THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 801/2010

In the matter between:

THE PREMIER OF THE WESTERN CAPE	**FIRST APPELLANT**
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	**SECOND APPELLANT**
THE CABINET OF THE WESTERN CAPE PROVINCE	**THIRD APPELLANT**
and	
OVERBERG DISTRICT MUNICIPALITY	**FIRST RESPONDENT**
EVE CATHERINE MARTHINUS	**SECOND RESPONDENT**
ISAK STEVENS	**THIRD RESPONDENT**
JAN CORNELIUS GELDERBLOEM	**FOURTH RESPONDENT**
FUNEKA CAROLINE KHOHLAKALA	**FIFTH RESPONDENT**
CHRISTINE VUYELWA MAZEMBE	**SIXTH RESPONDENT**
PATRICK THAMSANQA PONI	**SEVENTH RESPONDENT**
DEANNA CLAUDINE RUITERS	**EIGHTH RESPONDENT**
JOANA JANUARIE	**NINTH RESPONDENT**
DAVID JOHANNES ABRAHAMS	**TENTH RESPONDENT**
JOHN CHARLES OCTOBER	**ELEVENTH RESPONDENT**
ELLEN ROSALINE JANSEN	**TWELFTH RESPONDENT**

Neutral citation: *The Premier of the Western Cape v Overberg District Municipality* (801/2010) [2011] ZASCA 23 (18 March 2011).

Coram: Harms DP, Streicher, Brand, Shongwe and Theron JJA

Heard: **1 March 2011**

Delivered: **18 March 2011**

Summary: Council of first respondent dissolved by provincial executive in terms of s 139(4) of the Constitution of the Republic of South Africa, 1996 – decision based on erroneous interpretation of section – exercise of executive power reviewable for illegality.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Bozalek J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

BRAND JA (Harms DP, Shongwe and Theron JJA concurring):

[1] This matter turns on the provisions of s 139(4) of the Constitution.[1] By the nature of things, I shall presently return to a discussion of these provisions in some detail. Broadly stated for present purposes, however, s 139 of the Constitution permits and requires provincial governments to supervise the affairs of local governments and to intervene when things go awry. More particularly, s 139(4) deals with the situation where a local government fails to approve an annual budget or revenue raising measures necessary to give effect to the

1 Constitution of the Republic of South Africa, 1996.

budget. In that event, so the subsection provides, the provincial executive must intervene by taking appropriate steps, including dissolving the municipal council, to ensure that the budget or the revenue raising measures are approved.

[2] Relying on these provisions, the provincial executive of the Western Cape – or the provincial cabinet as it is known in that province[2] (the cabinet) – decided on 14 July 2010 to dissolve the council of the Overberg District Municipality (the council) in the light of its failure to approve an annual budget for the municipal financial year which started on 1 July 2010. The cabinet further decided to approve a temporary budget for the municipality and to appoint an administrator until the election of a new council.

[3] This gave rise to an application by the Overberg District Municipality itself and eleven former members of the council to the Western Cape High Court, Cape Town, for the setting aside of these decisions by the cabinet. In the event, the application proved to be successful in that Bozalek J granted the order, essentially in the terms that it was sought. In subsequent proceedings he afforded the appellants leave to appeal to this court, but ordered implementation of his original order in terms of rule 49(11) of the Uniform Rules, pending the outcome of the appeal.

[4] The underlying reasoning of the court a quo as well as the opposing contentions by the parties on appeal will be best understood against the background that follows. The three appellants are the Premier of the Western Cape; the Member of the Executive Council – known in the Western Cape[3] as the Provincial Minister – for Local Government, Environmental Affairs and Development Planning; and the cabinet itself. The 12 respondents, who were the applicants in the court a quo, are the Overberg District Municipality and the 11 members of the council (the individual respondents) who have since been reinstated as council members by the interim order of the court a quo.

2 By virtue of s 35 of the Constitution of the Western Cape, 1 of 1998.
3 Again by virtue of s 35 of the Western Cape Constitution.

[5] The 11 individual respondents were not the only members of the council. In fact, the council consisted of 20 members representing four political parties. Nine of them belonged to the African National Congress (the ANC), two to the National Peoples' Party (the NPP), eight to the Democratic Alliance (the DA) and one to the Independent Democrats (the ID). The governing majority consisted of a coalition between the nine members of the ANC and the two representing the NPP. They are the 11 individual respondents.

[6] What gave rise to the impugned decision by the cabinet was the failure of the council to approve an annual budget for the municipality before the start of the financial year on 1 July 2010. Municipal budgets are governed by chapter 4 of the Local Government: Municipal Finance Management Act (the MFMA).[4] Chapter 4 consists of ss 15 to 33. In terms of s 15 the municipality may incur no expense except in accordance with an approved budget. Section 16(1) provides that '[t]he council of a municipality must for each financial year approve an annual budget for the municipality before the start of that financial year'. Read with the definition of 'financial year' in s 1, it means before 1 July.

[7] Coupled with the provisions of s 16(1), is the requirement in s 16(2) that the proposed budget must be tabled at a council meeting at least 90 days before the start of the budget year. In this case the proposed budget was tabled at a council meeting which was held on 13 April 2010. Though this was less than 90 days before 1 July 2010, this flaw in the procedure turned out to be of no consequence in these proceedings. What did turn out to be of consequence was that at the same meeting the speaker of the council resigned. Moreover, for reasons unexplained on the papers, the council resolved to elect a speaker for that meeting only. After the meeting the council was therefore without a speaker. This is in conflict with s 36 of the Local Government: Municipal Structures Act (the Municipal Structures Act)[5] which anticipates that '[e]ach municipal council must have a chairperson who will be called the speaker'.

4 Act 56 of 2003.
5 Act 117 of 1998.

[8] At the meeting of 13 April 2010 the proposed budget was approved for purposes of publication and comment. Thereafter it was duly made public and submitted to both the National Treasury and the treasury of the province as required by s 22 of the MFMA. The only outstanding prerequisite to render the budget effective was approval by the council. That approval could only be obtained at a council meeting. At the heart of the problem in the case lies the fact that there was no meeting of the council before 1 July 2010. The reason why the meeting did not take place has to do with s 29 of the Municipal Structures Act. The relevant part of this section provides:

'Meetings of municipal councils

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

(2) The municipal manager of a municipality . . . must call the first meeting of the council of that municipality within 14 days after the council has been declared elected . . . '

[9] Because the council resolved on 13 April 2010 to elect a speaker for purposes of that meeting only, there was no speaker after the meeting to convene the next meeting. The individual respondents, constituting the majority of the council, then requested the municipal manager in writing to convene a meeting of the council, amongst other things, to elect a new speaker and to approve the annual budget. They did so on numerous occasions during May and June 2010.

[10] These requests led the municipal manager to seek advice from a member of the Cape Bar as to how he should proceed. The advice he thus obtained was, in essence, that his authority to convene meetings of the council was limited, by the provisions of s 29(2) of the Municipal Structures Act, to the first meeting after the election of the council. In the light of this advice the municipal manager steadfastly refused to convene a council meeting, despite the numerous requests by the individual respondents to do so. Counsel for the appellants since conceded, both in this court and in the court a quo, that the advice was wrong

and that, in the circumstances, the municipal manager was indeed able to convene a council meeting.[6] But this concession, of course, did not avoid the deadlock that arose at the time. The deadlock situation persisted until after the commencement of the new financial year on 1 July 2010.

[11] Eventually, the individual respondents obtained legal advice of their own. Acting on this advice, they again approached the municipal manager on 9 July 2010 with a written request to convene a council meeting for 15h00 on the same day. This time they added a rider that if the municipal manager should refuse to cooperate, the meeting would nonetheless proceed. Since the municipal manager remained resolute, the individual respondents resorted to the fall-back position reserved in their letter. Consequently, a meeting was held at 15h00 on 9 July 2010. It was attended by the 11 individual respondents only, because, so it appears, no other council member had been notified. At the meeting the individual respondents summarily elected one of their number as the new speaker and unanimously approved the proposed budget for the 2010/2011 financial year.

[12] In the meantime the municipal manager had informed the Provincial Minister for Finance in the Western Cape the previous day (ie 8 July 2010) that the municipality had failed to approve a budget for the financial year. In this light the second appellant, as the Provincial Minister responsible for Local Government, sought advice from legal experts in the field as to the options available to him.

[13] The advice he received was that in terms of s 139(4) of the Constitution read with s 26(1) of the MFMA, he had no alternative but to request the provincial cabinet to dissolve the council. The second appellant in turn conveyed this advice in a submission to the cabinet at its meeting of 14 July 2010. In relevant part the submission read as follows:

'● where a municipality has not approved an annual budget by the commencement

6 As authority for their concession they relied on the provisions of ss 51(3) and (4)(c) of the Western Cape Municipal Ordinance 20 of 1974 read with schedule 6 of the Constitution.

of the new financial year, there is . . . no statutory basis for the municipality to approve a budget;

- as the approval of a budget is a constitutionally entrenched legislative power of municipalities, the Provincial Executive may only consider and approve a temporary budget;
- where an annual budget has not been approved by the due date, the applicable legislation indicates that the dissolution of council is compulsory and only after a new council has been elected, it regains its authority to approve a budget for the municipality.'

[14] The submission by the second appellant also informed the cabinet that a budget had been approved by the council members from the ruling coalition, on 9 July 2010. It conveyed the opinion, however, that the approval was invalid for two reasons. First, because the meeting did not qualify as a properly constituted council meeting. Secondly, because in terms of the MFMA, the council had no authority to approve a budget after the first day of the financial year.

[15] In the light of the submission by the second appellant, the cabinet took the impugned decision, essentially by reason of its belief that it had no option to do otherwise. In short, the appellants' argument in defence of the decision, both in this court and in the High Court, rested on the narrow basis that the belief on which the cabinet's decision was founded is borne out by a proper interpretation of s 139(4) of the Constitution and s 26(1) of the MFMA. Because s 26(1) of the MFMA does no more than to echo the provisions of s 139(4) of the Constitution in identical terms, brevity dictates that I deal with the latter section only.

[16] Section 139(4) provides:

'If a municipality cannot or does not fulfil its 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.'

[17] What the section means, so the appellants contended, is that in the circumstances contemplated, the provincial executive is obliged to dissolve the council and to take the steps referred to in (a) and (b). The argument in support of the contention relied on the supposition that 'including' is the equivalent of 'incorporating'. Accordingly, the 'appropriate steps' must incorporate the three steps specifically mentioned in the section. In addition, the argument relied on the term 'must' which is ordinarily understood as an imperative.

[18] Any other interpretation, so the appellants' argument went, would render the specific reference to the three steps redundant. If the legislature intended to say that the provincial executive can do whatever steps it finds appropriate, so the appellants rhetorically asked, why would the three steps be mentioned at all? These steps would in any event be included in the open-ended category of 'any appropriate steps'.

[19] Let me start by saying that I do not agree with the appellants' interpretation of the section. To me the meaning of the section is quite plain. It provides that in the circumstances contemplated, the provincial executive must intervene. That is the imperative. Not that it must dissolve the council. Accordingly the executive is obliged to take some steps. It cannot do nothing. But the actual steps to be taken are left to the discretion of the executive. The only limitation imposed on that discretion is twofold. First, the steps must be 'appropriate', that is, the steps must be suitable. Secondly, these steps must be suitable for a particular purpose, that is, to ensure the approval of the annual budget.

[20] The reason why dissolving the council is specifically mentioned, as I see it, is that it is the most drastic step the provincial executive can take, while the

two steps referred to in (a) and (b) are concomitant to the most drastic step. It must be borne in mind that s 139(4) was introduced through a constitutional amendment[7] together with other additions to s 139[8] which, for the first time, made reference to dissolution of the municipal council as a measure available to the provincial executive. Prior to 2003 there was uncertainty as to whether the provincial executive was empowered to take that drastic step.[9] The specific reference to dissolution of the council was therefore aimed at removing the uncertainty that formerly prevailed.

[21] The interpretation contended for by the appellants raises the difficulty that it renders the reference to 'appropriate steps' in s 139(4) superfluous. If the provincial executive is compelled to dissolve the council what other appropriate steps could there be? The appellants' answer was that 'appropriate steps' must be understood to refer to the preparatory steps that the provincial executive may regard as appropriate to properly approve a temporary budget. But if this was the intention, the wording of the section would, in my view, have been quite different. It would have indicated that the executive council must take appropriate steps to dissolve the council and to achieve the results specifically mentioned in (a) and (b).

[22] The appellants' further contention was that there are compelling policy and strategic reasons why, in the circumstances contemplated, dissolving the council should be peremptory. Any other approach, so the argument went, would mean that a council can degenerate to a level where it can ignore statutorily imposed instructions to adopt a budget on time with impunity. Conversely, the appellants argued, the dismissal of a recalcitrant council which cannot even timeously adopt the most basic of instruments needed for delivery of services, would convey the message that there are definite limits to local politicking at the expense of residents.

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7 In terms of s 4 of the Constitution Eleventh Amendment Act of 2003.
8 In s 139(1)(c) and 139(5)(b).
9 See eg Yonina Hoffman-Wanderer and Christina Murray 'Suspension and Dissolution of Municipal Councils under Section 139 of the Constitution 2007 *TSAR* 141-142.

[23] I believe there are two answers to this argument. The first is that the mere prospect of its dissolution by the provincial executive should be enough to spur the recalcitrant or incompetent council into action. But the second answer is, in my view, even more pertinent in the present context. It is this. The appellants' argument pre-supposes that the council's failure to approve a budget is invariably attributable to incompetence or recalcitrance. The invalidity of the assumption is demonstrated by the very facts of this case. In this case the council was both willing and able to approve the budget timeously but it was prevented from doing so by factors beyond its control.

[24] In these circumstances it seems not only inappropriate but downright absurd not to allow the council to approve the budget, which has already passed through all the preliminary procedures, but to dissolve the council instead. Of course, one can think of examples of even more glaring absurdity, for instance where the budget was in fact approved, but one day late. What the argument amounts to is that, though the extreme measure of dissolution may be nonsensical in a particular case, it is dictated by the necessity to set an example for others who are indeed recalcitrant and incompetent. My short answer is that I cannot ascribe that intention to our Constitution.

[25] For their final contention the appellants sought to rely on those provisions of the MFMA which provide, in seemingly prescriptive terms, that municipal councils are to approve their annual budgets before the start of the financial year. Pertinent amongst these is the stipulation in s 16(1) that:

'The council of a municipality must for each financial year approve an annual budget for the municipality before the start of that financial year.'[10]

[26] In addition the appellants refer to s 27(2) of the MFMA. The import of the section is that the MEC for Finance in a province may, on application and on good cause shown by a municipality, extend any deadline or time limit pertaining

10 See also s 24(2) to the same effect.

to the tabling or approval of annual budgets stipulated in the MFMA or in any other legislation. But the section pertinently renders the MEC's authority subject to two provisos. First, that he cannot extend the deadline in s 16(1) and, second, that any extension he affords may not compromise compliance with s 16(1).

[27] In the light of these provisions, the appellants' argument proceeded along the following lines. After the commencement of the financial year there is no legal basis for the municipal council to adopt a budget and a provincial executive has no power to authorise something which the MFMA does not allow. Since the Constitution itself reserves the approval of an annual budget for the municipal council,[11] the provincial executive has no power to do so – even on a temporary basis – while the council exists. The provincial executive therefore has no choice. It is bound to dissolve the council so that it can approve a temporary budget itself in terms of s 139(4)(b), otherwise the municipality will be without any budget and therefore unable to operate. Consequently these provisions of the MFMA support the interpretation of s 139(4) of the Constitution that the appropriate steps available to the provincial executive are confined to those expressly mentioned in the section. These are to dissolve the council in order to restore democratic government and, in the meantime, to appoint an administrator and to approve a temporary budget. For this line of argument the appellants found direct support in the writings of learned authors in the field.[12]

[28] Despite this direct support, I cannot agree with this argument. As a point of departure it must be accepted, in my view, that the MFMA can only inform the provisions of s 139(4) of the Constitution. Any contradiction of, or departure from those provisions by the MFMA will inevitably be unconstitutional and thus invalid. On my interpretation of s 139(4), it does not limit 'appropriate steps' to dissolution of the council. Any limitation to that effect imposed by the MFMA must therefore be invalid for unconstitutionality. But I do not understand the MFMA to impose a limitation of that kind on the discretion bestowed upon the provincial executive in

11 See s 160(2) of the Constitution.
12 N Steytler & J De Visser *Local Government Law of South Africa* at 15-40; N Steytler & J De Visser in S Woolman *Constitutional Law of South Africa* Vol 2 2 ed at 22-125.

terms of s 139(4).

[29] For the sake of argument, I accept that the council has no authority to approve an annual budget after the start of the financial year. Moreover, a council that has failed to approve its budget by 1 July cannot approach the MEC for finance in the province. He or she has no authority to extend the deadline in terms of s 16(1). A council that finds itself in that situation has no option but to approach the provincial executive for guidance.[13] In terms of s 139(4) of the Constitution and s 26(1) of the MFMA the matter is then in the hands of the provincial executive. That body must then take any steps it regards as appropriate to ensure approval of the budget.

[30] The real question is thus whether there is anything in the MFMA which excludes a directive by the provincial executive that compels approval of the budget by the council after 1 July, from the wide ambit of 'any appropriate steps'. The answer to this question, I believe, is that the MFMA imposes no such limitation on the powers of the provincial executive. At the risk of repetition, I point out that, as I see it, 'any appropriate steps' in s 139(4) clearly include a directive by the provincial executive that enables the council to approve the annual budget. Any exclusion of that power in the MFMA would therefore impose a limitation on the powers bestowed upon the provincial executive by the Constitution itself. Since the MFMA contains no express limitation to that effect, it would have to be implied. Needless to say, in my view, that one could hardly imply a limitation into legislation that would be unwarranted by the Constitution.

[31] The fact that in terms of s 27(2) the MEC cannot extend the deadline imposed by s 16(1) does not mean that the provincial executive cannot do so under s 139(4) of the Constitution. In short, s 27(2) imposes a limitation on the powers of the MEC which has nothing to do with the powers of the provincial executive under s 139(4) of the Constitution and s 26(1) of the MFMA.

13 In terms of s 55 of the MFMA.

[32] In a situation where the budget is ready and awaiting approval after 1 July a directive to approve the budget within a stipulated time would clearly be the appropriate step. In other situations a directive of this kind may not be appropriate. It is because situations that may potentially arise after 1 July are so varied and different, that the Constitution left it to the discretion of the provincial executive to take any steps it regards as appropriate in the circumstances to ensure approval of the budget. Should the council be directed to approve a budget within a stipulated period, s 26(4) and (5) of the MFMA completes the picture by providing how municipal expenses can be met, pending approval of the budget in terms of s 139(4) of the Constitution and 26(1) of the MFMA.[14]

[33] The reasons why I not have to come to any firm conclusion as to whether the MFMA prevents a municipal council from approving a budget after 1 July, are twofold. The first is the one I have already given, namely, that the provincial executive is in any event empowered in s 139(4) of the Constitution, to direct the council to do so. The second reason is that the situation where the council has approved a budget after 1 July does not arise in this case. That situation would have arisen if the council validly approved a budget at the meeting arranged by the individual respondents on 9 July. But it is common cause that the meeting was not validly constituted because the other members of the council were not properly notified.

[34] Section 139(4) of the Constitution does not seem to contemplate the situation where the provincial executive is confronted with a budget which had

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14 Section 26(4) and (5) read as follows:
'(4) Until a budget for the municipality is approved in terms of subsection (1), funds for the requirements of the municipality may, with the approval of the MEC for finance in the province, be withdrawn from the municipality's bank accounts in accordance with subsection (5).
(5) Funds withdrawn from a municipality's bank account in terms of subsection (4) -
(a) may be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year; and
(b) may not –
(i) during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year; and
(ii) exceed the amount actually available.'

been approved by the municipal council after 1 July. As to what would be the position in that hypothetical situation, there appears to be two possible answers. The first is that 'any appropriate steps' confers the power on the provincial executive to bestow validity on a belated approval by the council that would otherwise be invalid. The second possible answer is that the MFMA does not render the belated approval of the budget by a council after 1 July invalid. If that were so, there would be no appropriate steps that the provincial executive can take to achieve a purpose which had already been achieved. But as I have said, I do not believe that we are called upon to resolve a hypothetical question that does not arise in this case.

[35] The court a quo arrived at the same interpretation of s 139(4) of the Constitution as I did, albeit along a somewhat different route. It essentially assumed that the meaning of the section is ambiguous. Departing from that premise it proceeded to the context of the Constitution as a whole. It then came to the conclusion that the context favours a wide discretion on the part of the provincial executive rather than a narrow one which is limited to dissolution of the council. The context of the Constitution the court referred to related in the main to those provisions which recognise local authorities as a separate sphere of government, independent of superior legislatures.[15] In this context, so the court a quo concluded, one should avoid an interpretation of s 139(4) which limits the authority of the provincial executive to the most drastic interference into the affairs of the local authority. Though I do not differ from the approach adopted by the court a quo, I find it unnecessary to follow that route, because I find the interpretation of s 139(4) contended for by the appellants simply untenable.

[36] The conclusion I arrive at is therefore that in this matter the cabinet had been wrongly advised and consequently erred when it acted on the assumption that it had no other option but to dissolve the council. The effect of the mistake was, of course, that the cabinet had failed to exercise the discretion bestowed upon it by s 139(4) properly, if at all.

15 See ss 40 and 41 of the Constitution. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 26.

[37] The long and the short of all this is the finding that, because of the error in its interpretation of s 139(4), the cabinet failed to consider less drastic means, other than to dissolve the council, to meet the desired end of an approved budget. Counsel for the appellants conceded that the impugned decision cannot survive this finding. I believe the concession was rightly made. It is true that the decision constituted executive action, as opposed to administrative action. In consequence it is not judicially reviewable under the provisions of the Promotion of Administrative Justice Act (PAJA).[16] Yet, this does not shield the decision from a challenge on the basis of illegality.

[38] This is so because it has by now become settled law that the constitutional principle of legality governs the exercise of all public power, rather than the narrower realm of administrative action as defined in PAJA.[17] And in *President of the Republic of South Africa v South African Rugby Football Union*[18] the Constitutional Court pertinently held that the principle of legality requires the holder of executive power not to misconstrue that power. As I see it, it follows that in the circumstances the impugned decision of the cabinet offended the principle of legality, because it directly resulted from the cabinet misconstruing its powers under s 139(4) of the Constitution. Stated slightly differently: by deciding to dissolve the council without considering a more appropriate remedy, the cabinet, in my view, offended the provisions of s 41(1) of the Constitution which requires all spheres of Government to respect the constitutional status, powers and functions of Government in other spheres[19] and 'not [to] assume any power or function except those conferred on them in terms of the Constitution'.[20] It follows that in my view the High Court was right in setting the impugned decision aside on the basis of illegality.

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16 Act 3 of 2000. In terms of s 6 of PAJA judicial review is reserved for 'administrative action' as defined, while the executive powers of a provincial executive under s 139 of the Constitution are expressly excluded from the ambit of the definition of 'administrative action' by s 1(bb) of PAJA.
17 See eg *Fedsure Life Assurance Ltd* para 59; *Pharmaceutical Manufacturers Association of SA: In re Ex parte the President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.
18 2000 (1) SA 1 (CC) para 148.
19 Section 41(1)(e).
20 See s 41(1)(f).

[39] For these reasons the appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

STREICHER JA:

[40] I agree with my colleague Brand JA that the appeal should be dismissed with costs including the costs of two counsel.

[41] The Overberg District Municipality failed to approve an annual budget before the start of the budget year whereupon the provincial executive of the Western Cape on 14 July 2010 decided to dissolve the council. The provincial executive took the decision to dissolve the council on the basis that it was in terms of s 139(4) of the Constitution obliged to do so. The court below held that the provincial executive misinterpreted the section in assuming that the council did not have the power to approve the budget after the start of the budget year. It is common cause between the parties that if that was the position the appeal should fail.

[42] Section 26(1) of the Local Government: Municipal Finance Management Act 56 of 2003 follows the wording in s 139(4) and reads:

'If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139 (4) of the Constitution by taking any appropriate steps to ensure that the budget or

those revenue-raising measures are approved, including dissolving the council and-

a) appointing an administrator until a newly elected council has been declared elected; and
b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.'

[43] Like s 26(1), s 139(4) of the Constitution provides that if by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget the '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.'

[44] In my view there is no basis on which s 139(4) can be interpreted to mean, as was submitted by the appellant, that every appropriate step that may be taken must include the dissolution of the municipal council. Appropriate steps to ensure the approval of a budget include the dissolution of the municipal council ie dissolution of the council is but one of the steps that can be taken to ensure the approval of a budget. I agree with my colleague and with the court below that the reason why dissolving the council is specifically mentioned is that it is the most drastic step of others that may possibly be appropriate.

[45] Relying on s 16 and s 24 of the Act the appellant submitted that a municipal council has no authority to approve an annual budget after the start of the relevant financial year and that an appropriate step to ensure that a budget is approved can only be a step that includes the dissolution of the council, the appointment of an administrator until a newly elected council has been declared elected and the approval of a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality. I do not agree. For the

reasons that follow I agree with the court below that a local authority does have authority to approve an annual budget after the start of the relevant financial year.

[46] The approval of a budget is a non-delegable function conferred on a municipal council by the Constitution.[21] Section 16(1) of the Act provides that the council of a municipality must for each financial year approve an annual budget for the municipality before the start of that financial year. Section 24 requires that the municipal council must at least 30 days before the start of the budget year consider approval of the annual budget and then repeats that the budget must be approved before the start of the budget year.

[47] Appropriate intervention in terms of s 139 of the Constitution includes the dissolution of the council by the provincial executive. It follows that a municipal council which fails to approve an annual budget by the start of the budget year runs the risk of being dissolved. It does however not necessarily follow that having failed to do so the municipal council no longer has the authority to approve a budget for the relevant financial year or that a budget approved by the municipal council after the start of the financial year would be invalid. That will only be the case if it was the intention of the legislature that it should be invalid.[22] In *Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434B Trollip JA referred to the traditional categorization of statutory requirements as 'peremptory' and 'directory' and stated that care must be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. He added:

'These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380).'

21 Section 160(2)(b) of the Constitution.
22 *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274.

In regard to the use of the word 'shall' he said that 'such seemingly imperative language is not necessarily decisive in favour of peremptoriness'. The same would apply to the use of the word 'must'.[23]

[48] It could in my view not have been the intention of the legislature that upon failure of a municipal council to approve a budget before the start of the financial year the council would no longer have authority to do so. One can think of many circumstances which would make such an interpretation quite untenable. My colleague mentions some of those circumstances. However, in his view they indicate that 'appropriate circumstances' in the Constitution include extension by the provincial executive of the time within which a budget may be approved. In my view they indicate that it could not have been the legislature's intention that failure of a municipal council to approve a budget before the start of a financial year would invalidate the approval of a budget after the start of the financial year. The object of s 26(1) is to ensure that a budget is approved by a municipal council. If that object is achieved before dissolution of a council it would in my view make no sense to invalidate the approval.

[49] Section 26(1) repeats the wording of s 139(4) of the Constitution. The legislature therefore probably intended the phrase 'appropriate steps including dissolving the council and . . . .' to have the same meaning as in s 139(4). If that is the case the legislature could not have intended a municipal council not to have authority to approve a budget after the start of the budget year. If the council can no longer approve a budget there will be no steps that can be taken by the provincial executive to ensure that a budget is approved other than dissolving the council and appointing an administrator until a newly elected council has been declared elected and approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

[50] The Act contains many seemingly imperative provisions relating to the

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23 At 435B.

budget process. In terms of s 21 the mayor ‘must’ do various things. He ‘must’ for example table in the municipal council a time schedule outlining key deadlines for various steps that have to be taken. Section 22 prescribes the steps that ‘must’ be taken after an annual budget has been tabled in a municipal council. The views of the local community, the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget ‘must’ in terms of s 23(1) be considered by the municipal council. After having considered all budget submissions the council ‘must’ give the mayor an opportunity to respond and if necessary revise the budget (s 23(2)). The municipal council ‘must’ at least 30 days before the start of the budget year consider approval of the annual budget (s 24(1)). The annual budget ‘must’ be approved before the start of the budget year (s 24(2)(a)) and ‘must’ be approved together with the adoption of necessary resolutions, amongst others, imposing any municipal tax for the budget year and setting any municipal tariffs for the budget year (s 24(2)(c)). The accounting officer of the municipality ‘must’ submit the approved annual budget to the National Treasury and the relevant provincial treasury (s 24(3)).

[51] Section 27(4) provides:

'Non-compliance by a municipality with a provision of this Chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy, does not affect the validity of an annual or adjustments budget.'

It could hardly have been the intention of the legislature to exclude the failure to submit the approved budget to the National Treasury and the relevant provincial treasury, being the last step in the process referred to above. The legislature must therefore have intended the budget process to include all the steps referred to above, ie all the steps up to the submission of the approved budget to the National Treasury and the relevant provincial treasury. It follows that the legislature specifically provided that the approval of an annual budget after the start of the budget year does not affect the validity of the annual budget.

[52] The appellant placed reliance on the provisions of s 27(1) and (2) of the Act. They are to the effect that the MEC for finance may, on application by the mayor of a municipality extend any time limit or deadline contained in the Act except the deadline contained in s 16(1) and provided that no such extension may compromise compliance with s 16(1). An extension of the time for the approval of a budget will of course relieve the pressure on a municipal council to approve the budget or run the risk of being dissolved. There is in my view no reason to believe that the legislature by prohibiting the extension of the time limit imposed for the approval of a budget intended more than to maintain the pressure on a municipal council to approve the budget before the start of the budget year.

[53] In summary I am of the view that upon a proper interpretation of the Act a municipal council must approve a budget before the start of the budget year, should it fail to do so –

i) It should reconsider the budget within 7 days and repeat the process until a budget is approved.

ii) The mayor must report the matter to the MEC of local government in

the province and may recommend an appropriate provincial intervention in terms of s 139 of the Constitution.

iii) The provincial executive must intervene in terms of s 139(4) of the Constitution by taking any appropriate steps to ensure that the budget is approved.

iv) The provincial executive is under no obligation to dissolve the council and may ensure the approval of the budget by any legitimate means such as for example persuading the council under threat of being dissolved to approve a budget.

v) For as long as the council fails to approve a budget it may be an appropriate step in terms of s 139(4) to ensure the approval of a budget to dissolve the council and to (a) appoint an administrator until a newly elected council has been declared elected; and (b) to approve a temporary budget.

[54] For these reasons I agree that the appeal should fail.

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P E STREICHER
JUDGE OF APPEAL

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