initially scheduled. Van Niekerk was held up in court fending off his removal.

23 Minutes, Proceedings of Special Meeting of the Nelson Mandela Bay Metropolitan Council, Council Chamber, City Hall, 23 March 2022.

24 Noxolo Nqwazi, 'Message from city manager Dr NL Nqwazi', 24 March 2022.

why you should not be suspended'. Here Qaba was carrying out the resolution of the council meeting the previous day. After putting Nqwazi on notice, Qaba turned his attention to staff with a letter that sought to calm them. 'I call on all staff', he wrote, 'not to be intimidated by her as I will deal with her bully tactics through proper processes as mandated by Council and those should be completed soon'.²⁵ Before the end of the day, Qaba had acted on his undertaking to 'deal with her'. He suspended Nqwazi, and the conditions of that suspension, he laid out, not only included staying away from the office but also not to 'leave the jurisdictional area of the Nelson Mandela Bay Municipality during working hours'. In instances where she felt compelled to travel outside of the NMB, Nqwazi 'will be required to complete leave forms which are to be submitted to your supervisor'. If she failed to abide by the conditions, Qaba warned her, she may not be paid her monthly salary whilst on suspension.²⁶

Having told Qaba that he was appointed irregularly, Nqwazi did not heed his instruction suspending her. She showed up for work the next day. But she never stayed the entire day. She left in the company of the police. It is not clear if she left voluntarily or was ejected. Nqwazi claims she left of her own volition, as she feared being attacked. She had even locked the entrance into City Hall. Meetings of portfolio committees, as a result, could not be held. Councillors, especially those from the EFF, were irked by the inconvenience. Their supporters subsequently gathered outside the building, demanding that she open the premises. Because the EFF was amongst the parties that voted for her suspension, their unhappiness at the closure of municipal offices appear to have escalated to a demand that she should vacate the office. 'We only have an acting city manager', said the EFF's Zanele Sikawuti, '(w)e don't recognize Nqwazi so we decided to help move her because we don't want a situation like the one in Amathole'.²⁷

The 'Amathole situation' refers to an incident wherein a member of the mayoral committee, Nanziwe Rulashe, was dragged out of her office by security guards on the instruction of the city manager of the Amathole District Municipality.²⁸ Sikawuti's mention of that incident suggests that she and her fellow EFF members may have given the police an ultimatum: either the police eject her from the office, or they will drag her out. The political head of the metro police, MMC Lawrence Troon, who had also voted to suspend Nqwazi, was present when his officers escorted her out of the office. Troon was pleased at the sight, remarking that 'she is not wanted here' and 'must be taken to St Albans'.²⁹ Ejected out of her office, Nqwazi petitioned the court to nullify Qaba's appointment on account that the speaker, Gary van Niekerk, was no longer a councillor and, therefore, the meeting at which she was suspended lacked any legal standing.

Until the court ruled, the municipality was beset with two city managers. Both had issued letters warning staff not to comply with the instructions of the other. In the meantime, from 17 March 2022, the mayoral committee and administration ground to a halt. The mayor and her

25 Anele Qaba, letter to 'All NMB Employees', 'Clarity on Certain Administrative Issues Pertaining to the Recent Council Meeting of 23 March 2022'.

26 Anele Qaba: Acting City Manager to letter to N Nqwazi, 'Suspension from duty on full remuneration', 25 March 2022.

27 *The Weekend Post*, 26 March 2022. 'Inside today'.

28 News24.com. 25 January 2022. 'Amathole mayor calls for probe after video of armed guards dragging councillor from office'.

29 St Albans is a prison. Troon's remarks were captured in a visual recording that was circulated widely on social media, 25 March 2022.

MMCs could not meet as they were at loggerheads over the city manager. Executive decisions and activities required for the day-to-day running of the municipality were not taken. Fearful of repercussions, executive directors were reluctant to act on instructions from either of the two feuding city managers. The adjustment budget could not be passed. It can only be tabled by the mayor, who has been at loggerheads with her coalition partners.

Not passing the adjustment budget has meant that the municipality could not spend on critical services. These include measures to address dire water shortages and to effect the youth employment scheme that was initiated earlier this year. Moreover, the municipality risked not getting more than R700 million worth of grants from the Treasury. Adjustment budgets are normally passed at the end of February, and Treasury punishes municipalities financially when lapses happen. Even if the municipality gets the outstanding grants, it may not spend them entirely before the end of the financial year, at June-end. Passage of the new budget for the 2022/23 financial year has also been at risk. Preparations, especially community consultations, for compiling the Integrated Development Plans have not commenced. In other words, the impasse over the new city manager has derailed service delivery, hampered decision-making on potential benefits for the metro, and jeopardised the financial state of the municipality.

Issuing the verdict on 5 April 2022, Judge Glen Goosen could not contain his disbelief at the nature of the dispute. He found it, 'utterly bizarre that a municipality could sue its council ... it is not legally and conceptually possible' to do so. The peculiarity of the matter lay in that the municipality encompasses both the administration and council. The city manager, who leads the administration, does so on the instruction of council. The mayor too accounts to council. They are all part of the same system with different functions, but are essentially one. None has an independent existence from the other. And so Nqwazi, Goosen reasoned, could not bring charges against the council ostensibly on behalf of the municipality when council is actually part of the municipality. This made for an absurd situation of the municipality being both the litigant and accused – a dispute that should not have even been brought before court.

Notwithstanding his incredulity, Goosen still had to make a ruling on Nqwazi's plea over the legality of the 23 March meeting. The answer to this question rested largely on Van Niekerk's legal status as councillor and, therefore, Speaker of Council. Goosen disagreed with Nqwazi, and found that she had actually flouted the rules in her rush to remove Van Niekerk:

... for a vacancy to be declared the jurisdictional facts required by s 27 must be established. In the present matter Dr Nqwazi relied solely upon the letter received from Haylee Gee dated 21 March 2022. This notwithstanding that she was aware of pending legal processes related thereto and without affording Mr Van Niekerk any notice of her intended communication to the IEC.³⁰

Having found that Van Niekerk was still councillor, Goosen declared the outcomes of the 23 March meeting valid. Nqwazi's application to disqualify Qaba's was accordingly dismissed. This meant Qaba's appointment as acting city manager stood. And this finding did not necessarily

30 Goosen, op. cit., pp.21.

nullify Nqwazi's appointment as city manager, even though the judge also ruled that council was inquorate (with 57 councillors) when it appointed her. Goosen's reluctance to nullify Nqwazi's appointment arose from the fact that Qaba – i.e. the respondent – had not made a counter-application seeking her disqualification. Goosen could only rule on what he was asked to. He nonetheless anticipated that he could be asked to do so in future and would, but for now he referred the matter back to council to resolve. The judge proposed that a properly constituted council meeting can either review and, consequently, set aside its earlier decisions, or simply rescind and pass new resolutions.

Albeit referring the matter back to council for resolution, Goosen was not entirely optimistic that councillors would 'resolve the immediate conflict that gave rise to this application'. The mere fact that they had resorted to courts seeking relief in an 'utterly bizarre' dispute shows how entrenched they are in their positions. Not much time passed before the judge's uneasiness was proven right. The mayor simply ignored the judgment. Rather than defer the matter to council, she claimed to have powers delegated to her to act, which she did by firing Qaba instantly. She continued to insist that the meeting that appointed him was illegally constituted:

... I have received a legal opinion from an independent Senior Council, not associated with the court matters, that states that councillors cease to be councillors, once the City Manager informs the IEC about the vacancy, which was done on 22 March 2022. This therefore means that the position of Speaker was vacant since 22 March 2022.³¹

The following day, following Qaba's application to court, Judge Goosen declared Mayor Johnson's instruction of termination unlawful. That came as no surprise. Qaba's termination had simply ignored Goosen's earlier ruling. Johnson's behaviour went beyond incompetence. It is unimaginable that she could not have understood the implications of the judgment. She had her lawyer and the legal unit of the municipality to explain it, assuming she even needed an explanation. Her behaviour defied common sense. It was simply irrational. This brings me to the question: what could have possibly prompted such glaringly irrational behaviour, to the point of suggesting that the mayor may have even lost her mind? I now turn to answer this question.

Managerial appointments: Proxies of politico-financial interests

The zealotry of the mayor, and her party (the ANC), to appoint Nqwazi as city manager is undoubted. Their zealotry, however, went beyond her appointment to shielding Nqwazi from being investigated for possible impropriety, which could lead to disciplinary measures. The initial sign of Johnson's intent to shield Nqwazi surfaced over the mayor's proposal to apply for a review of the adverse findings regarding Nqwazi of the Special Investigative Unit (SIU). These findings related to a contract with, and payment to, a company, Pelatona, over the construction of emergency toilets for informal settlements. The mayor's proposal on how the council should handle the SIU findings suggested a common-purpose between her party (the ANC) and Nqwazi.

31 Office of Executive Mayor: Eugene Johnson. 'Message from the Executive Mayor Councillor Eugene Johnson', 7 April 2022.

Politicians and administrators: A long and entrenched history of collusion³²

Before dealing directly with the immediate matter at hand, it is worth pointing out that the problem of managers being proxies for politicians' financial interests is not new at the NMB. It dates back to 2008 and has been recurring since then. The primary cause is councillors seeking to secure access to the financial resources of the state. Previously, they could do so without seeking to influence the choice of a city manager. During the inaugural term of local government in South Africa's new democracy, councillors were allowed to do business with the municipality. They even sat on bid committees that decided who got which contract. Some even formed companies and others worked as consultants for the municipality.³³ This practice was a relic of the apartheid state, which the new government simply continued over the transitional period from 1995 to 2000. It was only in the second term of local government that a new set of legislation, especially the Municipal Structures Act (MSA) and Municipal Financial Management Act (MFMA), was introduced to create a clearer delineation of responsibilities in line with the requirements of a democratic state.

Having financial interests in municipal work stunted the ability of councillors to exercise oversight. Their decisions were self-serving to a point that those who got contracts, including themselves, were often not the most competent to undertake the work. Yet, administrators were held accountable for administration, which bordered on unfairness. They were blamed for incomplete or shoddy work, but had no say in selecting the most competent service providers. The MSA barred councillors from any involvement in administrative decisions, limiting them purely to their council duties of approving policies and programmes, and exercising oversight over the administration to ensure implementation. Administration and financial matters, as the MFMA emphasised, were reserved for administrators. The effect of this was that councillors no longer determined recipients of contracts, nor were they allowed to do business with the municipality.

However, councillors would not accept being shunned out of the largesse of the state. Unable to influence the allocation of contracts directly, they resorted to influencing the choice of those tasked with the responsibility. Thus, feuds ensued amongst themselves, including party officials, as they sought to exercise such influence. Graham Richards, who was appointed city manager of the NMB for the second time in 2006 (following his initial stint from 1995 to 2002), never finished his term. He resisted approaches from the regional headquarters of the ANC, Florence Matomela House, and had the backing of the then mayor, Nondumiso Maphazi. The mayor insisted on sticking to the prescripts of legislation. Matomela House applied pressure on Maphazi to fire Richards, claiming that he was corrupt. Maphazi refused, and even instituted an investigation confident that it would prove that Richards was untainted. The findings of the investigation – laid out in the Kabuso Report³⁴ – would eventually confirm Richards's innocence, and, ironically, pointed at his accusers as the corrupt lot. In the meantime, some of Maphazi's

32 This whole sub-section draws from: Ndletyana, M. 2020. *Anatomy of the ANC in Power: Insights from Port Elizabeth, 1990–2019*. Cape Town: HSRC Press.

33 Port Elizabeth Transitional Local Council, 'Possible Contravention by Councillors of Section 10H of the Local Government Transition Act, Report of the Executive Committee', 12 September 2000.

34 Kabuso Report, 'Forensic Investigation Final Report: Nelson Mandela Bay Municipality', Department of Local Government and Traditional Affairs, Eastern Cape, February 2002.

colleagues in council went along with instructions from the regional office and voted to suspend Richards. He was eventually paid out, ensuring that he never returned.

With the rule-bound Richards out of the way, party officials, together with their allies in council, got a pliant (acting) city manager in Elias Ntoba. And, many more appointees would follow in an acting capacity, even exceeding the 90-day maximum period allowed by legislation, strictly because they were compliant with political instructions to rig the bidding process in favour of councillors' proxy companies. When council eventually succumbed to the pressure in 2011 to comply with the law by appointing a permanent city manager, the appointment process was botched by disagreement amongst councillors and their party bosses. Regional party leaders, who had already been accused of corruption in the Kabuso Report, together with their allies in council, insisted on one particular candidate, Sithembele Vatala. Maphazi's successor, mayor Zanoxolo Wayile, maintained Maphazi's firmness on an independent city manager. Maphazi had been forced to resign partly because of her doggedness in requiring proper conduct on the part of her city managers.

Maphazi's fate did not deter Wayile from requiring similar conduct from city managers. He disapproved of Vatala because of his close links to politicians. Earlier, Wayile had to fend off instructions from Matomela House to appoint Vatala as head of procurement. That was a clear indication to Wayile that if Vatala was appointed city manager he would do the bidding of the faction that backed him. The interview panel, however, had scored Vatala more highly than the other candidates. Wayile ignored the scoring and appointed someone else instead. Some of the councillors, who had served on the panel and were Vatala's allies, tipped him that he was scored highest and should have been appointed. Vatala went to court, and the result was that the appointment process had to be redone.

Wayile eventually managed in March 2013 to get his ideal, independent city manager. That was Lindiwe Msengana-Ndlela, who had been head-hunted for the post owing to her impressive credentials. A holder of a doctoral degree in development studies, Msengana-Ndlela had reached the pinnacle of the bureaucracy, rising to become a Director General of a national department, in which position she earned the reputation as an upright and diligent administrator. That was the reason Wayile had encouraged her to apply and she did not disappoint. Finding the NMB in the midst of a scandal over a contract related to creating an Integrated Public Transportation System (IPTs), Msengana-Ndlela quickly moved to put an end to it. She objected, among other things, to the purchase of a ticketing system for the new buses. The buses came with an in-built ticketing system. The acquisition would be a wasteful expenditure, used as an excuse to release money from the coffers of the municipality for the benefit of unscrupulous politicians and their business associates.

Unfortunately for Msengana-Ndlela, her initial backer, Wayile, was removed as mayor soon after facilitating her employment. The new mayor, Ben Fihla, was the opposite of Wayile and Maphazi. Besides warning her against cancelling the aforementioned contract, Fihla instructed her to employ ANC members as bodyguards without following due process nor budgetary allocations. When she resisted, Fihla threatened that she might be physically attacked and, to guarantee her own safety, she had to go along with the instruction. Msengana-Ndlela refused

to succumb to the threats and resigned, within six months of her employment. The unrelenting political pressure to approve improper contracts and commit financial irregularity forced her to resign. A forensic investigation by National Treasury would later reveal that, following Msengana-Ndlela's forced departure, approximately R600 million related to the IPTS was either paid out fraudulently or siphoned off. Among those who were subsequently arrested and currently face legal charges are the former deputy to Fihla, Chippa Ngcolomba, who was the political head of the IPTS project; Mhleli Tshamase, an official directly in charge; Zandisile Qupe, the former regional secretary of the ANC; and Fareed Fakir, a businessman who passed on kickbacks to the ANC, in return for its intervention in securing the contracts.³⁵ Msengana-Ndlela's successor appears to have given Tshamase *carte blanche*, or simply turned a blind eye to his shenanigans.

It would take approximately three years for the NMB to make another permanent appointment to the city manager post, Johann Mettler.³⁶ He too would subsequently be hounded out of the job before completing his term. Like Msengana-Ndlela, Mettler resisted political meddling to influence allocation of contracts, and instructions to cover up corruption. The NMB, therefore, has a long and entrenched culture amongst the political elite of employing city managers who serve as their proxies, advancing the elite's financial interests through irregular contracts. City managers, in turn, enjoy protection, are retained in those lucrative jobs, and possibly receive kickbacks.

Nqwazi-Johnson Nexus

Johnson's protection of Nqwazi began with, and has its roots in, the findings of the SIU. In August 2020, the SIU received information from a whistleblower alleging possible impropriety in the awarding of a contract, worth just more than R24 million, to a company called HT Pelatona Projects. The company was hired to construct 2 000 toilets in the various informal settlements throughout the NMB. In appointing Pelatona, according to the whistleblower, the acting city manager, who was then Nqwazi, deliberately circumvented the process in order to ensure that Pelatona got the contract. She effectively colluded with the company.

The SIU's investigation confirmed the allegation. It found 'that the service provider was appointed even before the award letter' was issued; the emergency conditions that Nqwazi used as justification for infringing on the process were non-existent; and, from the moment of appointment, Pelatona had built fewer than 200 toilets. Overall, there 'was no fairness and competitiveness in the procurement process'.³⁷ As a result, the SIU intended to approach the Special Tribunal to declare the contract invalid, freeze any further payments to Pelatona and recover the funds already paid to the company. On receiving the findings, the municipality stopped payments to Pelatona, even before the SIU could secure an order from the Special

35 *The Herald*. 21 November 2020. 'IPTS corruption: What you need to know'.

36 Johann Mettler, as noted above, is currently at the centre of controversy at the CoJ over the appointment of a city manager. To his credit and unlike his predecessors, Mettler was hounded out of the NMB for standing up against political meddling and exposing corruption by politicians.

37 Special Investigative Unit. February 2021. Finalised matters in respect of the investigation into the procurement of, or contacting for goods, works and services, including the construction, refurbishment, leasing, occupation and use of immovable property, during, or in respect of the National State of Disaster, as declared by Government Notice No. 313 of 15 March 2020, by or on behalf of the State Institutions.

Tribunal. The new mayor from the DA, Nqaba Bhanga (whose tenure spanned December 2020 to November 2021), suspected possible corruption and did not need much persuasion to freeze payments, even though there was no legal order to that effect.

The freeze on payments prompted Pelatona to approach the court, seeking an order that it be paid. The company contended that the municipality could not withhold payments purely on account of the SIU findings. The findings, Pelatona explained, are not a verdict of guilt on its part. Only the Special Tribunal, upon being approached by the SIU for a ruling and if convinced by the evidence, could issue such an order. The SIU opposed Pelatona in court, insisting that the municipality was correct in freezing further payments. Presiding over the case, Judge Sunil Rugunanan³⁸ agreed with Pelatona. Rugunanan emphasised that the SIU's role was to investigate and present findings, not to make pronouncements on guilt or even issue punitive measures. The judge added that the SIU had no business even approaching his court, or any other civil court, for validation of its findings. The only court it can, and should have, approached is the Special Tribunal. Until such time that the Special Tribunal makes an adverse ruling against Pelatona, the judge ruled, the municipality should pay.

It is worth emphasising that the ruling related strictly to the role and powers of the SIU. The investigative body had overstepped its powers. On considering the judgment, Mayor Johnson, however, sought to stretch the implications of the ruling to impugn the merit of the findings. She proposed to council that the municipality launch a court application to nullify the SIU findings. The application, added the mayor, should not just focus on the Pelatona contracts, but all other investigative reports the SIU has compiled on Covid-19 contracts. The motion suggested that Johnson was concerned neither with the irregularities the SIU unearthed nor with imposing punitive measures on the guilty parties. Rather, she sought to kill the reports, and Nqwazi had issued most, if not all, of the irregular contracts. The motion passed with 57 votes.³⁹ The ANC had managed to get support from its coalition partners, with the exception of the UDM.⁴⁰

The UDM argued against taking the SIU reports on legal review. Instead, the party urged that the process be allowed to proceed to the Special Tribunal, where the veracity of the evidence in the SIU reports would be tested. There was no need, the UDM stressed, to initiate a legal challenge to test the SIU evidence when the Special Tribunal was scheduled to do that anyway. What the mayor sought to do was not in the interest of the municipality, but signalled an inclination to quash the SIU reports and protect Nqwazi. Other members of the Bloc were eventually persuaded by the UDM. That is why they would not agree, in the deliberations within the coalition, to supporting Nqwazi's appointment as city manager. The stalemate, as noted above, even led to the cancellation of the council meeting scheduled for 10 March 2022.

Nqwazi and the ANC share a common interest. And, their machinations suggest that common interest exceeds professional boundaries. Nqwazi employed irregular means in an unsuccessful attempt to remove Van Niekerk, the Speaker of Council, for nullifying her appointment on

38 Rugunanan, J. High Court of South Africa: Eastern Cape – Port Elizabeth. Case No.2807/2020. 18 January 2022.

39 57 votes represented the majority of those who voted and the meeting had a quorum – i.e. more than 61 councillors present in the chamber. In addition to the UDM (1), which broke ranks with coalition partners, the motion was also opposed by the DA (48), ACDP (2), PA (2) FF+ (2). The EFF (8) abstained.

40 *The Herald*. 1 February 2022. 'Fury over Bay's SIU report challenge'.

account that the council meeting was inquorate. The ANC's Johnson ignored a court judgment in her intent to have Nqwazi installed as the city manager. Their desperation suggests fear of what might follow should Nqwazi not be appointed, or should she face disciplinary measures. Johnson's fear is possibly that Nqwazi may well implicate the ANC if she is put through a disciplinary process. Having Nqwazi as the city manager, and not face punitive measures, possibly protects the ANC as well; and also offers some space to manoeuvre either to quash the SIU reports or to limit the fall-out arising therefrom.

Possible institutional remedy: Cutting the umbilical cord

A remedy that possibly offers a durable solution to the administrative instability lies in changing the selection process of city managers and their lines of accountability. It goes without saying that councillors' penchant for patronage is the primary cause of their conduct. The selection process, together with a pliant city manager, is simply an enabler. It is doubtful though if councillors will cease manipulating their appointment of city managers, and abusing their attendant powers to fire and re-appointment, towards their own unscrupulous ends. The longevity of this problem at the NMB suggests intense resistance to any change. If the behaviour of individual councillors cannot change of the council's own volition then what remains is to reconfigure the institution in a way that hinders councillors' crooked pursuits.

Presently, the appointment of a city manager is an internal, mayoral-driven process. According to the current regulations guiding the process,⁴¹ the mayor chairs the panel made of three to five members. For a panel of three members, two panellists should be councillors – i.e. the mayor and another councillor – and an outsider who is familiar with the requirements of the job. Regulations are not specific on the formula (internal vs external panellists) in a panel of five members. But it is highly possible that it follows the same formula, as for the panel of three, with the majority being internal members. In addition to selecting internal members and assuming the role of chairperson, the mayor shortlists and screens applicants, in consultation with the other panellists. On completion of the interviews, the panel recommends three names for appointment. The actual selection of the successful candidate is done by council, through voting. Council, in other words, is the employer with typical rights to suspend, fire and re-employ upon expiry of a contract. The fate of the city manager, therefore, rests on the council and mayor. This places pressure, and rightfully so, on a city manager to be responsive to their decisions and resolutions. The problem is that some of their demands are not consistent with municipal procedures nor do they advance the collective interests of the municipality. And this is an old and common problem.

The inaugural National Planning Commission (NPC) made a similar diagnosis more than ten years ago. In chapter 13 titled 'Building a Capable State', the National Development Plan (NDP), notes:

At senior levels, reporting and recruitment structures allow for too much political interference in selecting and managing senior staff. The result has been unnecessary turbulence in senior posts in the public service and reduced confidence in the state.⁴²

41 Department of Cooperative Governance. Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers. No. 21, 17 January 2014; South African Local Government Association, 'Guidelines for the Appointment of the Municipal Manager'.

42 National Development Commission: National Development Plan. 11 November 2011, p. 364.

Political meddling produced public servants who were indebted to politicians, doing their bidding instead of functioning professionally in pursuit of a civil mandate. To ensure professionalism, the NDP then proposed that civil servants be shielded from politicians. That insulation should begin at recruitment and appointment stages. To this end, the NDP proposed a hybrid model that incorporates both an independent institution and the executive. The outside institution would be the Public Service Commission (PSC), which would screen candidates, shortlist interviewees and make recommendations for appointment. The NDP further proposes the creation of ‘an administrative head of the public service with responsibility for managing the career progression of heads of department, including convening panels for recruitment, performance assessments and disciplinary procedures’.⁴³ While it says that, in the provinces, this role would be played by the DG in the Office of the Premier, the NDP is silent on equivalent processes at local government level. It however calls for the development of ‘systems to strengthen local government, including recruitment systems, operational guidelines for routine tasks, staffing frameworks for municipal functions, standard assessment procedures for recruiting new staff and guidelines on salary levels.’⁴⁴

The proposal, therefore, is that the hybrid model, which takes the appointment process out of the hands of politicians, should be applied at local government level – at least in the metropolitan and district municipalities. The politicians would simply make their pick from a list of recommended candidates, chosen outside of their influence. Renewals of contracts would similarly be determined independently, free from political influence or involvement. To be sure, the NDP did not propose anything unheard of in this country. That is how senior executives in the civil service were appointed before 1994. Continuing with the model, however, presented challenges to the post-apartheid state. The PSC’s strict requirements for relevant qualifications or experience would have ruled out most black and progressive white applicants, and would have continued to give preference to white South Africans, who had previously had such opportunities. And the ANC did not trust apartheid-era bureaucrats enough to appoint them into senior positions to lead transformation. These bureaucrats had spent most of their professional life in the apartheid state, implementing racist policies and treating blacks contemptuously.

The solution was to divest the powers of appointment away from the PSC to government (and politicians). What began as a responsive measure to the problem of the time has itself conjured up its own set of problems. Politicians can no longer be trusted to ensure the appointment of professional and independent senior managers. Their choices are not always geared towards achieving optimal functioning of the municipality for the public good. Rather, politicians’ own selfish interests, financial and otherwise, have assumed priority. The NDP proposal to return appointments back to an independent process, however, has evidently not been implemented. It has now been more than ten years since the proposal was first made. The impact of political meddling has not only contributed to the deteriorating state of municipalities, but councillors have also become even more daring in their meddling

43 National Development Plan, op. cit., p. 411.

44 National Development Plan, op. cit., p. 438.

In summary, the deadlock at the NMB, with damaging consequences for municipal performance, reaffirms the urgency for government to act on its own proposal. The National School of Government recently initiated deliberations to consolidate the NDP proposals into new regulations. This augurs well for reform, and the regulations should also deal with how this would manifest at local government level. It is critical to lay down both the principle and how it should be operationalised: taking the appointment process and management of performance evaluation out of council and the mayoral office to an independent and administrative body or individual. This would ensure that both appointments and evaluations are based strictly on merit and technical indicators. The result would be the independence of city managers to operate professionally, without the pressure to accede to councillors' unscrupulous demands. The provincial PSCs could extend their role beyond provincial administration to local government. The centrality of PSCs also demands that they too be staffed with individuals, especially the commissioners, who are appointed strictly on merit with demonstrable expertise and experience in public administration. These should be bureaucrats, at the tail-end of their careers, and academics in fields that are relevant to the public administration.