Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 229/2021

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Date of hearing: 1 March 2021
Delivered electronically on: 19 March 2021

In the matter between:

EXECUTIVE COUNCIL OF THE WESTERN CAPE PROVINCE	First Applicant
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Second Applicant
WESTERN CAPE MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES	Third Applicant
ADMINISTRATOR (FINANCIAL RECOVERY) OF KANNALAND LOCAL MUNICIPALITY	Fourth Applicant

and

KANNALAND LOCAL MUNICIPALITY + AND 20 OTHERS	Respondent(s)

JUDGMENT

MANGCU-LOCKWOOD AJ,

INTRODUCTION

1. The applicants have brought an application seeking, as Part A, urgent relief interdicting the first to tenth respondents (the respondents) from certain conduct. Part B of the application will be determined in due course, and will seek declaratory relief as well as review of the conduct complained about in these proceedings. The respondents oppose the application on the basis of a collateral challenge, and in the alternative, they raise a counter-application.

2. The first applicant is the Executive Council of the Western Cape Province ('the Provincial Executive'). The second applicant is the Western Cape Minister of Local Government, Environmental Affairs and Development Planning ('the Local Government Minister'), and the third applicant is the Western Cape Minister of Finance and Economic Opportunities. The first respondent is the Kannaland Local Municipality ('the Municipality'), and the second to tenth respondents are political office-bearers and Municipal Council members of the Municipality, including the Municipal Manager, the Chief Financial Officer, the Executive Mayor, the Speaker, the Deputy Executive Mayor and four ordinary councillors. These political office-bearers and Municipal Council members are also cited in their personal capacities, as eleventh to nineteenth respondents. The twentieth respondent is Inovasure (Pty) Ltd, and the twenty-first respondent is the National Minister of Finance.

THE RELEVANT FACTS

3. The background facts are common cause or are not seriously disputed. In 2016 the Kannaland Local Municipality was in such serious financial crisis that it was unable to

provide basic municipal services, or to meet serious financial commitments. Some of the examples cited include an Eskom bulk services account which was in arrears to the tune of R12 million, almost resulting in the disconnection of electricity supply to the entire Municipality. Another example is the deterioration of the municipal infrastructure due to an inefficient tariff structure. It is also common cause that, due to the conclusion of many questionable contracts, the Municipality was spending so much money on litigation that service delivery was severely prejudiced.

4. In acknowledgement of its financial crisis, the Municipal Council resolved on 2 December 2016 to request the Provincial Executive to intervene in its affairs in terms of section 139(5) of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution'), and the latter resolved to accept the invitation. Section 139(5) of the Constitution provides for what is referred to as a 'mandatory intervention', as follows:

> '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—
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> (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 –
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> (i) is to be prepared in accordance with national legislation; and
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> (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
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> (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.

5. Pursuant to the intervention, in March 2017 the Provincial Executive imposed a comprehensive recovery plan ('the Plan') upon the Municipality as a framework for the latter's financial rehabilitation. Initially, the Municipality was charged with implementing the Plan. However, after it admitted that it could not take the executive measures necessary to implement the Plan, and requested to be placed under 'full administration', a designate, referred to as the Administrator (Financial Recovery) – the fourth applicant - was appointed by the Provincial Executive for the purpose of implementing the Plan, with effect from December 2018. The Administrator was accorded all the executive and administrative powers of the Municipal Council necessary to implement the Plan. The Municipal Council was not dissolved. It retained residual executive powers only to the extent that they did not impact or relate to the Plan. The Municipal Council also retained its legislative powers, provided they were in alignment with the Plan. In practice, the Administrator interacted with the municipal officials on a daily basis, and with the Executive Mayor and the Speaker on a weekly basis. He attended all meetings of the Municipal Council, and gave guidance regarding any issue arising that might affect the Municipality's finances, which advice would invariably be followed by the Municipal Council. It is common cause that this arrangement continued until late 2020, when the events that precipitated these proceedings ensued.

6. Before dealing with those events, it is necessary to mention that the parties agree that significant strides have been made by the Administrator in stabilizing the Municipality's affairs. It is also common cause, however, that despite the positive strides made, the Municipality remains in dire financial straits. As a result, on 2 August 2020 the National Minister of Finance, at the request of the Provincial Executive, approved a process to amend the Plan in terms of section 144 of the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA'). On that same day the National Minister of Finance authorized the Municipal Financial Recovery Service ('MFRS') to assist with the review and amendment of the Plan. The amendment is aimed at capitalizing on the achievements made thus far, and to update the Plan to ensure that it meets in the Municipality's needs going forward. Similarly, the term of the Administrator was extended with effect from 1 December 2020 until the first sitting of the Municipal Council after the 2021 Local Government elections.

7. A relevant positive stride made during the course of the intervention is the review of the Municipality's organizational structure, and the development of an organogram that meets the Municipality's operational and financial needs. The development of the new organogram was facilitated by the Administrator, and was approved and adopted by the Municipal Council on 31 May 2020. It is not in dispute that the implementation of this new organogram will result in a cost-saving of approximately R8 900 000 for the Municipality.

8. During September 2020, the Executive Mayor of the Municipality fell seriously ill, and took a leave of absence. The sixth respondent (Councillor Antonie) assumed the position of Acting Executive Mayor. Since then, the Municipal Council has taken steps

which have led to the launching of this application, and which may be summarized as follows:

8.1 Since November 2020 the respondents have purported to terminate the mandatory provincial intervention, and to remove the Administrator from office.

8.2 The respondents have taken steps to conclude a multi-decade contract with Inovasure for the provision of energy, water services and infrastructure to the Municipality. According to the applicants the contract contravenes various prescripts regarding municipal procurement, and has not been concluded in compliance with a competitive or transparent process. It will furthermore come at a cost of hundreds of millions of rand which the Municipality cannot afford.

8.3 The respondents have resolved to establish a new organizational structure or staff establishment. According to the applicants, this new staff establishment consists of a bloated contingent of political appointees, and is wasteful, unnecessary and un-affordable. The respondents have also made personnel decisions and approved various payments to current and former employees of the Municipality that are not due or owed.

9. Each of these developments is now discussed below.

Termination of the provincial intervention

10. At a Special Council meeting held on 16 November 2020, the Municipal Council resolved to ‘lift’ the provincial intervention with immediate effect. Thereafter, the

Administrator and the Local Government Minister sent correspondence to the Municipal Council, indicating that they regarded the resolution of 16 November 2020 as unlawful, and of no force and effect. The Local Government Minister sought a series of undertakings that the Municipality would cooperate with the Plan and the Administrator, and would cease all attempts of terminating the intervention. No such undertaking was forthcoming.

11. Instead, on 30 November 2020 the Municipal Council again passed a resolution to terminate the provincial intervention, and also to terminate the services of the Administrator. Further to this, on 3 December 2020, the Acting Municipal Manager issued communication pointing to the expiration of the Administrator's term of contract, and indicated that the Administrator was no longer part of the Municipality, and that officials were not to take instructions from him or to give information without the permission of the Acting Municipal Manager or the Municipal Council.

12. On 8 December 2020, the Administrator received written notification of the resolution of 30 November 2020 purportedly lifting the provincial intervention. He was informed that his services had come to an end, and was requested to vacate the offices of the Municipality by end of that day. On 10 December 2020 the Municipal Council resolved that councillors should refrain from 'leaking information' pertaining to the affairs of the Municipality and items on the agenda to the Local Government Minister or the Administrator, and that disciplinary action should be instituted against any councillors who were found to have leaked information. When the applicants, through their attorneys, subsequently requested copies of the minutes recording the decisions taken at

the Municipal Council meeting of 10 December 2020, none were provided by the respondents.

13. Subsequently, all remaining meetings relating to the Plan were cancelled, as the Municipal Council maintained that the provincial intervention has been lifted. The Municipality has furthermore refused to participate in any workshops relating to the review and amendment of the Plan, which are currently underway.

The Inovasure contract

14. In about 2012 the Municipality appointed Inovasure to conduct a feasibility study for the provision of energy, water and telecommunications security to Kannaland. In June 2020 the Municipality advertised a draft Public-Private Partnership (PPP) agreement that it proposed entering into with Inovasure, as an unsolicited bid.

15. In a letter dated 19 August 2020 and attached to the founding affidavit, the National Treasury pointed out to the Municipality that it had failed to follow various provisions of the MFMA, Treasury PPP Regulations, and the Unsolicited Bid Framework, as follows.

    15.1 In terms of section 33 of the MFMA the Municipality was required to provide the draft PPP contract together with an information statement setting out its obligations in terms of the proposed contract, as well as a notice inviting comments from the public. Although the Municipality had published the proposed contract, it had not complied with the rest of these requirements.

15.2 In terms of the MFMA, Treasury PPP Regulations, and the Unsolicited Bid Framework, unsolicited bids were required to be fair, transparent, competitive and cost-effective. It was pointed out that, contrary to these principles, Inovasure was initially appointed to undertake a feasibility study of the project, and had used the information obtained from the feasibility study to submit an unsolicited bid to the Municipality, which violated the MFMA, Treasury Regulations and Supply Chain Management ('SCM') policies. It also constituted a conflict of interest in terms of the SCM Regulations.

15.3 The Electricity Regulation Act 4 of 2006 requires the consultation with the National Energy Regulator on all electricity projects. There was no evidence that the Municipality had complied with this requirement. As a result, the affordability of the proposed tariffs on the citizens could not be confirmed.

15.4 The letter concluded thus: *'The issues raised above are pivotal for the three tests of a PPP (affordability, value for money and significant risk transfer). Given the observations raised above, it is the views (sic) and recommendations of the National Treasury that the project should not proceed until all the issues raised above have been addressed. The municipality is currently under a section 139(5) intervention as a result of a crisis in its financial affairs. The National Treasury cannot support the proposed project without first determining the financial impact that the proposed PPP project will have on the financial resources of the municipality and the future of affordability of the electricity service on the citizen. It is therefore recommended that the municipality should wait for the finalization of the Financial Recovery Plan to stabilize its finances prior to making any future budgetary commitments.*'

16. On the same day, the National Treasury addressed another letter to the Western Cape Provincial Chairperson: Standing Committee on Finance, Economic Opportunities and Tourism. In addition to pointing out the Municipality's non-compliances with the MFMA and the Constitution, it indicated that the Municipality had gone through various procurement processes without the necessary input from the National Treasury.

17. In September 2020, further cautions were addressed to the Municipality, this time by the Provincial Executive. In a detailed letter, the Provincial Executive advised and cautioned the Municipality on the illegality of the resolution taken by the Municipal Council to appoint Inovasure for a period exceeding 25 years by way of an unsolicited bid process. All the applicable laws and contraventions were raised, together with the significant costs that would arise, thereby undermining the objectives of the mandatory intervention and the Plan. It was specifically stated that any step taken by the Municipality, including a decision to conclude the contract, would be unlawful insofar as it undermined the objectives of the intervention and the Plan.

18. On 2 October 2020 the Administrator issued a series of directives to the Municipality, referred to as resolutions, noting that both the National and Provincial Treasuries had highlighted a number of irregularities with regard to the Inovasure project. The resolutions included directives to suspend the process of establishing a PPP with Inovasure; instructing the Municipal Manager not to sign the PPP agreement or to appoint transaction and legal advisors for the purpose of furthering the agreement, which the respondents were embarking upon; instructing the Municipality to engage the

National Treasury and Provincial Government, including for the purpose of obtaining an unbiased opinion regarding the project.

19. The Municipality did not heed any of these cautions. Instead, on 8 December 2020, the Municipality's Speaker published notice of a special council meeting to be held on 10 December 2020. The notice attached a report dated 6 November 2020 from the Municipal Manager, which outlined the background and progress of the Inovasure project, and recommended the management of the project as a long-term contract and an unsolicited bid.

20. On 9 December 2020, the Local Government Minister sent a letter to each councillor demanding that the Municipal Council should refrain from passing any resolution in respect of the project. At the meeting of 10 December 2020, the Municipal Council resolved to proceed with the project, and to conclude a 25-year contract in this regard. It was resolved that the project would not be structured as a PPP, but would instead be managed as an unsolicited bid. The Acting Municipal Manager was directed to appoint an external legal advisor to facilitate the conclusion of the process.

21. Thereafter, the parties exchanged correspondence, with the applicants highlighting the views espoused in this application and requesting copies of minutes and resolutions of the meeting of 10 December 2020; and respondents asserting the Municipality's 'constitutional, autonomous decision-making powers and rights' to make decisions as it did on 10 December 2020. By 7 January 2021, no agreement has been reached, no undertakings sought by the applicant had been given, and the respondents had not furnished copies of minutes and resolutions of the meeting of 10 December 2020. This application was launched on the following day.

22. The respondents do not deny the facts set out above regarding the Inovasure project. What they emphasise is that the final contract with Inovasure is a 'long way in the future', as the referral to the Bid Adjudication Committee has yet to take place; and there are accordingly no financial obligations that are about to be assumed by the Municipality. The respondents state that, in any event, if the project were to be implemented, Inovasure would carry all the risk, and provide all the funding in exchange for a share of the municipal tariffs.

Amendment of staff establishment and personnel decisions

23. As mentioned earlier, the Administrator facilitated the determination of a new cost-saving organizational structure and staff establishment for the Municipality, which was approved by the Municipal Council on 28 May 2020. On 10 December 2020 the Municipal Council resolved to amend that structure. The effect was to increase the staff complement in the offices of the political office-bearers, from 6 to 12 employees - in other words, by a hundred percent. Of the 6 new appointments, 5 were to be in the office on the Speaker, namely an office manager, a driver, a clerk, a 'political support' officer and a 'support staff' member.

24. It is admitted by the respondents that the Municipal Council has voted to amend the staff establishment. The respondents have given an undertaking to not enter into a binding financial commitment in respect of the hiring of new personnel pending Part B of this application. The undertaking is further that, in the interim, the vacant posts in essential roles will be filled by internal secondments that will entail no additional expenditure.

25. In addition to the above decisions relating to the staff establishment, on 10 December 2020 the Municipal Council resolved to reinstate a senior employee (Mr Hendrik Barnard) who was previously dismissed, with immediate effect, and the Acting Municipal Manager was authorised to conclude a full and final settlement agreement with him. The settlement agreement was entered into on 14 December 2020, and was made an arbitration award on the same day.

26. In another instance, two employees (Ms Melrose Xego and Ms Naledi Nqeketo) who were previously dismissed by the Municipality were reinstated in terms of a Bargaining Council award which also provided for payment of certain amounts to them. On 10 December 2020, the Municipal Council resolved to make additional payments amounting to R204 903,19 to the employees, on the basis that these were benefits that should have been taken into account when the Bargaining Council calculated its monetary award.

27. Yet another staff-related decision that is challenged is the decision to pay a performance bonus in excess of R136 000 to the Municipality's former Municipal Manager (Mr Morne Hoogbaard). According to the applicants, Mr Hoogbaard did not have a performance agreement in place with the Municipality that would have entitled him to a performance bonus. The payment of the bonus was placed on the agenda for a meeting that was to be held on 15 December 2020. However, as the respondents point out, because no *quorum* could be reached, the meeting had been postponed twice and a resolution in this regard had not been passed by the time the matter was heard in Court. It bears mentioning that the reason no *quorum* could be reached is that those respondents who were opposed to the decision to pay the bonus deliberately absented themselves from the meetings. This appears from the applicants' papers.

THE RESPONDENTS' CASE

28. The respondents have raised a collateral challenge, on the basis of which they argue that the interim interdict should be dismissed. In the alternative, they rely on a counter-application, based on the same facts averred in the collateral challenge. In the counter-application they seek the review and setting aside of the Provincial Executive's decisions to impose the intervention, the Plan and the appointment of the Administrator; as well as relief declaring those decisions to be unlawful, unconstitutional and of no force or effect. Upon inquiry by the Court, the respondents were agreed that if the issues relating to lawfulness of the intervention are dealt with in Part B, then it is appropriate that the counter-application should be determined at that stage, together with Part B of the applicants' application.

29. The essence of the respondents' case is that the intervention by the Provincial Executive was avoid *ab initio* and constitutes a nullity, for two main reasons, namely the failure to comply with the MFMA requirements for developing a financial recovery plan; and the failure to comply with the constitutional requirements for the appointment of the Administrator.

30. Regarding the development of the Plan, the respondents rely on a number of provisions of the MFMA, namely sections 139, 141(2) and 143, and on the Constitution.

31. Section 139 provides as follows:

> '(1) 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 provincial executive must promptly-

(a) request the Municipal Financial Recovery Service-

(i) to determine the reasons for the crisis in its financial affairs;
(ii) to assess the municipality's financial state;
(iii) to prepare an appropriate recovery plan for the municipality;
(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
(v) to submit to the MEC for finance in the province-
(aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and

(b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.

(2) The MEC for finance in the province must submit a copy of any request in terms of subsection (1) *(a)* and of any determination and assessment received in terms of subsection (1) *(a)* (v) *(aa)* to-
(a) the municipality;
(b) the Cabinet member responsible for local government; and
(c) the Minister.'

32. The respondents argue that the Provincial Executive should have requested the MFRS, which is a unit of the National Treasury, to undertake the tasks identified in section 139(1) of the MFMA, and this was not done. In terms of section 141(2) of the MFMA, only the MFRS may prepare a recovery plan for the municipality, and that did not take place, according to the respondents. Instead, the Provincial Executive took it upon itself to undertake those tasks, to the exclusion of the national government.

33. The respondents also rely on section 143(3) of the MFMA, which provides as follows:

'(2) On receipt of a financial recovery plan pursuant to a mandatory intervention referred to in section 139, the MEC for finance must verify that the process set out in section 141 has been followed and that the criteria contained in section 142 are met, and-
(a) if so, approve the recovery plan; or

(b) if not, direct what defects must be rectified.

(3) The responsible MEC must submit an approved recovery plan to-
(a) the municipality;
(b) the Minister and the Cabinet member responsible for local government;
(c) the Auditor-General; and
(d) organised local government in the province.'

34. The respondents state that the approval processes required by these provisions were not adhered to. In terms thereof, the MEC for Finance is required to verify, before approving a plan, that the process in section 141 has been followed, and that the criteria in section 142 are met. The MEC for Finance could not have complied with those requirements in this case because section 141(2) was not complied with. In addition, there is no evidence that the Plan was submitted to the bodies mentioned in section 143(3) for comment.

35. Regarding the appointment of the Administrator, the respondents cite section 139(5)(b) of the Constitution, and argue that the appointment of an Administrator is only available as an option if the Municipal Council has been dissolved. Here, the Municipal Council was not dissolved, meaning that an essential jurisdictional requirement for the appointment of the Administrator has never been met. As a result of the appointment was void and of no force or effect.

36. On the basis of the two arguments raised above, it is contended that this Court may not order, even on an interim basis, the enforcement of unlawful and unconstitutional decisions upholding the Plan and the appointment at the Administrator. I will deal with the substance of the arguments later.

37. For now, it is necessary to mention that there are other arguments raised by the respondents. They state that the Provincial Executive's manner of intervention was disproportionate to what was necessary in order to address the financial difficulties of the Municipality. In this regard, the Provincial Executive failed to respect the separation of powers between the spheres of government which are established in the Constitution. According to the respondents, it was open to the applicants to invoke section 32, read with section 171 of the MFMA which provides for recoupment of wasted funds, as well as for potential criminal charges against malfeasants.

38. It is also contended by the respondents that the Provincial Executive has singled out the first respondent on political grounds. Other municipalities in the Western Cape have been plagued by chronic underpayment for services. Indigent populations and a limited rates base, aggravated by the sharp rise of unemployment triggered by the COVID-19 pandemic, have devastated several municipalities. But only Kannaland has been subject to the maximally intrusive intervention that is the subject of this litigation. The Provincial Executive has not once invoked a section 135(5) intervention against any municipality that is controlled by the Democratic Alliance ('DA').

39. There are yet other challenges raised by the respondents. They raise a point of non-joinder in respect of Mr Barnard, Ms Nqeketo, Ms Hoogbaard, as well as the South African Local Government Association (SALGA). It is said that the named employees should be joined in light of their interest in the impugned decisions regarding personnel in this application. According to the respondents, SALGA should be joined as the party to whom the MEC was required to submit an approved recovery plan in terms of section 143(3)(d).

40. The respondents challenge the urgency of this application. They state that the Inovasure project has been in the pipeline since 2012, and that the Government parties have been engaging about it since then. Further, that the applicants have known that the Municipality was engaging with Inovasure since at least February 2020. In any event, no binding contract with budgetary implications has been signed by the Municipality. Similarly, the respondents charge that the applicants have been aware of the changes to the staff establishment as early as October 2020, and by the latest on 16 November 2020, and yet only launched this application on 8 January 2021.

41. As mentioned earlier, in the event that it is found in these proceedings that the decisions of applicants in intervention are not a nullity, the respondents rely on a counter-application, relying on the answering affidavit as the founding affidavit therein.

THE INTERIM INTERDICT

42. The requirements for an interim interdict are well-known. The applicants must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy. When a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. [1]

***PRIMA FACIE* RIGHT**

[1] At para [45].

43. The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, she cannot succeed.[2] The question is whether, having regard to the facts and the inherent probabilities, the applicant should obtain final relief when the main case is heard.[3] It is not necessary for an urgent court to make a final determination on the legal issues.[4]

44. In this case, it is common cause that the requirements for a mandatory intervention in terms of section 139(5) of the Constitution were present in March 2017. The Municipality was in the middle of a financial crisis and, as a result, was in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments. The Municipality furthermore admitted at the time that it was unable to meet its obligations and financial commitments, which was evinced by its request for the Provincial Executive to intervene in its affairs.

45. It was also at the insistence of the Municipality that the mandatory form of intervention was embarked upon. The facts show that, after the Provincial Executive started with a less intrusive form of intervention, the Municipality requested to be placed under 'full administration'. This belies the argument that the Provincial Executive could have undertaken a less drastic form of intervention. It was the Municipality that insisted to be

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[2] *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-H; See also *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688 (E)
[3] *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-H; See also *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688 (E).
[4] *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T) paras 41 - 42.

placed under ‘full administration’. In any event, whether the Provincial Executive could have undertaken a less drastic form of intervention does not detract from the fact that the jurisdictional requirements for the mandatory intervention were present at the start of the intervention.

46. Even further, the conditions for the mandatory intervention continue to exist. As the respondents put it in their answering affidavit, *‘the Municipality remains in dire financial straits’*.[5] In terms of section 148(2) of the MFMA, a mandatory intervention ends when the crisis in the municipality's financial affairs has been resolved, and the municipality's ability to meet its obligations to provide basic services or its financial commitments is secured. Neither of these events, which must exist simultaneously, have been fulfilled, and this is common cause. It is therefore doubtful whether, in such circumstances, the Municipal Council has power to terminate the provincial intervention without at least consulting with the Provincial Executive. A reading of section 139(5) of the Constitution suggests that this cannot be, since in terms thereof, an intervention is activated, managed and brought to an end by a Provincial Executive. That interpretation is fortified by section 148(3) of the MFMA, which requires that the MEC for local government or the MEC for finance in the province should notify the municipality when a mandatory intervention comes to an end. It is the Municipality that receives notification from the Provincial Executive, not the other way round. It would not make sense, in any event, for the termination of a mandatory intervention to be at the behest of a municipality, especially when it was the conduct of the latter that led to the mandatory intervention in the first place.

[5] Record p 522, para 133.

47. Furthermore, the decision to not share information, records and documents with the Administrator and Local Government Minister is contrary to section 149 of the MFMA, which states as follows:

> *"[i]f a provincial executive intervenes in a municipality in terms of section 139 of the Constitution, the provincial executive and its representatives have access to such information, records and documents of the municipality or of any municipal entity under the sole or shared control of the municipality as may be necessary for the intervention, including for identifying or resolving the financial problem of the municipality."*

48. It is clear from this provision that the applicants have a right to all information, records and documents of the Municipality which relates to the Municipality's Financial affairs or the conduct of the mandatory intervention.

49. Most importantly, the intervention, the Plan and the appointment have been extant since March 2017 and December 2018, respectively, without murmur from the respondents, until late 2020. This is context in which the respondents raise the collateral challenge. The respondents rely on several pre-constitutional and post-constitutional authorities[6] for the proposition that they need not bring a separate court application for review if the decisions complained about were a nullity. The law relating to collateral challenges was set out by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited ('Merafong')*.[7] The majority judgment found that our courts have always allowed a degree of flexibility in collateral (or reactive challenges) to administrative action, even before our Constitutional era. However, the Constitutional

[6] *Harris and others v Minister of the Interior and Another* 1952 (2) SA 428 (A); *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala and Others 2012 (3) SA 325 (SCA); Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC); *Schierhout v Minister of Justice* 1926 AD 99.

[7] See also *Gobela Consulting v Makhado Municipality* (Case no 910/19) [2020] ZASCA 180 (22 December 2020) para [18].

Court re-asserted that the import of *Oudekraal Estates (Pty) Ltd v City of Cape Town*[8] and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*[9] was that a government institution cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside.[10] Referring to *Kirland*, the Constitutional Court stated that it *did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the Oudekraal principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.'*[11]

50. The Constitutional Court pointed out that neither *Oudekraal* nor *Kirland* expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid.[12] It all depends on the circumstances.[13] A collateral challenge should be available where justice requires it to be; and that will depend, in each case, on the facts.[14] As the Court stated, the permissibility of a collateral challenge by an

[8] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

[9] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 219 (SCA).

[10] At para [41].
[11] At para [43].
[12] At para [44].
[13] At para [44].
[14] At para [55].

organ of state must depend on a variety of factors, invoked with a *'pragmatic blend of logic and experience'*, and it would be imprudent to pronounce any inflexible rule.[15]

51. As indicated earlier, the respondents point to the irregularity of the adoption of the Plan – that the MFRS was not the initiator of the Plan and did not undertake the tasks required by section 139(1)(a) of the MFMA. They point to section 141(2) of the MFMA which states that only the MFRS may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139. They also rely on section 143 which sets out the requirements for approval and dissemination of the final plan. Regarding the involvement of the MFRS, the applicants have attached to their replying affidavit email correspondence between the Provincial Treasury and the MFRS dated February 2017, indicating that a draft of the financial recovery plan was in fact submitted to the MFRS, and that in turn, the MFRS revised it and made significant and substantive contributions to it. They have also attached correspondence dated August 2020 in which the Provincial Executive requested the National Minister of Finance to review and amend the Plan. The respondents complain that the correspondence of February 2017 is hearsay evidence because no confirmatory affidavit from the National Treasury was attached to the applicants' replying affidavit. Further, the fact that the Provincial Executive requested the National Minister of Finance in August 2020 to review and amend the Plan is too little too late, according to the respondents, and cannot *ex post facto* cure the nullity of the existing Plan. I do not think it is appropriate to reject or ignore the email correspondence between the Provincial Treasury and the MFRS dated February 2017 as hearsay evidence at this stage for several reasons. The parties have approached the Court in urgent proceedings, with voluminous papers; and

[15] At para [56].

the issue regarding the MFRS has never been raised between the parties until the answering papers, and the applicants sought to cure it through a replying affidavit. It was after the delivery of the replying affidavit that the hearsay argument was raised. Further, the application seeks to deal with the substance of the validity of the Plan in the main proceedings, not now, and may therefore cure the alleged inadmissibility in due course. I also, in any event, do not think that the respondents have cast serious doubt that the National Treasury and the MFRS were involved in the process of developing the Plan. Whether and to what extent they were the originators of the Plan, and what may be considered to be sufficient compliance in those circumstances, is an issue that may more appropriately be dealt with in the main proceedings.

52. On the whole, I do not consider it appropriate to decide whether the Plan or the appointment of the Administrator should be determined as void *ab initio* at this stage of the proceedings. Those determinations will more appropriately be made in Part B of the proceedings, in the determination of the validity of the intervention. In making that determination, I have taken into account several considerations, some of which arose in *Merafong*. Firstly, as in *Merafong,* the Municipality has taken the approach that it should be entitled to ignore a decision which was palpably and obviously beyond the powers of the decision-maker, in other words which *'lack[ed] the facial imprimatur of lawfulness',* until, as a matter of process, that decision is sought to be enforced against it, as the applicants here have done.[16] The Constitutional Court rejected this argument as unsound in Merafong, emphasizing that even decisions 'purportedly taken' under a

[16] At para [50].

statute, but which in fact lack authorisation, are subject to review.[17] The Court continued with the following which is apposite to this case:

> *'If we were to sustain Merafong's argument that it was entitled to ignore the Minister's decision until it was sought to be enforced, this must extend to all cases of patent invalidity. This would suggest that an official may ignore a decision, taken under statutory power (intra vires), that is tainted by patently improper influence or corruption. But that is precisely what happened in Kirland — and the self-help argument was not countenanced. What is more, not only would what is or is not 'patently unlawful' be decided outside the courts, but there would be no rules on who gets to decide and how. If failure to review a disputed decision is defensible on the basis that the decision was considered patently unlawful, the rule of law immediately suffers. So the argument is not tenable.'*[18]

53. The Court in *Kirland* had stated similar considerations as follows:

> '*the Department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration.*'[19]

54. The considerations mentioned in the above extracts are apposite to this case. From March 2017 until the end of 2020, if not February 2021 in their court papers, the Municipality did not raise the nullity arguments, until the applicants launched these proceedings. One example of this is that, according to the communication sent out on 3 December 2020, the purported reason for terminating the Administrator's service was the expiration of his term of contract. It is only in the court proceedings that the void *ab initio* argument is raised regarding his appointment.

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[17] The Court was specifically referring to relief in terms of PAJA on this point, but the principle is equally applicable to review based on the grounds of legality.
[18] At para [54].
[19] At para [89].

55. Furthermore, as the Constitutional Court affirmed in *Kirland* and *Merafong*, self-help should not be countenanced. The respondents in this case have indulged in considerable self-help which has led to the launching of these proceedings before challenging the decisions that are now the subject of the collateral challenge.[20] In my view, upholding the collateral challenge would, in effect lend support to the self-help.

56. In the circumstances of this case, upholding the collateral challenge would also have the effect of disrupting what the parties have agreed are positive strides made since the intervention, and create instability in the Municipality. It must be remembered that ultimately, it is the citizens that are affected by the conduct of the organ of states. The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation. Sections 152 and 153 of the Constitution set out the objectives of local government, read together with sections 4(2)(f) and 73 of the Local Government: Municipal Systems Act 117 of 1998. In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. At the very minimum, the state must refrain from interfering with existing rights. The Constitutional Court has stated[21] that where access to water, sanitation, electricity and fire and emergency services once existed but is then taken away due to a dispute within or relating to the management of a municipality, there may be a violation of fundamental rights of the inhabitants.[22] These rights are affected, and are will continue to be affected by the issues that are the subject of this case.

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[20] See *Gobela Consulting v Makhado Municipality* (Case no 910/19) [2020] ZASCA 180 (22 December 2020) at para [22] where the SCA took impermissible self-help as an important consideration in whether a collateral challenge should have been allowed by the court *a quo.*

[21] *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* 2015 (1) BCLR 72 (CC) at paras [13] - 14], [22].

[22] See *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* 2015 (1) BCLR 72 (CC) at paras [13] - 14], [22].

57. Another consideration which militates against granting the collateral challenge in this case, which also arose in *Merafong*, is the Municipality's delay in raising the collateral challenge. [23] Nowhere in the papers has the Municipality explained why it failed to raise this challenge in the period since 2017. On the other hand, the applicants have set out evidence, which is not seriously disputed, to show that the respondents opportunistically seized the moment of the Executive Mayor's absence due to illness.

58. In my view, justice does not require that this Court should declare the intervention, the Plan and the appointment of the Administrator invalid and unlawful at this stage of the proceedings. Further, I do not find that the respondents' arguments have cast serious doubt on the applicants' *prima facie* right to intervene, to impose the Plan and to appoint the Administrator.

59. I am also mindful that the Municipality relies on the same grounds for the collateral challenge as it does in the counter-application. Therefore, in dismissing the collateral challenge the Court is not closing the door on the Municipality raising the invalidity issues in the main proceedings between the parties.[24]

60. As regards the Inovasure contract, the respondents have not seriously disputed that the project will have significant and long-term effects on the Municipality's financial position, and the manner in which it provides basic services over the next three decades. The fact that no contract has yet been concluded is not the point. The Municipality has committed itself to a path of unlawfulness by seeking to accept an

[23] At paras [72] – [77].
[24] This was one of the factors taken into account by the Constitutional Court in *Merafong* at paras [67] – [68].

unsolicited bid of this magnitude, whilst under mandatory intervention. It is exactly this kind of contract that needs to comply with the Plan, and in respect of which the Administrator was given exclusive authority.

61. In taking steps towards this arrangement, the respondents have ignored a whole range of legal requirements and considerations, which were repeatedly pointed out to them in the correspondence from the National Treasury dated 19 August 2020 and the Provincial Executive dated 29 September 2020, and which are set out earlier in this judgment.

62. Furthermore, in terms of section 217 of the Constitution, municipalities and other organs of state must contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Generally, in respect of high-value or long-term contracts section 217 requires that they be concluded following an open and competitive tender process. If a Municipality wishes to appoint an unsolicited bid, it must comply with the provisions of the Municipal Supply Chain Management Regulations ('SCM Regulations'). Regulation 37(2) of the SCM Regulations provides that an unsolicited bid may only be considered if –

(a) the product or service offered in terms of the bid is a demonstrably or proven unique innovative concept;
(b) the product or service will be exceptionally beneficial to, or have exceptional cost advantages for, the municipality or municipal entity;
(c) the person who made the bid is the sole provider of the product or service; and
(d) the reasons for not going through the normal bidding processes are found to be sound by the accounting officer.

63. Applying these provisions, the applicants state firstly that Inovasure's proposal - which relates to renewable energy and water technology - is not a unique innovative concept; and Inovasure is not the sole provider of the services in the market. Secondly, according to the applicants, Inovasure's bid will not be exceptionally beneficial, or have exceptional cost advantages to the Municipality. In this regard they refer to the framework document setting out of the salient aspects of the project, which indicates that a single unit energy vault will cost approximately R735 000 000. This amount excludes the costing for the water, information technology and management services to be provided by Inovasure. According to the applicants, the Municipality can ill-afford to pay this amount for an energy security system, when its annual operating budget is R174 290 000, which amounts to 23% of the energy security component of the Inovasure project. Thirdly, the applicants state that there are no sound reasons for not procuring energy security technology and water systems through a competitive bidding process. Such a process would allow a better opportunity to assess what the market is willing and able to provide, and whether those offerings are within the Municipality's means.

64. The respondents have not at all attempted to engage with these legal considerations in these proceedings. They also did not do so when the correspondence from the national and provincial governments and was sent to them in August 2020 and September 2020, respectively.

65. A municipality may not exercise executive powers to conclude contracts with third parties beyond the powers conferred on it by law. Where the law constrains these powers, as contemplated in section 139(5)(a) of the Constitution, read with section

146(2) of the MFMA, the municipality may only conclude contracts with third parties within the scope of the powers it is permitted to exercise. Given that the Plan binds the Municipality in the exercise of its executive and legislative authority to the extent necessary to achieve the objectives of the Plan, and has done so since its approval on 17 March 2017, since then, the Municipality has been obliged to ensure that all decisions takes, including decisions to conclude contracts, do not prevent to undermine the successful fulfilment of the objectives set out in the Plan.

66. Regarding the impugned personnel decisions, I have already stated that it is not in dispute that they have the potential to incur significant costs for the Municipality. It is furthermore common cause that the staff establishment that was approved in May 2020, was a cost-saving organizational structure. Furthermore, the Plan expressly identified the review of the organizational structure and the placement of staff as a key deliverable of the intervention. This is the reason that the task of reviewing and updating the organizational structure was discharged. This was the background to the approval of the staff establishment in May 2020. The respondents' amendment to that approved staff establishment made no reference to the review already undertaken by the Administrator which resulted in the approved establishment in May 2020, or the priorities identified in the Plan. Even in these proceedings, no attempt has been made to justify the amendments. There is especially no justification given for why, during a financial crisis which is common cause, and a global pandemic, a member of the Municipal Council whose office previously only had one assistant, should now require an additional five employees.

67. With regard to the disputed payments to staff, it is not denied by the respondents that there was no legal obligation to pay the additional amounts made to Ms Xego and Ms

Nqeketo. However, they point out that the same report that recommended that the payments should be made also states that all the amounts paid to these employees should be investigated as possible wasteful expenditure. The real issue, however, is whether the payments should be made in the first place. It is too late to investigate the payments only after the payments have been made. That decision is even more astonishing given that it appears to be common cause that there is no legal basis for the payments in the first place. This is exactly the kind of decision-making - the kind that appears to lack a principled approach - that requires supervision from the Administrator and which demands conformity with the Plan.

68. All of these decisions, if followed through, will no doubt have a significant impact on the Municipality's finances. They also undermine the Municipality's financial recovery, and are inconsistent with the Plan. If unabated, and on an urgent basis, the respondents' conduct will have the effect of undoing the good work that has been achieved through the intervention, which is common cause.

IRREPARABLE HARM

69. There is no doubt that the latest decisions made by the respondents have an impact on the financial affairs of Municipality. The evidence shows that it is exactly the sort of conduct complained about in these proceedings - the profligate spending, unnecessary expenditure in litigation, substandard SCM controls, and fruitless in wasteful expenditure - that resulted in the mandatory intervention. This sort of conduct by public officials and political official bearers is harmful not only to the rule of law and the applicants, but to the residents of Kannaland. It runs contrary to section 139(5) of the

Constitution - the provisions that permit the intervention. It is a recipe for chaos in governance.

70. The respondents state that it is the grant, not the denial of the relief sought by the applicants that poses the real threat to the rule of law. They state that, since the intervention and the appointment of the Administrator were unlawful *ab initio*, the rule of law *'demands that the intrusion into the institutional and functional integrity of Kannaland's local government to be corrected by this Court'*. The respondents further rely on the following passage from *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others*[25]*:*

> *'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.'*[26]

71. However, the case of *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* is distinguishable from the facts of this case. Firstly, the municipal councillors in that case objected to the provincial intervention immediately. They did not wait for a period of three years before challenging the intervention. Secondly, the applicants in that case approached the court in making their objectives known. Here, the respondents opted to take the law into their own hands instead of approaching the court. Thirdly, as the quoted portion above indicates, in that case the MEC did not consult the municipality before appointing an administrator. In the present case, the Municipality

[25] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014).

[26] At para [43].

was not only consulted but requested the intervention. The case of *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* therefore provides no assistance to the respondents.

72. I have already referred to the Constitutional Court case of *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others*. There, the Court made the following statement which is apposite when considering the requirement of harm to this case: *'It needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councillors, but in the continued disruption of basic essential services to the people and communities the Municipality is supposed to serve. The people who may suffer the real harm are not party to these proceedings. It is because of the alleged failure in its executive obligation to them that the Municipality was dissolved.*'[27] The common cause facts in this case are that, although positive strides have been made, the situation in Kannaland remains dire. In other words, the provision of basic essential services continues to be compromised, and as a result, the conditions for an intervention continue to exist.

73. The respondents state that no harm will flow from the Inovasure project because there is no final, binding agreement yet, and because there is a lengthy bid adjudication and public participation process ahead. However, it has not denied that it has failed to comply with the minimum requirements for an unsolicited bid – in another words, that the path that it has embarked upon is unlawful. Furthermore, it is not clear why the respondents allege that the adjudication process will be lengthy, given that the

[27] At para [9].

evaluation has already been completed. Another consideration is that it is common cause that the financial crisis is, in part, attributable to the Municipality's small rates base. I therefore find it startling that the Municipality would, whilst under a mandatory intervention, find it appropriate to agree for a private company to have a R730 million share of future tariffs, without proper processes being followed. Even if the contract has not yet been signed, the conduct already embarked upon by the respondents with regard to this contract, which is on record in these proceedings, displays reckless disregard and failure, if not refusal, to appreciate the dire reality of the circumstances in which the Municipality finds itself. It is not in dispute is that this Municipality cannot afford to lose hundreds of millions of rand in future revenue. The residents will furthermore be forced to bear the cost of this multi-decade endeavour, if it is allowed to continue unabated.

74. Regarding the staff appointments, I have already referred to the undertakings given by the respondents, namely that no further appointments will be made pending the outcome of this interim application. In my view, this is inadequate given the obvious cost implications for the Municipality. The undertaking also does not deal with the unlawful appointments already made. It also does not extend beyond these interim proceedings, to Part B of the application. It means that, unless this Court intervenes, the respondents can continue with their conduct until the conclusion of the main part of the proceedings.

75. Lastly on this point, no evidence has been supplied by the respondents for the charge that the Municipality has been targeted on political grounds because it is not DA-controlled. The applicants deny this, and state that at all relevant times of the intervention, including when the Plan was imposed, and when the Administrator was

appointed, the Municipality was led by a coalition that included the DA. The respondents have simply failed to make out a case in this regard.

76. In granting this Order, I have considered its impact on the constitutional and statutory powers and duties of the respondents. However, as the Constitutional Court stated in the *Ngaka Modiri* case, what is even more important is the impact of the respondents' conduct on the citizens of this municipality. Given the ongoing nature of the harm being propagated at the expense of the Municipality's citizens, it is only appropriate that the status *quo ante* be restored until the determination of Part B of the proceedings.

BALANCE OF CONVENIENCE

77. A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.

78. In *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*[28] ('Outa') the Constitutional Court added that the balance of convenience enquiry must also carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. '*The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be*

[28] *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC).

granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.'[29]

79. I am alive to the constitutional and statutory prerogative and rights accorded to the Municipality in terms of the Constitution and legislation, including the MFMA and the Municipal Systems Act. However, I am also mindful of the disruption of basic essential services to the people and communities the Municipality is supposed to serve. In my view, when taking into account the fact that the respondents have endured the intervention since 2017, without murmur, indicates that there can be no possible prejudice for them to wait until the determination of Part B of this application. The sudden, unlawful change in the governance philosophy of the Municipality, as at the end of 2020, weighs considerably in favour of granting the interim relief. I am not persuaded that the respondents will suffer harm or prejudice if the interdict is granted.

ALTERNATIVE REMEDY

80. The applicants have no other remedy in ensuring the respondents' compliance with their legal obligations, other than through the relief sought in these proceedings. The Court papers include correspondence from, not only the applicants, but also from the National Treasury, directing the respondents to comply with their legal obligations before these proceedings were launched. Those pleas fell on deaf ears.

[29] At para [47]; [65] – [66]

81. The respondents have placed reliance on the Intergovernmental Framework Relations Act 13 of 2005 ('IRGFA'), stating that the applicants should have avoided this litigation, and should have rather taken the matter to mediation in terms of that statute in the spirit of cooperative governance. The swift answer is that, in terms of section 39 of the IRGFA, a dispute concerning an intervention in terms of section 139 of the Constitution is specifically excluded from the ambit of that statute that deals with settlement of intergovernmental disputes. The respondents have invited the Court to nevertheless be disinclined to rule in favour of the applicants on the merits, and should rather afford to the parties an opportunity to negotiate in the spirit of intergovernmental cooperation embodied in the Constitution. Given the applicants' futile attempts thus far in engaging the respondents to comply with their legal obligations, it is doubtful whether that route provides a realistic alternative remedy. In any event, nothing prohibits the parties from engaging after the granting of this Order and before the determination of the main matter. For the purposes of granting this Order, it suffices that the applicants have made out of case for the interim interdict.

82. As indicated earlier, the respondents also argue that the applicants could have used '*a plethora of legislative machinery to counter [the] alleged malpractices'* instead of approaching this Court. The specific remedies mentioned in this regard are recouping wasted funds, and laying criminal charges against the recalcitrant individuals. In my view, such a piecemeal approach to dealing with the fundamental governance problems posed by the conduct of the respondents, would be inadequate. What is required is relief that will be adequate enough to bring to an end what the applicants have referred to as the 'capture of the Municipality'.

83. For all these reasons I am not persuaded that the applicants have alternative remedy other than to approach this Court.

84. It is implicit in granting this Order, that I am persuaded that the matter is urgent, and warrants urgent intervention by this Court. I am not persuaded by the respondents' argument that the matter lacks urgency.

85. During the hearing of this matter, the parties were in agreement that the costs can stand over for later determination, together with Part B of the application.

ORDER

86. In the circumstances, I grant an order in the following terms:

(a) An order in terms of the draft order handed up by the applicants, which shall be attached as "X" to this judgment, with the timetable adjusted by arrangement between the parties, failing which the parties may approach the Court for determination of the dates; and

(b) The respondents' collateral challenge is dismissed.

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N. MANGCU-LOCKWOOD

Acting Judge of the High Court

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