

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO. 3809/2021

In the matter between:

THE SPEAKER: OR TAMBO DISTRICT MUNICIPALITY	First Applicant
OR TAMBO DISTRICT MUNICIPALITY	Second Applicant
ROBERT NOGUMLA	Third Applicant
NOMPUMELELO GCININDAWO	Fourth Applicant
ZIZIPHO BOKWE	Fifth Applicant
ZEMEMVULA GUSANA	Sixth Applicant
UNATHI MALGAS	Seventh Applicant
and	
THE PREMIER OF THE EASTERN CAPE	First Respondent
THE MEC FOR LOCAL GOVERNMENT & TRADITIONAL AFFAIRS	Second Respondent
THE EXECUTIVE COUNCIL OF THE EASTERN CAPE	Third Respondent
THE MINISTER FOR LOCAL GOVERNMENT & TRADITIONAL AFFAIRS Respondent	Fourth
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
BASIL MASE N.O.	Sixth Respondent
THE PROVINCIAL SECRETARY OF THE EASTERN CAPE	Seventh Respondent

REASONS

RUGUNANAN, J

[1] Two applications were before this court on 29 September 2021 and having heard argument by the parties' counsel, the following orders were issued on 8 October 2021 with an indication that reasons will be given in due course.

[2] In respect of the first application the order reads:

- “(i) The decision of 4 August 2021 by the third respondent, being the Provincial Executive Council of the Eastern Cape, and adopted by the second respondent, being the Member of the Executive Council of the Eastern Cape Province for Co-operative Governance and Traditional Affairs, by publication in the Provincial Gazette No. 4606 on 6 August 2021 to dissolve the OR Tambo District Municipal Council by invoking the provisions of section 139(1)(c) of the Constitution of the Republic of South Africa be and is hereby reviewed and set aside.
- (ii) The First, Second, Third and Seventh respondents shall pay the applicants' costs of suit jointly and severally, the one paying the other to be absolved; such costs shall include the reserved costs attendant on the orders granted by Bloem J on 26 August 2021 and by Nhlangulela DJP on 9 September 2021.”

[3] In the second application the order reads:

“The application by the Member of the Executive Council of the Eastern Cape Province for Co-operative Governance and Traditional Affairs for contempt of the order of Bloem J dated 26 August 2021, is dismissed with costs.”

[4] What was essentially before this court was an urgent review under Part B of a notice of motion issued by the first and second applicants on 22 August 2021 (and subsequently amended) in which they sought an order reviewing and setting aside the decision of the second and third respondents to dissolve the Municipal Council of the second applicant, the OR Tambo District Municipality (“the

Municipality”). The dissolution was effected in terms of section 139(c) of the Constitution. The third to seventh applicants, as intervening parties, supported the review application and supported the opposition to the contempt proceedings against the second applicant. The fourth, fifth and sixth respondents did not oppose the review application.

[5] Simultaneously with the review application, was an application at the instance of the second respondent, the Member of the Executive Council for Cooperative Governance and Traditional Affairs (“the MEC”). The MEC sought a declaratory order to the effect that paragraph 2 of an agreed interim order granted by Bloem J on 26 August 2021 be extended to mean that the first and second applicants may only continue to exercise their duties and functions with the concurrence of the administrator (the sixth respondent) and that the Council of the second applicant (“the Municipality”) be held in contempt of that order.

[6] Paragraph 2 of the interim order reads as follows:

“2. In the interim, pending a further determination, if needs be, on 9 September 2021, the Council and Executive of the second applicant, the OR Tambo District Municipality, are entitled to return to the Municipality and continue to exercise all their duties and functions which existed prior to the notice which was issued in terms of section 139(1)(c) of the Constitution, in consultation with the Administrator, the sixth respondent, duly assisted by his team of officials.”

CONSTITUTIONAL FRAMEWORK OF LOCAL GOVERNMENT

[7] In the context of the Constitution, the institution of government is exemplified by three spheres, i.e. the national, provincial and local spheres (the latter consisting of municipalities). Though interdependent and interrelated, each sphere is distinct from the other and is cloaked with the autonomy to exercise its functions and powers within the bounds of its defined space.¹ It is axiomatic that

¹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2020 (6) SA 182 (CC) at paragraph [42]

all spheres of government and all organs of state in each sphere must respect the status, institutions, powers and functions of government in the other spheres without assuming any power or function except those conferred on them by the Constitution.

[8] In the domain of local government the autonomous nature of municipalities is underscored by section 151 of the Constitution. The section provides that the executive and legislative authority of a municipality is vested in its municipal council and that a municipality is vested with the right to govern, on its own initiative, the affairs of its community.² Provincial intervention in local government is sanctioned by section 139 by the intervention of the relevant provincial executive when a municipality “cannot or does not fulfil an executive obligation” – a state of affairs that is concerned with an ongoing failure and not a past failure³. Subject to various conditions set out in the section, provincial intervention may include the provincial government itself assuming responsibility for the obligation or even dissolving a municipal council and replacing it with an administrator. The power of intervention is drastic and “most intrusive”⁴ and may only be exercised “if exceptional circumstances warrant such a step”⁵.

THE REVIEW APPLICATION

[9] The review application (unopposed by the fourth, fifth and sixth respondents) concerns a decision to dissolve the Council of the Municipality by the invocation of section 139(1)(c) of the Constitution. The decision was ostensibly taken on 4 August 2021 by the third respondent (“the PEC”) and

² There is a limitation– the right of municipalities to govern is subject to national and provincial legislation and also arises from the concept of co-operative government in terms of which a provincial government must by legislative and other means provide support and assistance to local governments and maintain supervision and monitoring. See *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECHC 14 (5 August 2009) at paragraphs [43]-[44]

³ The section is concerned with an omission or an inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased. See *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C) at paragraph [94]

⁴ *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* (35248/14) [2014] ZAGPPHC 400 (19 June 2014) at paragraph [20]

⁵ See Section 139(c).

communicated as such in a letter dated 8 August 2021 directed by the MEC to the first applicant (“the Speaker”). The decision was followed by the appointment of the sixth respondent as administrator to manage the affairs of the Municipality.

[10] The review application is grounded in the principle of legality. Legality is an incident of the rule of law⁶ - it requires public power to be exercised lawfully, rationally and in good faith. This standard applies irrespective of whether or not the exercise of public power constitutes administrative action in terms of the Promotion of Administrative Justice Act.⁷

[11] The decision to dissolve the Municipal Council in terms of section 139(1)(c) of the Constitution was premised on the following categories of complaints:⁸

- (i) The legitimacy of the councillors, the consequent council meetings convened, and the decisions taken thereat;
- (ii) The ongoing litigation between the Municipality and the executive mayor, Independent Electoral Commission⁹, and various councillors;
- (iii) The approval of the municipal budget and infrastructure grant spend; and
- (iv) Water and sanitation service delivery.

[12] The review of the decision to invoke the section is underpinned by irrationality, capriciousness, arbitrariness, bias, and ulterior purpose. In addition, the applicants allege that the decision to dissolve the Council was not properly taken; that the respondents failed to place information before court to demonstrate that the required factual position of an ongoing failure persisted; that

⁶ *NDPP v Freedom Under Law* 2014 (4) SA 298 (SCA) at paragraph [28]

⁷ Act 3 of 2000. See *Freedom Under Law v NDPP and Others* 2014 (1) SA 254 (GNP) at paragraph [124]; also *NDPP v Freedom Under Law supra* at paragraph [29]; and *Airports Company South Africa v Tswelokogotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) at paragraph 7

⁸ Heads of argument – first and second applicants, paragraph [37]

⁹ Now called the Electoral Commission. See *OR Tambo District Municipality v Independent Electoral Commission and Others* (1995/2021) [2021] ZAECHMHC 31 (24 August 2021) at footnote 2

the representations made by the Council in response to the PEC's intention to invoke the section were not considered; and that the decision was not the appropriate intervention.¹⁰ While endorsing these grounds of review the intervening applicants rely on three further grounds; namely, the failure to consider a less invasive alternative;¹¹ the participation of "non-councillors"; and the imminent local government elections.¹²

[13] As regards the elections, the argument is directed at the irrationality of the invocation of section 139(1)(c) on 4 August 2021. At the time of the decision, the elections were already scheduled for 27 October 2021. This was by virtue of a proclamation issued by the Minister of Cooperative Governance and Traditional Affairs on 3 August 2021.¹³ It does not assist the respondents to contend that the decision to dissolve the Council was taken with the expectation that the elections would be postponed to a date early in 2022. It was irrational to have taken the decision before the question of a postponed local government election had been dealt with by the Constitutional Court in *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others*¹⁴ which finally determined that the elections be scheduled for 1 November 2021.

[14] A reading of the section makes it plain that the express purpose of a dissolution is to appoint an administrator "until a newly elected Municipal Council has been declared elected". Under section 159(2) of the Constitution an election must take place within 90 days of the date of the dissolution of a municipal council. It is inevitable that a new Municipal Council will be elected on 1 November 2021. This eventuality will intercede before the 90 day period expires after that date. The respondents realised this as is evident in their "with prejudice"

¹⁰ Supplementary founding affidavit pages 246-247

¹¹ See also *Mnquma supra* at paragraph [68] and *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* [2020] 2 All SA 793 (GP) at paragraph [94] where the section has been construed to sanction the taking of less intrusive measures before the more drastic step of dissolving a municipal council is taken.

¹² Heads of argument – 3rd to 7th applicants, pages 6-11

¹³ see *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21) [2021] ZACC 29

¹⁴ (CCT 245/21) [2021] ZACC 29

offer made to the applicants on 23 September 2021.¹⁵ The applicants' repudiation of and their counter-proposal to that offer - which counter-proposal entailed taking an order by agreement together with costs - is vindicated by the end result in these proceedings.

[15] The grounds for review relied on by the applicants and those intervening are expatiated in considerable detail in their supplementary affidavits. The facts were argued by the applicants with reference to relevant authority set out in heads of argument. This judgment will not be burdened with a recital of the facts grounding the review since the main issues turned on whether the decision had become moot or whether the applicants were entitled to relief as at the date of the hearing of this matter.

[16] The answering papers deposed by the MEC in which he does so on behalf of the first, third and seventh respondents makes it obvious that the relief sought by the applicants is not contested, neither is the invocation of section 139(1)(c) defended in response to the grounds for review on which the application is posited. The answering affidavit does not answer the material allegations pertinent to the review grounds set out in the founding and supplementary affidavits.¹⁶

[17] Significantly, the MEC states:

"... I do not propose to deal with the affidavits deposed on behalf of the Applicants in the main application in any detail."

But in the same breath he makes the assertion:

"... as far as the merits of the main application are concerned, the applicants must have foreseen a dispute of fact incapable of resolution on the papers."

¹⁵ Answering affidavit annexures AA1 and AA2

¹⁶ Answering affidavit in main application and replying affidavit in contempt application, paragraphs [16] and [17]

[18] It was incumbent on the MEC to have raised the disputes by pleading the relevant facts. Plainly, the disputes have not been raised, and until they have been pleaded, only then do they arise. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted,¹⁷ and accepted as proven. The stance taken by the MEC is tantamount to a concession and acceptance that the decision cannot be credibly sustained and is reviewable. That is exactly where the matter ends.

[19] Referring to the answering affidavit, and quoting in relevant part, the MEC states:¹⁸

“Exco ... only has one general meeting a month, on the last Wednesday of the month, which is 29 September 2021 ...

... I have every reason to believe that Exco will approve, at that meeting, my recommendation, that in the interests of co-operative government ... the decision to dissolve the Council should be rescinded, an eventuality which would obviate the need for the court to decide the main application.”

[20] It was contended for the MEC that the relief claimed in the review application has become moot. In the answering affidavit the respondents argue for the dismissal of the application but ask that the interim order granted by Bloem J be maintained pending the upcoming municipal elections. The respondents maintain that the invocation of section 139(1)(c) pertains to the exercise of executive powers and functions, which they accept are reviewable¹⁹. They contend however that the self-determined rescission, to be exercised internally by the PEC, constitutes the exercise of a discretionary executive power or function which is of importance for the political functioning of government. The argument stems from the proposition that the authority under section 139(1)(c) to dissolve a municipal council is discretionary²⁰ and that the scope of that

¹⁷ *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151E

¹⁸ at paragraphs 10.8 and 10.9

¹⁹ If it is shown to fall outside the definition of administrative action in the Promotion of Administrative Justice Act 3 of 2000

²⁰ *Mnquma supra* at paragraph [67]

discretion permits, as in this instance, the PEC to change its approach by having the decision rescinded. This court was urged to accord recognition to that discretion and to decline assistance to the applicants, this in the light of the history of the matter. The stance adopted by the intervening applicants is that an internal rescission is not competent. Their argument is that the *functus officio* doctrine²¹ applies and the decision regardless of whether it is administrative or executive in nature remains extant until it is set aside by a court.²² As a matter of fact as at the date of the hearing of this matter the decision to dissolve the Council was not set aside. For reasons set out elsewhere in this judgment the applicants presented a case that is unanswered and unanswerable. That being so, they were entitled to the order granted by this court. From this perspective of the matter the issue of mootness does not arise and it is unnecessary to engage with the *functus officio* debate or to address the issue whether the self-determined rescission is a discretionary power and whether it complies with the Constitution.

THE CONTEMPT APPLICATION

[21] The applicants placed two broad issues before this court: the non-joinder of the administrator, and the merits of the application. I accept that the administrator is a necessary party who ought to have been joined as a co-applicant in the contempt proceedings but do not believe that the application as a whole should be dismissed merely on the joinder conundrum. The fate of the application as evidenced by the order made on 8 October 2021 fell to be determined on its merits.

[22] In so far as the new matter contained in the replying affidavit by the MEC is concerned, I have deviated from the general approach that a litigant cannot rely on new matter in reply. The MEC deposed to the founding affidavit on 6

²¹ See the discussion thereof in *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA) at paragraph [22]

²² Reliance is sought on *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at paragraph [105] and *Pharmaceutical Manufacturers Association of South Africa and Another : In re Ex Parte President of the RSA and Others* 2000 (2) SA 674 (CC)

September 2021 and could not have been in possession of all the facts pertaining to events in the period subsequent to that date. Despite the indulgence, its influence on the merits, from what appears below, is insignificant.

[23] The essential relief sought by the MEC, in addition to claiming costs on a punitive scale, is for an order:

- (i) declaring the Municipality to be in contempt of paragraph 2 of the order by Bloem J (“the order”); and
- (ii) declaring that paragraph 2 of the order means that the Municipal Council and the Executive of the Municipality are entitled to return to the Municipality and continue to exercise all the duties and functions which existed prior to the notice which was issued in terms of section 139 (1) (c) of the Constitution only with the concurrence of the administrator duly assisted by his team of officials.

[24] What bears directly on the contempt application is the meaning and practical effect attributed to the phrase “in consultation with the Administrator” as it appears in the order by Bloem J (“the order”). The MEC contends that the phrase “in consultation with the administrator” means “with the concurrence of the administrator”. The authority cited in support of this contention is not disputed.²³

[25] The practical effect of the meaning advocated by the MEC is that the Council and executive of the Municipality shall require the concurrence of the administrator for the exercise of their duties and the performance of the functions referred to in the order.²⁴ The issue in these proceedings is whether the Council knew that it was impermissible to have taken the resolutions at the special meetings convened on 27 and 31 August 2021, and on 10 and 16 September 2021. In the nature of these proceedings the issue, as I see it, affects the *onus*.

²³ See *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at paragraph [85] footnote 94, and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at paragraph [63]

²⁴ MEC’s founding affidavit paragraph [19]

[26] It is vital to the administration of justice and the rule of law - a founding value of the constitution - that those affected by court orders must obey them. Contempt of court is a crime unlawfully and intentionally to disobey a court order, the essence of which lies in violating the dignity, repute and authority of the court. Disregard for court orders tarnishes the authority of the courts (see *Fakie N.O. v CII Systems (Pty) Ltd*²⁵). It upsets the foundations of the law and compromises the status and constitutional mandate of the courts.²⁶

[27] Tritely, it is required of an applicant in contempt proceedings to prove the requisites of contempt (i.e. the order, service or notice, non-compliance and wilfulness (intent) and *mala fides*) beyond reasonable doubt.²⁷ (Parenthetically, I add that the standard of proof on a balance of probabilities only applies if a declarator or other civil remedies short of committal are sought²⁸ as in the present matter). Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established on the applicable standard of proof.

[28] Turning to the issue affecting the *onus* as set out earlier, it was submitted for the MEC that the Speaker, as head of the Council, has not stated that they have a different understanding of what is meant by the phrase “in consultation with”. This submission proceeds from the premise that there was non-compliance with the order hence wilfulness is inferred and the *onus*²⁹ will then be on the

²⁵ *Fakie N.O. v CII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 332-333

²⁶ *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at paragraph [183]

²⁷ *Fakie supra* at paragraph [42]

²⁸ *Fakie supra* at 345A and *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) paragraph [64]

²⁹ The *onus* must be understood in the context of the distinction between the burden of proof properly so called and the evidential burden as was expressed in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 where, quoting in relevant part, the following was stated: “... the word *onus* has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents the *onus* in its true or original sense. In *Brand v Minister of Justice* 1959 (4) SA 712 at 715 Oglivie-Thompson JA called it ‘the overall onus’. In this

respondents to rebut the inference of wilfulness (see *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522H). On the facts, I have doubt about the correctness of this submission.

[29] The facts indicate that the Council called meetings and gave notification to the administrator for his attendance. Except for having attended the meetings of 10 and 16 September 2021, the administrator did not attend the meetings scheduled for 27 and 31 August 2021. The MEC argues that the non-attendance of the administrator at those meetings did not exonerate the Council from its duty to request and obtain his concurrence for whatever resolutions they wanted to adopt. The resolutions adopted at the meeting of 27 August 2021 were to:

- (i) reinstate the provision of security for the chief financial officer of the Municipality and all the services that were terminated by the administrator with immediate effect;
- (ii) pay back all the salaries of councillors and traditional leaders who were allegedly short-paid;
- (iii) direct the acting municipal manager to write to all service providers to reinstate their services; and
- (iv) nullify all the decisions taken by the administrator after the dissolution of the Municipal Council.

[30] At the meeting on 31 August 2021 the Council appointed an acting municipal manager without consultation with the administrator.

sense the onus can never shift from the party on whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other." See also Schwikkard Van Der Merwe, *Principles of Evidence*, 2nd ed Juta at page 539

[31] In response to these allegations, the answering affidavit by the Speaker of the Council³⁰ discloses that the administrator took arbitrary decisions prior to the lapse of the 14 day period stipulated in section 139(3)(b) of the Constitution³¹ and without his terms of reference having been gazetted. Regarding the decision to appoint an acting municipal manager, the three-month term of the relevant appointee at that time came to an end on 31 August 2021. The Municipality required a new appointment, the duty for which rested on the Council in keeping with legislation.

[32] As for the administrator's presence at the meetings of 10 and 16 September 2021, the Council took a decision regarding the advertisement of the post of the municipal manager (on a full-time basis) and a further decision favouring amendment of the institutional organogram, notwithstanding objections raised by the administrator. In all instances pertaining to these meetings my sense is that the Council complied with the order by seeking the administrator's attendance. In these circumstances I am unable to conclude that there was non-compliance with the order.

[33] Should I be mistaken in that regard, I turn to address to the question of wilfulness and *mala fides*. It was incumbent for the MEC to have placed evidence before this court indicating that the Council went ahead and took decisions or passed resolutions in the knowledge that they were not permitted to do so.

[34] Where such evidence has not been adduced, wilfulness cannot readily be inferred. A factual basis must be established before the inference can be drawn. In terms of *Fakie*, the *onus* to have adduced such evidence was on the MEC. Once that evidence has been adduced, only then did the Council have an evidential burden to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. The omission by the MEC to

³⁰ Paragraphs 61 and 62

³¹ The section provides that a dissolution under section 139(1)(c) takes effect 14 days from the date of receipt of the notice of dissolution by the municipal council unless set aside by the cabinet member responsible for local government affairs or the council before expiry of that period.

have placed the requisite evidence before court is fatal to the contempt application.

[35] In these circumstances the conventional rule that costs follow the result must apply in respect of both applications.

S. RUGUNANAN
JUDGE OF THE HIGH COURT

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Date heard on virtual platform:	29 September 2021
Order issued:	08 October 2021
Reasons:	25 October 2021

This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 25 October 2021.