IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 35248/14

In the matter between: 19/6/2014

MOGALAKWENA LOCAL MUNICIPALITY Applicant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

17/06/14
DATE

SIGNATURE

PROVINCIAL EXECUTIVE COUNCIL, LIMPOPO First Respondent

MEMBER OF EXECUTIVE COUNCIL FOR COGHSTA, LIMPOPO Second Respondent

NATIONAL MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Third Respondent

NATIONAL COUNCIL OF PROVINCES Fifth Respondent

DH MAKOBE Sixth Respondent

JUDGMENT

Tuchten J:

1 This urgent application has as its genesis a disunity amongst the councillors elected as members of the municipal council of the

applicant for the ruling party in the municipal council. I shall refer to the applicant as the municipality or the council of the municipality. Pursuant to a decision of the first respondent ("the province") on 17 March 2014, the province has sought to intervene in the government of the municipality by assuming responsibility for what the province asserts are certain executive obligations of the municipality under s 139(1)(b) of the Constitution as amended by s 4 of Act 3 of 2003. The province appointed the sixth respondent to act on its behalf in this regard. The municipality objects to this intrusion into its governmental competence and seeks relief directed at staying the implementation of the province's decision pending a review of the decision in due course.

2 Only the applicant, the province, the second respondent ("the MEC") and the sixth respondent were represented before me. These respondents were represented by the same counsel, to whom I shall refer as counsel for the respondents. Two preliminary issues were urged upon me by counsel for the respondents: firstly that the matter was not urgent and should be struck off the roll; secondly that the case sought to be made by the municipality was *res judicata*, ie had already been decided against the municipality in a prior legal proceeding. Counsel invited me to consider these issues in the context of the case as a whole and I shall proceed to do so.

3 Because this application has been brought as a matter of urgency and because what is sought is interim relief, I shall not excessively burden this judgment with recitation of authority. The case was fully argued on both sides, with copious reference to relevant authority, and I bear the submissions of counsel and the authorities cited in mind. I make no final findings of fact or of law for these are the province of the review court. My findings are thus provisional and made on the evidence presently before me.

4 The disunity which I have mentioned focussed around the persons of the former mayor of the municipality, Mr Mashamaite ("the former mayor") and a group of councillors, alleged to be the associates of the former mayor, on the one hand, and the municipal manager, Mr Kekana, on the other. The former mayor tried to have Mr Kekana removed as municipal manager. This gave rise to extensive litigation. At one stage Mr Kekana physically left, or was forced to leave, his office premises. Mr Kekana appears ultimately to have won the support of the majority of councillors and kept his job. But the former mayor did not manage to keep his. The disunity within the ruling party in the municipality resulted in a resolution being proposed and ultimately passed by the council of the municipality on 17 April 2014 pursuant to the provisions of s 59 of the Local Government: Municipal Structures Act 117 of 1998 ("the Structures Act"), removing the former

mayor from office. A new mayor, Mr Mabuela, was then appointed and presently holds office.

5 Mr Kekana was instrumental in having forensic investigators appointed to investigate whether there had been any financial irregularities in the conduct of the municipality's affairs during his absence from office, ie from 12 July to 11 October 2013.

6 The investigators found that there had been irregularities. During the period 1 July to 30 October 2013, the mayoral discretionary fund was depleted from R1 784 311 to R192 352,20. The money was used primarily for what were claimed to be mayoral outreach initiatives toward the community. T-shirts were handed out to those who attended. Lavish catering was provided. The public were bussed to the venues. All this was paid for by the municipality. But the conclusion of the investigators was that these were political events, not genuine mayoral outreach events. If this is correct, the most probable inference is that the former mayor organised these events, at the municipality's expense, to promote his personal popularity.

7 The former mayor and certain other councillors were invited by the investigators to respond to the allegations. All of them declined to do so. I must thus for the purposes of this application treat the allegations as established.

8 The former mayor assumed office in 2012. According to the evidence presently before me, for some years before the former mayor's accession to office, the municipality had an excellent record in exercising its powers, especially in the field of service delivery. The municipality received unqualified reports from the Auditor-General for the financial years 2009-2010. 2010-2011and 2011-2012. Apparently unqualified audit reports at municipal level are regrettably the exception rather than the rule in our country. A ratings agency rated the municipality as the best in Limpopo from 2007 through 2011. The municipality also received for two years in a row the Greenest Municipality Award.[1]

9 But in the Auditor-General's report for 2012-2013 in relation to the municipality was qualified. The Auditor-General reported substantial unauthorised expenditure for that period. The respondents allege that this unauthorised expenditure amounted to nearly R70 million. What went wrong? The municipality says that the former mayor was to

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[1] The evidence is silent upon whether municipalities were assessed for attractive vegetation, a reduced carbon footprint or on some other criterion.

blame. The respondents point out that the unauthorised expenditure took place under Mr Kekana's leadership. I am of course not called upon to decide this dispute. I have not heard the former mayor on the subject. But given the former mayor's decision to remain silent and be of no assistance to the forensic investigators, I am driven for present purposes to accept the applicant's version, which effectively stands uncontradicted.

10 By letter dated 28 February 2014, the speaker of the municipality wrote to the second respondent ("the MEC") to say that the council of the municipality had resolved to ask the MEC to exercise certain powers vested in the second respondent to remove the former mayor and certain other councillors mentioned in the report of the forensic investigators. On 10 March 2014, the MEC replied, advising the municipality to apply the rules of natural justice and hear those in question in relation to the complaints against them. By letter dated 17 March 2014, the speaker told the MEC that the municipality would do as suggested.

11 It seems that some nine councillors hold the balance between the two factions. This fact is important in the light of how the intervention arose and developed.

12 The intervention decision under attack was made on 17 March 2014. It was conveyed to the municipality in a notice of the same date and reached the municipality on 18 March 2014. It was signed by the second respondent as MEC with political responsibility for the provincial department of Cooperative Governance, Human Settlements and Traditional Affairs ("COGHSTA") and is addressed to the municipality and reads:

> **Notice that the Provincial Executive Council of Limpopo Province is assuming responsibility for some executive obligations of the Mogalakwena local Municipality in terms of section 139(1)(b) of the Constitution**
>
> 1 The Provincial Executive Council has resolved to intervene in Mogalakwena Local Municipality in terms of section **139(1)(b)**, by assuming responsibility of some executive obligations and to appoint an [sic] designate a person to act on its behalf with regard to the implementation thereof.
>
> 2 The Provincial Executive Council has reason to believe that the Municipal Council does not fulfil an executive obligation in terms of the Constitution or legislation as follows:
>
> a) Financial Management;
> b) Coordination of Executive Committee and Municipal Council;
> c) Implementation and review of IDP and budget
> d) Development of Policy and initiation of by-laws.

3 The Provincial Executive Council is therefore intervening in terms of section 139(1)(b) of the Constitution by assuming responsibility for the executive obligations listed in paragraph 2 above.

4 The Provincial Executive Council assumes responsibility for the executive obligations listed in paragraph 2 and for those executive obligations the performance of which is incidental to the fulfilment of those mentioned in paragraph 2 until such time as the Municipal Council can resume responsibility for those obligations in a sustainable manner.

5 The Provincial Executive Council will designate a person to act on its behalf with regard to the further implementation of the assumption of responsibility, and the Municipal Council will be informed thereof.

6 The Municipal Council must give its full cooperation to that person in the execution of his or her task to ensure that the Municipal Council can resume responsibility for these obligations in a sustainable manner.

7 The Municipal Council should take note that this intervention may be reviewed or terminated by the Minister of Cooperative Governance and National Council of Provinces as prescribed. [Emphasis as in original]

13 As I have shown, the MEC had at the time been in correspondence with the municipality about matters which the MEC, as a member of the first respondent, must have been considering in relation to the intervention decision of 17 March 2014. It is strange that the second respondent did not allude in the correspondence to the contemplated

decision and tell the municipality that the province had concerns which, if not attended to, might drive the province to intervene. As I shall demonstrate, the advice to hear the former mayor and other affected councillors before any action was taken against them appears to have been somewhat disingenuous: because the MEC, as well as the province and the sixth respondent, intended that the powers of the municipality should fall under the dictation of the sixth respondent before the municipality could undertake the processes recommended by the MEC. And the proposed hearing of the allegedly delinquent council members does not, from what is before me, appear to be something which the sixth respondent intended to give any priority, if he intended to deal with it at all.

14 For a proper appreciation of the import of the intervention decision, I must quote s 139 of the Constitution in full:

> Provincial intervention in local government
> (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)-

(a) it must submit a written notice of the intervention to-

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces,

within 14 days after the intervention began;

(b) the intervention must end if-

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1) (c)-

(a) the provincial executive must immediately submit a written notice of the dissolution to-

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces; and

(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and-

(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to-

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces,

within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.

15 Before its amendment, the provisions of s 139(1) were substantially identical to those of s 100(1) of the Constitution before the amendment of this section by s. 2 (b) of the Constitution Eleventh Amendment Act, 3 of 2003, which provides for intervention by the national executive in the administration of a province. Section 100(1) presently reads:

> National intervention in provincial administration
> (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution [or legislation], the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
> (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
> (b) assuming responsibility for the relevant obligation in that province to the extent necessary to-
> (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
> (ii) maintain economic unity;
> (iii) maintain national security; or
> (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole. [Words in brackets added by amendment]

16 Section 100(1), prior to its amendment, was interpreted by the Constitutional Court to mean that an assumption of responsibility under s 100(1)(b) was not competent unless a directive had first been issued under s 100(1)(a).[2] Counsel were agreed that as it stood before its amendment, s 139(1) had to be interpreted in the same way.

17 The assumption of responsibility in the present case was not preceded by a directive. But, submitted counsel for the respondents, the amendment to s 139 had changed the position and an intervention by the province under s 139(1(b) was lawful even if it had not been preceded by a directive. Counsel's submission had two legs: firstly, counsel pointed to the omission between subss (1) and (2) of the conjunction "and" which had previously linked the two subsections; secondly, counsel pointed to a recourse to the minister in the national government, said to be enjoyed by an aggrieved municipality under subs 2(b).

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2 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of Amended Text of the Constitution of the Republic of South Africa* 1996 1997 2 SA 97 CC para 119

18 There is apparently no decision directly in point but counsel for the respondents referred me to *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (Bisho High Court case no 231/2009) [2012] JOL 28311 ECB. This case dealt with a dissolution under s 139(1)(c) and is therefore not directly in point but I have found the decision valuable for forming my own conclusions and I have drawn heavily on the industry and insight displayed, if I may say so with respect, by the learned judge.

19 Drawing heavily on linguistic factors, the learned judge concluded that the conjunction "or" between subss 2(b) and 2(c) was a decisive indication of a legislative intention to sever any sequential connection between subs (2)(a) and subs 2(c). The judgment in *Mnquma* was delivered before decisions such as *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA and *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA, the latter of which laid down at para 16 that

> ... in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary

matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.

20 The legislature is presumed to know the law. In my view, the likelihood is that if the legislature had intended to withdraw the safeguard previously expressed to exist by the Constitutional Court in relation to the requirement that an intervention under subs 1(b) be preceded by a directive, it would have said so in clear and direct language and not contented itself with the excision of the conjunction "and" and the enactment of s 139(2)(b).

21 In my view, in the interpretation of s 139(1) in its amended form significant weight should be given to the policy of the Constitution to separate the powers of the three spheres of government applicable in this context. As has been said authoritatively, the power to intervene in the affairs of a municipality is most intrusive. The electors of the municipality have in such a case chosen their representatives. Section 139(1)(c) itself provides that the power to dissolve may only be employed in extreme cases.

22 Furthermore, s 139(1) provides that an intervention might be effected by the taking of *any* appropriate steps by the province. Subsections (1), (2) and (3) are only examples of such steps. In my respectful view, a dissolution might well require a prior directive if it would be

appropriate that one be given. In deciding *Mnquma*, the learned judge considered, convincingly in my respectful view, what the nature of appropriate *substantive* steps would be but did not, apparently, consider whether a directive or other step would be appropriate before a decision to dissolve was made.

23 So if the amendment removed the mandatory requirement that an intervention under subs 1(b) be preceded by a directive and provided that a prior directive is not mandatory before a decision to dissolve is made under subs 1(c), I think it is at least arguable that the proper construction of s 139(1) is that it depends on the facts: much the same as the principle that the requirement that a fair hearing before a court or an administrative tribunal demands a hearing of the affected party before a decision is made may be relaxed in cases of urgency or other exigency. In legal proceedings, such cases are known as *ex parte* applications and the caution with which courts will make orders, even interim orders, in the absence of affected parties is well known.

24 The powers of the minister and of the national cabinet to put an end to the intervention are not administrative powers. They are executive powers, constrained only by the principle of legality. A power to intervene under subs 1(b) could have devastating effects on a municipality if wielded by the political opponents of those in power in

the municipality. The present case, on the municipality's version, is an example of just that. An interpretation that in all, or all but the most extreme, cases a directive must precede an intervention would enable a municipality to answer the allegations against it or, if it had been remiss in the fulfilment of an executive obligation, get its house in order and thus forestall any intervention. The ability to ask the minister or the cabinet, both of whom might not be unduly distressed by the political demise of those in power in the affected municipality, would provide scant safeguard.

25 I therefore lean toward an interpretation that would require the province to issue a directive in a case such as the present. Such an interpretation would in my view promote the constitutional values of democracy and separation of powers.[3] I therefore hold that the municipality has good prospects of success in the review on this ground.

26 The municipality has forthrightly asserted that the province has exercised its power of intervention for the ulterior purpose of promoting the interests of the Mashamaite faction over the faction now in control of the municipality. It is common cause that the party in

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3 Steytler and De Visser, Local Government Law of South Africa (looseleaf ed) chapter 15 para 5.2.3A consider that a notice prior to *any* intervention under s 139(1) is mandatory in all cases.

power in the province is the same as the party in power in the municipality and that Mashamaite and the Mr Kgetjepe, who held the office of MEC until after the present application was launched, are friends.

27 Before I deal with the facts at this level, I shall say something about the nature of government as a legal institution under the Constitution. Government authority vests in three levels of government, the national provincial and local spheres. These spheres are distinctive, interdependent and interrelated. Every organ of state within such a sphere mst respect the constitutional status, institutions, powers and functions of government in the other spheres and must exercise its powers in a manner that does not encroach on the functional or institutional integrity of the others. Each has its own budget. Under our dispensation a municipality is autonomous. Executive and legislative authority within its jurisdiction and sphere of operation vests in the municipal council, which has the right to govern, in accordance with law but otherwise as it sees fit, the local government affairs of the community it serves. The national and provincial spheres may not compromise or impede a municipality in the exercise of its powers or performance of its functions.

28 The Constitution establishes a relationship between the organs in these three spheres based on cooperation, aimed at the advancement of inter-governmental participation and support. Provincial governments are under a constitutional duty to support municipalities within their provinces and promote their developmental capacities. National and provincial governments must support and strengthen the capacity of municipalities to perform their functions and exercise their powers.

29 Local government provides a forum for local community participation in matters entrusted to municipalities. The members of municipal councils are democratically elected by those they serve. Municipal government provides for grass roots democracy. It follows from this application of the democratic principle that the choices made by voters at the municipal level must be respected, as they must in relation to voters' choices at the provincial and national levels. The corollary is that voters must generally live with their bad democratic choices until the next election, when they may show their dissatisfaction with their representatives by voting them out.

30 Provinces may not, however, stand supinely by when there is performance by a municipality which is less than effective. The Constitution provides that provincial governments must not only

support but also monitor municipalities and see to the effective performance of their functions. A provincial executive is fully entitled, if not obliged, to ensure that the Constitution and applicable legislation is adhered to by municipalities.[4]

31 The notice of intervention which I have quoted is exceptionally vague. It is impossible on a reading of the notice to grasp what executive obligations the first respondent had in mind when it took its decision. This is of the utmost importance in the present context because the interventions contemplated by s 139 are not designed to be punitive. Neither the national nor a provincial government may usurp the functions of a municipality except temporarily and in compliance with strict procedures.[5] The notice to the municipality conveying the decision of the province to intervene, even assuming, for the sake of argument and against my contrary inclination, that such a notice need not be given before the s 139(1)(b) intervention decision is made, must tell the allegedly delinquent municipality what executive obligations it allegedly cannot or does not fulfil. This is so for at least three reasons: firstly, a specific notice would enable the municipality

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4 The propositions contained in this paragraph and the preceding three paragraphs are derived largely from *Mnquma, supra*, paras 40-48, where the authorities have been collected and the applicable principles expounded. A recitation in this judgment of the authorities collected in *Mnquma* would be otiose.

5 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 CC para 44

to identify its alleged shortcomings and contribute its resources towards remedying the respects in which it is allegedly remiss, thus removing the need to perpetuate the intervention; secondly, it would enable the municipality to challenge the intrusion into its sphere, whether by representations to the minister or the National Council of Provinces under s 139(2)(b) or by way of judicial review; and, thirdly, the notice would demarcate the scope of the intervention by the province into the areas of power and function which the Constitution has otherwise vested in a municipality.

32 For these reasons, in my view, the municipality has established a strong *prima facie* case for setting the decision aside on review on the grounds that it is unduly vague and therefore lacks rationality.

33 The notice does not assert that the alleged shortcomings objectively exist but that the decision maker had reason to believe that there were such shortcomings. Section 139 requires an objective state of affairs, not a mere opinion by the decision maker that such a state of affairs exists.[6] It seems therefore likely that the first respondent misconceived the scope of its powers of intervention. However, the test in this regard is not that applicable to administrative action. It was common cause before me that the contemplated review is what is called a review for

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6 See *South African Defence and Aid Fund and Another v Minister of Justice* 1967 1 SA 31 C 34H-35D

legality. It may be open to the province to attempt to demonstrate the objective existence of that which it claimed to have reason to believe existed. I shall thus make no finding in this regard.

34 I have described how the MEC kept secret from the municipality the fact that the province was considering an intervention. This is quite at odds with the cooperative governance regime which the Constitution imposes on all spheres of government. It is also at odds with the national legislation enacted to regulate the supervisory and monitoring power of provinces in relation to municipalities.

35 Section 106(1)(a) of the Local Government: Municipal Systems Act, 32 of 2000, ("the Systems Act") provides that an MEC who has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation or that maladministration, fraud, corruption of any other serious malpractice has occurred or is occurring in a municipality within his province *must*, by written notice to the municipality request it to supply the MEC with any information he needs. If the MEC considers it necessary, s 106(1)(b) empowers the MEC to launch an investigation. Under s 106(3), an MEC acting under s 106(1) must supply a written statement to the NCP and the minister motivating his actions.

36 Under s 136 of the Local Government: Municipal Finances Management Act, 56 of 2003, ("the MFMA"), an MEC responsible for local government who becomes aware that there is a serious financial problem in a municipality must consult the mayor, assess the situation *and the municipality's response to the situation* and determine whether the situation justifies or requires an intervention under s 139 of the Constitution.

37 There is no suggestion that the MEC did what was required of him, on the respondents' version, under these two statutes. The conclusion appears to be irresistible: either the MEC was in dereliction of his statutory duties or he did not genuinely believe that there existed a state of affairs which warranted action under the statutes.

38 Be that as it may, by letter dated 19 March 2014, the MEC wrote to the speaker of the municipality, calling upon the municipality to suspend normal council business and allow him to address the council on the scope of the proposed intervention. A special meeting of the council of the municipality was convened for this purpose on 25 March 2014. This meeting was however prevented by an interdict ("the MRA interdict") obtained *ex parte* by a Mr Pale and the Mogalakwena Residents Association as applicants in this court under case no 10200/2014 ("the MRA application") on that date. The interdict in its

terms interdicted the intervention pending a review which the order recited commenced "herewith".

39 The effect of the order was to deny the respondents in the MRA application[7] any hearing at all relative to the interim relief obtained. This suited the interests of the municipality but not, obviously, the MEC. The *ex parte* procedure adopted by the applicants in the MRA application constituted a gross violation of the rights of the province and therefore of the MEC. Fortunately for the administration of justice, the MEC was not left without a remedy: he brought a reconsideration application under rule 6(12). The reconsideration application succeeded. On 2 May 2014 the MRA interdict, which had been obtained *ex parte*, was set aside.

40 The present application was launched by the municipality on 27 May 2014 on notice, albeit very short notice, to the respondents. I have set out this history because it is relevant to the attack on the urgent procedure adopted by the municipality and the defence of *res judicata*.

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[7] The municipality, the second respondent and the premier of the province of Limpopo

41 I proceed to describe the scope of the powers which the first respondent claimed by virtue of the notice. It was never suggested that the sixth respondent acted outside the authority purportedly conferred on him by the province. It must therefore be accepted for present purposes that the province intended, by its decision, to achieve the goals which the sixth respondent asserted that he sought to achieve on behalf of the province.

42 The first substantive step taken in the intervention by the MEC was to convey to Mr Kekana, the municipal manager, in a letter dated 20 March 2014, on no legal basis that I am able to determine, that the sixth respondent had been vested with all powers of the accounting officer in the municipality and would report to the province via the MEC's office. The powers vested in Kekana, as municipal manager and accounting officer were, said the MEC, "hereby withdrawn."

43 The seriousness of this step cannot be overstated. With a stroke of his pen, the MEC attempted, in favour of a functionary of the MEC's own choosing, to circumvent the carefully constructed network of constitutional and other statutory powers which led to the vesting in the municipal manager, by the democratically elected representatives of the community served by the municipality, of the municipal manager's powers to administer the funds of the municipality. The

functionary selected by the province, declared the MEC, would not be accountable to the council of the municipality and ultimately the voters within the municipality but effectively to the MEC.

44 After the MRA interdict was set aside, the MEC and the sixth respondent lost no time pursuing their goal of achieving power in the municipality.

45 On 4 May 2014, COGHSTA[8] issued a press statement setting out the powers which it claimed vested in the sixth respondent. In this document, COGHSTA, on behalf of the province, sets out what it claims are the duties of the sixth respondent, whom the statement styles as "the Administrator". These are:

45.1 to undertake all fiscal and financial management functions at the municipality including being a signatory on the municipal banking account;

45.2 to ensure that the duties of the first respondent under s 139(1)(b) are realised;

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8 Apparently Mr Kgetjepe is no longer the provincial minister politically responsible for COGHSTA, having been moved to another portfolio in a provincial cabinet reshuffle. It is not clear when the reshuffle took place.

45.3 to advise the council (of the municipality?) on all policy matters in respect of development and implementation;

45.4 to review all systems and policies to ensure they are in line with legislation;

45.5 to appoint a municipal and other managers under ss 54A and 56 of the Systems Act;

45.6 to develop a turn-around strategy for the municipality;

45.7 to implement a system to control and approve all expenditure;

45.8 to implement all governance systems and procedures including appropriate council oversight mechanisms;

45.9 to ensure implementation of proper financial systems, policies and procedures;

45.10 to ensure implementation of the Municipal Property Rates Act;

45.11 to set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue;

45.12 to finalise the integrated development plan and approve the municipal budget before the end of the current financial year on 30 June 2014.

46 I wish to say two things about the plan of action identified in this press release: firstly, the intervention appears to be an attempt to gain control of and administer every facet of the municipality, including the all-important allocation of its available funds; secondly, the municipality has denied that the municipality has any significant problems. Those that there were, the municipality says, arose from the manner in which of the former mayor administered the affairs of the municipality. And nothing in what the respondents have put up in evidence indicates that there were any problems suggested in the press release which required redressing by the sixth respondent.

47 By letter dated 6 May 2014, the sixth respondent wrote to Kekana, asserting that the office of the speaker of the municipality was vacant because the then (and present) incumbent was no longer a councillor of the municipality. He did this in an attempt to enable the MEC to "announce and introduce" the intervention. The kindest explanation for this action would be that the sixth respondent thought that the intervention had been executed under s 139(1)(c). But as the sixth respondent has not explained his actions and because this would suggest that the sixth respondent had not read s 129(1) or the intervention notice dated 17 March 2014, this inference cannot be drawn in his favour. Suffice it to say that nothing in the decision under attack could possibly have been divested the speaker of her appointment as a councillor or divested Kekana of his powers and his duty to account to the council of the municipality.

48 By letter of the same date, the sixth respondent turned his attack upon Kekana himself. He told Kekana that he was considering suspending him pending possible charges of misconduct against Kekana relating to the unauthorised expenditure found by the Auditor-General in his report for the financial year 2012-2013 and to certain other matters. The irony in this, fortunately abortive, move should not be overlooked: the majority of councillors in the municipality suspected the former mayor of being responsible for these and other irregularities, notably

in relation to the mayoral outreach functions described in the report of the forensic investigators. Kekana had been instrumental in this process. Now the sixth respondent, on behalf of the first and second respondents, was manoeuvring to deflect attention in relation to the irregularities from the former mayor by insinuating that Kekana was to blame for them. There is not the slightest suggestion that the sixth respondent attempted to investigate the former mayor (Mr Kgetjepe's friend) in these regards. One wonders from whom the sixth respondent obtained the information that prompted the letter dated 8 May 2014.

49 It is incontrovertible that none of the respondents had any powers to discipline Kekana. The taking of disciplinary steps is classically administrative rather than executive action. Nothing in s 139(1)(b) gives a province to divest a municipality or its council of its power to take administrative action.

50 I have mentioned that nine councillors held the balance between the two factions of the ruling party in the council of the municipality. It is not disputed by the respondents that on 5 May 2014, the sixth respondent visited Kekana in the latter's office. The sixth respondent was accompanied by the general manager: legal services in

COGHSTA as well as some police officers.[9] The sixth respondent told Kekana that he was *taking over* [*sic*] the duties of the council of the municipality as administrator and that councillors would perform their functions under the sixth respondent's supervision. He said that while he, the sixth respondent, was not taking away the powers and functions of the municipal manager conferred upon that functionary by legislation, the municipal manager would perform those functions under the sixth respondent's supervision and control.

51 The sixth respondent then demanded of Kekana that he declare vacancies of the seats of the nine councillors on the grounds that the ruling party in the council, which had appointed these councillors from a list contemplated in Schedule 2 to the Structures Act, had recalled them. Such councillors are appointed pursuant to what are called proportional representation elections in the heading to Part 3 of Schedule 1 and have, no doubt for that reason, been described in the papers as the PR councillors. I shall similarly refer to them. PR councillors are elected from lists of candidates submitted by the parties competing in the election. The number of councillors appointed by each party is proportionate to the number of votes secured by the party as a proportion of total votes cast in the election.

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9 Passions were running high in the area at the time and persons on both sides feared, or said they feared, for their physical safety.

52 The PR councillors had faced party disciplinary proceedings for voting in support of Kekana in the municipal council in his dispute with the former mayor. They were found guilty and suspended from membership of the party for two years. They remained members of the party. This was confirmed in a letter dated 10 April 2014 by the secretary general of the party.

53 Section 27(c) provides that a PR councillor vacates office (and thus ceases to be a councillor) when he ceases to be a member of the party that nominated him for office. It thus follows that a mere suspension of a PR councillor by his party has no effect upon his position as councillor.

54 The party which had nominated the PR councillors for election withdrew their names from its list in response to their suspensions. That party, and apparently the province, the MEC and the sixth respondent, believed that this act removed the PR councillors from office. I need say no more than that this view was wrong. Once a person on a party list has been elected as a councillor, he remains a councillor until his term f office expires by effluxion of time or until he vacates his office pursuant to s 27 of the Structures Act.

55 It is of great significance for purposes of these proceedings that the sixth respondent, who was presented as an impartial administrator, should have sought to interfere in the politics of the municipality at all. Manifestly what the party, the province, the MEC and the sixth respondent all had in mind was to replace the PR councillors with persons who, the party believed, would do the party's bidding in the municipal council. I have not had the benefit of the sixth respondent's version but it seems to me, on the evidence at this stage before me, that this conduct was anti-democratic and reprehensible. I say it is reprehensible because the conduct appears to have been designed to misuse the Constitution, an instrument designed to promote democracy (amongst other high ideals and values) in this country, to subvert democracy and advance purely factional party political interests.

56 This conclusion is reinforced by the grounds which the respondents claim in their affidavits justified the intervention. They are four in number.

57 Firstly, the respondents claim that the municipality has not yet competed the process which must precede the submission of the municipality's annual budget to its council for approval. The municipality says that this process is well under way. It is extraordinary

that if the first respondent genuinely believed that the municipality had become dysfunctional or was otherwise unable to approve a budget, this did not form the subject of correspondence or action under the Systems Act and the MFMA as described above. In such a case, moreover, s 139(4) provides a remedy for the problem: a rapid, dedicated intervention, designed to remedy the deficiency and otherwise leave the constitutionally mandated governance of the municipality in the hands of its democratically elected representatives.

58 Secondly, the respondents point to the irregular expenditure apparently uncovered by the Auditor-General. Here again, no concerns were expressed or action taken before the intervention decision. But irregular expenditure, once suspected or established, is a matter for the SA Police to deal with, not the province. There is no suggestion that the province used its wide statutory powers or its influence to establish the facts or promote an investigation by the police.

59 Thirdly, the respondents claim in vague terms that in "many instances the municipality does not implement its supply chain management policy" and that there is an irregular use of the quotation system of procurement. The only concrete example of alleged inappropriate procurement is that the municipality extended a security services

contract to provide more security guards for Kekana and the municipality's speaker. The municipality claims that proper procedures were followed in this instance. Wherever the truth may lie on this issue, there is a plethora of legislative machinery to counter such alleged malpractices, none of which the first respondent has ever used. Section 139(1) requires that any intervention under this subsection be taken by way of "appropriate steps". There is no attempt by the respondents to explain why none of the other, less intrusive, steps were taken while leaving the government of the municipality in the hands of its elected representatives.

60 Fourthly, the respondents complain that the municipality has not yet completed the annual review of its integrated development plan for purposes of the 2014-2015 financial year. The municipality says that the review has been completed and steps to approve the plan and submit the budget for council approval are "running like clockwork". Again, the first respondent has never before raised these concerns or taken the statutorily mandated steps to correct them.

61 Wherever the truth may lie in relation to these allegations, nothing put up by the respondents in its affidavits before me justifies an intervention under s 139(1)(b) of the Constitution.

62 The applicant has forthrightly accused the first respondent of having used s 139(1)(b) and having made the decision under attack with ulterior motives and in bad faith. Because these are proceedings for interim relief, I shall say no more than that there appears to be substance in this accusation and that the applicant has prospects of establishing its case on this ground in its review in due course.

63 Against this background, I proceed to evaluate the respondents' submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondent which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently. Rule 6(12)(b) provides:

> In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

64 It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.

65 The case for the applicant is that the respondents are seeking unlawfully to take away its lawfully derived power to govern the municipality at a local government level. That case, if ultimately substantiated, is directed at redressing nothing less than a serious violation of the rule of law. The prejudice to the applicant is manifest. Every action taken by someone who is in law a usurper of power is unlawful and, especially where third parties are involved, might give rise to complex questions of fact and law. Where the funds of a municipality are disbursed by such a usurper, recovery might be attended by serious problems and even be impossible. I find that the applicant has shown that it will suffer prejudice which cannot be redressed at a hearing in due course.

66 The main point taken by counsel for the respondents in relation to urgency is that the applicant delayed impermissibly in launching its application from 18 March 2014, when it received notice of the impugned decision, until 15 May 2014, when it gave notice of this application to the respondents.

67 I think that the delay point is entirely met by the fact that pursuant to the MRA application, the respondents were precluded by interdict of this court from taking action. There was not only no need for the applicant to take any action itself but if it had done so, it would have been met with the answer that because of the very existence of the MRA interdict, there was no reason why the applicant could not be afforded substantial redress at a hearing in due course. Once the MRA interdict was discharged, the applicant acted very speedily.

68 In addition, the respondents have put what they wanted to before the court. This Division has a proud tradition of making judges available at short notice for cases which deserve prompt attention. This is such a case. There was no prejudice to the administration of justice: this case alone was assigned to me for hearing on the day it came before me. So no other litigants were prejudiced by the applicant's effort to promote itself in the queue of pending cases.

69 Weighing all this, I hold that the matter is urgent and permit it to remain on the roll for hearing.

70 As to the *res judicata* point taken by counsel for the respondents: the first difficulty I have is that I do not know on what grounds the MRA interdict was set aside. I cannot tell whether the learned judge made her decision on the merits of the MRA application or on some other basis. For example, the order to set aside the MRA interdict might have been based simply on the abuse by the MRA applicants of the *ex parte* procedure or on the footing that it was inappropriate to exercise the discretions vested in the court in interim interdict applications. Put shortly, I am unable to determine whether the order was equivalent to judgment for the second respondent or merely absolution from the instance.

71 There is a legion of additional difficulties in the way of the respondents. The "same parties" requirement for a successful plea of *res judicata* is to my mind not met by the fact that the present applicant was joined as a nominal respondent in the MRA application with no relief being asked against it. And finally, the relief sought was interim in nature and the order refusing interim relief cannot satisfy the requirement that the order be final. The defence of *res judicata* is dismissed.

72 Because this is an application for interim interdicts, the applicant must establish a *prima facie* right, a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, an absence of any other satisfactory remedy and a balance of convenience in favour of the grant of interim relief. Where there are factual disputes, the facts set out by the applicant must be taken together with any facts set out by the respondent which the applicant cannot dispute and the court must consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. An applicant upon whose case serious doubt is thrown cannot succeed in obtaining temporary relief.

73 Once a well grounded apprehension of irreparable harm is established, in the absence of an adequate ordinary remedy the court is vested with a discretion, which will usually resolve into a consideration of prospects of success and the balance of convenience. The stronger the prospects of success, the less need for such balance to favour the applicant. Conversely, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant. *Cipla Medipro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 4 SA 579 SCA para 40.

74 I have found that the applicant has established a strong *prima facie* case, with good prospects of success in the contemplated application for final review relief. The harm to my mind if an interdict is not granted is manifest. I have dealt with this aspect in the course of considering urgency.

75 Counsel for the respondents submitted that the requirement of absence of another satisfactory remedy had not been met and pointed to the possibility that the applicant might approach the minister for relief under s 139(2)(b) of the Constitution. I am by no means satisfied that the minister is obliged to hear an aggrieved municipality in these circumstances. I think that the powers vested in the minister under s 139(2)(b) are executive rather than administrative.

76 The point was not taken on the papers so the applicant has not had the opportunity to deal with the point at a factual level. Had the point been raised in the papers, as it ought to have been, the applicant might, for example, possibly have taken the position that it did not anticipate that the minister would act impartially in this factional dispute within the minister's own party and that accordingly the applicant could not expect justice from any approach to the minister.

77 But I think, ultimately, that the point must fail for the reason submitted by counsel for the municipality: the minister has the power to perpetuate the intervention or to bring it to an end. The minister does not have the power vested in this court to suspend the implementation of the decision pending a full hearing in due course. I hold that the applicant has demonstrated the absence of another satisfactory remedy.

78 The balance of convenience strongly favours the municipality. Its council is the lawfully elected government of the municipality. As long as legal requirements are met, its legislative decisions are valid, as are the acts of its office bearers in their capacities as such. On the other hand, I have found that the municipality has good prospects of showing that the powers sought to be exercised by the province through the sixth respondent may not lawfully be exercised by them. No prejudice will arise to the respondents or to the public if the present dispensation remains in office pending the review. On the other hand, considerable prejudice may follow if the sixth respondent is allowed to assume the office the province and the MEC claim for him.

79 It follows that interim interdicts must issue. Because these are interim proceedings it is appropriate that costs, including the question whether the employment of both senior and junior counsel was justified, be reserved for consideration by the review court. I wish, however, to sound a note of warning in regard to costs.

80 There is a prospect that the review court might hold that the measures provided by s 139(1)(b) are not being used for their proper purpose but to resolve a political dispute in favour of a preferred political faction within the party in power in the municipality. In my view, public money should not used to resolve such a political dispute and should not, in a local government context, be diverted from its proper purpose of building communities and supplying them with resources. The courts have wide powers to regulate the remuneration of their officers. *Tasima (Pty) Ltd v Department of Transport and Others* 2013 4 SA 134 GNP para 73. It would be open to a court to order, as it did in *Tasima*, that no public money might be used to remunerate the lawyers for any party who is found to have acted in the fashion which I have described. I myself made such an order in *Mosiane-Segotso and Another v Tlokwe City Council and Others*, a case I decided in this Division on 29 July 2013 under case number 41251/2013.

81 I make the following order:

1 Pending the final determination in this court of the application for relief on review set out in Part B of the applicant's notice of motion dated 15 May 2014:

1.1 the first, second and sixth respondents are interdicted and restrained from:

1.1.1 implementing in any manner whatsoever, the first respondent's decision to assume, under s 139(1)(b) of the Constitution, responsibility for executive obligations of the applicant; and

1.1.2 interfering in any way whatsoever with the ability or right of council of the applicant, its municipal manager or any of its officials to exercise powers or perform functions vested in them under the Constitution or any other applicable legislation;

1.2 the first respondent is interdicted and restrained from intervening in the applicant's affairs in terms of s 139(1) of the Constitution and particularly from appointing an administrator to act on its behalf in terms of this subsection;

1.3 the effect of the first respondent's decision to assume responsibility for executive obligations of the applicant under s 139(1)(b) of the Constitution as set out in annexure M2 to the applicant's notice of motion as well as of any actions performed by the sixth respondent relating to such decision are suspended with immediate effect.

2 The costs of this application, including the questions whether the costs of the employment of both senior and junior counsel and the scale upon which such costs should be awarded, are reserved for the consideration of the court hearing the review.

NB Tuchten
Judge of the High Court
17 June 2014
MogalakwenaLimpopo35248.14

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