IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7069/17P

In the matter between:

PHILANI GODFREY MAVUNDLA	Applicant
and	
UMVOTI LOCAL MUNICIPALITY	First Respondent
THAMSANQA CLIVE NGUBANE N.O.	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
PREMIER FOR THE PROVINCE OF KWAZULU-NATAL	Sixth Respondent
MINISTER FOR CO-OPRATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Seventh Respondent

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REASONS FOR JUDGMENT

CHETTY J:

[1] On 30 June 2017, being the last day of the session, the applicant launched an urgent application in this Court in which he sought the following relief:

'1.1 The first respondent, Umvoti Municipality, be and is hereby interdicted, prevented and stopped from implementing on 1 July 2017 the budget approved at the meeting of the Council of the Umvoti Municipality held on 31 May 2017 pending finalization of this application;

1.2 The first respondent be and is hereby interdicted, prevented and stopped from transferring to any person the properties described as Extension 9 and Extension 14 and advertised in the Greytown Gazette of the 21 June 2017 ("the properties") pending the outcome of the review proceedings to be instituted by the applicant within thirty (30) days of the granting of this Order;

1.3 *Pendente lite*, the officials of the first respondent be and are hereby directed not to sign any transfer papers, issue any rates clearance certificates and or take any steps or do anything which may facilitate the transfer of the properties referred to in paragraph 1.2 above;

1.4 The applicant is directed to institute proceedings within thirty (30) days of this Order for the review of the decision of the first respondent to dispose of the properties;

1.5 Declaring that the First Respondent failed to comply with the provisions of section 215 (3) (c) of the Constitution (Act 108 of 1996) and with the provisions of sections 16 (2); 22 and 23 of Chapter 4 of the Municipal Finance Management Act 56 of 2003;

1.6 Directing the Third, Fourth and Sixth respondents to exercise their powers in terms of Section 27(5) of the Municipal Finance Management Act 56 of 2003 ("the MFMA") by taking such steps as are necessary to ensure that there is compliance with the provisions of Chapter 4 of the MFMA and must intervene in accordance with Section 139 (4) of the Constitution;

1.7 The Fifth respondent is directed to exercise powers in terms of Section 38 (2) (a) to (c) of the MFMA to, *inter alia,* call for representations forthwith from the First respondent as to why the Fifth respondent should not exercise his powers in terms of Section 38 of the MFMA to stop the transfer of funds due to the municipality;

1.8 The Fifth respondent is directed to stop the transfer of funds to the First respondent should the first respondent fail to give written representations within seven (7) days of this Order, subject to the Third, Fourth and Sixth respondents ensuring that, if the stopping of funds affect the provision of basic municipal services, they monitor the continuation of those services.

1.9 The Second respondent and any officials of the First respondent to the extent that they have flagrantly disregarded their obligations in terms of the MFMA and the Constitution that they be ordered to pay costs in their personal capacities such costs to include costs of two Counsel. Alternatively that the First and Second Respondents be directed to pay the costs of this application, jointly and severally, with any other respondent who opposes this application and such costs to include the costs occasioned by the employment of two counsel;

1.10 The Seventh Respondent is directed to stop the transfer of funds to the First respondent pending the finalization of this application.'

[2] The matter served before my colleague Bezuidenhout J as an unopposed application on his Motion Court roll. After hearing counsel for the applicant, Bezuidenhout J granted the relief set out in the Notice of Motion and issued a *rule nisi* returnable on 26 July 2017, save for the deletion of paragraph 1.10 above and the insertion of para 2 to read:

> 'Pending the final determination of this application, paragraphs 1.1; 1.2; 1.3; 1.4; 1.5; 1.6; 1.7 and 1.8 shall operate as interim relief forthwith.'

[3] Upon the Order coming to the attention of the respondents, they immediately took steps to have the application reconsidered, alternatively that the return day be anticipated in terms of Rule 6(8) or Rule 6(12). The application was set down on 6 July 2017. At the same time the applicant brought an application for the joinder of the seventh respondent, which was not opposed. Despite Court being in recess, in light of the urgency foreshadowed in the reconsideration papers filed by the

respondents and given that all parties had filed detailed affidavits, I considered it in the interests of justice to hear the matter.

[4] On 6 July 2017 after hearing lengthy argument from all parties I granted an order discharging the *rule nisi* issued by Bezuidenhout J on 30 June 2017 with costs, including costs of two counsel where so employed. The applicant thereafter applied for reasons for the Order, which are rendered below.

[5] The following salient features emerge from the founding affidavit of the applicant:

[5.1] The applicant is a businessman, and former Mayor of Umvoti Local Municipality. He owns property in five different wards in the municipality.

[5.2] By virtue of his former position as mayor, he is *au fait* with the budgetary processes and obligations of the first respondent ('the municipality') in terms of the Municipal Finance Management Act ('MFMA') Act 56 of 2003, read with the provisions of section 215 of the Constitution. He is a member of the African National Congress.

[5.3] The Umvoti Municipality falls within section 155(1)(b) of the Constitution and the second respondent is the current mayor. The MEC for Co-operative Governance and Traditional Affairs, the MEC for Finance and the Finance Minister of the Republic of South Africa as well as the Premier of KwaZulu-Natal are cited as respondents, by virtue of their duty to perform certain functions in terms of the MFMA.

[5.4] An application was brought to interdict the implementation of the annual budget of the municipality, which had been approved at an earlier meeting of the council on 31 May 2017. The applicant sought an order interdicting the transfer of two properties and that none of the municipal officials are to sign any of the transfer papers, or issue rates clearance certificates in respect of the properties set out in the notice of motion. In addition, the applicant seeks orders directing the third fourth, first and the sixth respondents to carry out their responsibilities under the Constitution and the MFMA.

[6] Although the applicant has brought this application in his own name, he contends that he has also brings the application in the wider interest of his community. He contends that the community have been disregarded in the process leading up to the approval of the budget of the municipality and out of a desire to ensure that properties belonging to the state are disposed of in a fair manner in accordance with the constitution and the MFMA.

[7] The applicant's founding papers indicated that his application is founded on the 'constitutional and legislative obligations on the First Respondent, in particular and all the other Respondents when dealing with matters relating to the budget'. He further asserts his right to bring the application where the values of democracy, social justice and fundamental human rights are undermined by an organ of State, and does so on behalf of members of the community whose rights have been disregarded, and to ensure that the disposal of state property takes place in accordance with law. The applicant purports therefore to act in terms of s38(a), (c) and possibly (d) of the Constitution. However, when one looks more closely at the applicant's papers, the complaint he articulates are those which affect him alone. It is his personal view that there has been non-compliance with MFMA. In a letter addressed by his attorneys to the municipality on 26 June 2017, four days before the hearing of the urgent application, there is no indication that the applicant acts for any broader coalition or in the interests of any class of persons. The letter is written on behalf of the applicant alone and is more revealing on the subject of locus standi, where it states:

> 'Our client, as a resident and a rate payer has an interest in the matter and is also directly affected by the purported approved budget.'

[8] In response to my query as to what interest the applicant has in the passing of the budget and the extent to which he is affected thereby, Ms *Norman* SC who appeared with Mr *Kuboni* for the applicant, directed my attention to the publication of the final budget in the *Greytown Gazette* on 21 June 2017. According to the

applicant, tariffs which were not part of the Council's agenda at its earlier meetings, and therefore not passed by council, nonetheless found their way into the final budget. The applicant contends that the tariffs should have been published in advance to afford him an opportunity to comment. He fails to add what he would have said in relation to the proposed tariffs, had they been so published. He thereafter proceeded to analyse the increase in the costs of plastic refuse bags.

[9] The Applicant takes issue at the fact that at the meeting on 31 May 2017 the budget was not voted on, and therefore there has been non-compliance with a Constitutional imperative. Section 160(2) of the Constitution provides that amongst others, the function of the passing of a budget by a municipality cannot be delegated. Section 160(3)(b) provides that:

> 'All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a municipal council with a supporting vote of the majority of its members.'

The stance of the municipality is that the councillors did not vote on the budget because it was accepted without opposition. There was only one budget presented for consideration. In light of there being no alternative proposed, the budget as tabled, was accepted. Councillor Maharaj, on whose report the applicant relies for this particular ground in his application, was the lone objector. The view of the majority carried the day and according to the municipality there was therefore no need to vote on the budget. I am unable to find any basis of irregularity as contended for by Ms *Norman* and in I am not persuaded by counsel's argument that the absence of the vote was contrary to the constitution. This appears to be the high watermark of the applicant's complaint.

[10] We know from *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) that in order to satisfy the requirement of locus standi where one seeks to challenge a decision of an organ of state, one needs to show a 'demonstrable interest in the interests of the borough' . The Court went on to add at para [25] that:

> 'Even a complainant under section 38(a) of the Bill of Rights must have an actual or a potential right or interest that is affected by the ultimate administrative decision.'

[11] In my view, despite the applicant's assertions that he acts for a wider class of persons and has put up a petition to this effect, the only persons who have 'supported' his application are two councillors from the Inkatha Freedom Party and another from the Democratic Alliance. The councillors are not parties to this application. One cannot infer from their 'supporting affidavits' that they align themselves with the relief sought by the applicant. While these councillors portray the impression that their views were drowned out by the ANC, it is true their views were simply out voted those of the majority party. Dissatisfaction resulting from a loss to a majority party as a consequence of a democratic process, however aggrieved one may feel, does not vest the applicant with locus to bring an application of the nature he did.

[12] Moreover, while the councillors raised issues in their letters of 31 March 2017 and 31 May 2017 pertaining to the draft budget and deficiencies in that process, that does not automatically transform the applicant's status, in my view, from an own-interest litigant, to one who is acting in a wider, public interest. In *Giant Concerts*, the court at para [33] said:

> 'An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests.'

And at para [35] that:

> 'where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.'

I am of the view that the applicant has failed to overcome the threshold set out in *Giant Concerts*, and even if I am incorrect in my conclusion that he is an own-interest litigant, I am still not convinced of his standing on the wider grounds set out in s38(c) or (d) of the Constitution.

[13] To the extent that the application was brought on an urgent basis, the applicant contended that the matter was urgent as the budget was likely to be implemented from 1 July 2017, a day before the hearing of this application before Bezuidenhout J. He further contends that in relation to the properties, Extension 9 and Extension 14, if he is to wait for their transfer to take place it is highly unlikely that the act of transfer could be reversed. To that extent it is contended that an interdict was necessary. The applicant in terms of section 35 of the General Law Amendment Act, 62 of 1955 is also required to give at least 72 hours' notice of an application where it seeks relief against a State Department. The applicant therefore seeks condonation for the time periods in respect of the provisions of the General Law Amendment Act, and the rules of court. The issue of urgency assumes a greater importance in light of the arguments raised by the respondents in the reconsideration application. I will deal with the subject in further detail below.

[14] After setting out the details of the legislative framework as contained in the MFMA, the applicant points out that on 17 May 2017 the first respondent placed a notice in the *Greytown Gazette* of a roadshow for the 2017/2018 budget and the Integrated Development Programme (IDP) to take place on the same day as the advert.

[15] While the applicant avers that he does not know what transpired at that meeting, he also contends that no meetings were held in the other 13 wards of the municipality. He presumably believes that the meetings called in the wards were a sham. He does not put up any evidence for his contention that no meetings were called in the other wards. In any event, he confirms that a special council meeting was scheduled for 31 May 2017. While the applicant was not present at this meeting, he relies on the minutes of the meeting to paint a picture of what transpired on that day, particularly that tariffs and rates were implemented without any rand values attached to them. On this basis he contends that the council was presented with a blank document from which no informed decision could be made. He relies on the recollection of three members of the Executive Committee – Rev. Mweli, Mr RS Maharaj and Councillor R Maharaj. All three councillors were present at the meeting on 31 May 2017 and they contend that the council proceeded to adopt the draft budget despite lack of compliance with certain legislative formalities. None of these

council members have stated under oath what these formalities are. It is noteworthy that in a letter written by Rev Mweli to the Speaker of the Umvoti Municipality on 31 May 2017 (the day when the disputed budget was approved), he does not raise any issue of irregularities pertaining to the failure to consult in 13 wards. He raises other issues as well including budget figures which were not supplied, expenditure incurred by the municipality for security personnel, usage through petrol cards and the use of two specific vehicles during the course of the by-election. These have little in common to the issues giving rise to the urgent application.

[16] The applicant further contends in his founding affidavit that certain objections were overruled during the course of the meeting on 31 May 2017, and that no voting took place for the adoption of the municipal budget. He contends that there has been non-compliance with the provisions of sections 160(2) and 160(3)(b) of the Constitution. Although the applicant makes reference to section 30 of the Local Government: Municipal Structures Act, 17 of 1998, which deals with quorums and decisions of municipal councils, no further details emerge regarding non-compliance of this section, nor is it apparent from the minutes of the meeting on 31 May 2017. It is not clear what submissions in this regard, if any, were made to Bezuidenhout J at the time of the hearing of the urgent application.

[17] On 12 June 2017 the applicant wrote to the second respondent contending that on his assessment, the 2017/2018 budget was at variance with the Constitution, the MFMA, the Municipal Budget and Reporting Regulations, the Local Government Municipal Planning and Performance Management Regulations, the Local Government: Municipal Systems Act, 32 of 2000 and the Municipal Finance Management Circulars issued by National Treasury with specific reference to those dealing with municipal budgets. The applicant then issued an ultimatum to the second respondent in the following terms:

> ‘In terms of section 27 of the Municipal Finance Management Act there is an obligation upon you to report this non-compliance. You are afforded an opportunity to engage directly with myself within 72 hours and also to call upon the speaker to convene a special sitting of council to discuss these non-compliance issues raised.’

The letter further warned that if there was no response within 72 hours, action would be instituted. When the applicant received no response, he approached the councillors who attended the meeting on 31 May 2017. It is however no answer as to why he failed to take action against the respondents following the expiry of his 72 hour deadline. Instead, an application was brought some two weeks after the expiry of his self-created deadline.

[18] The applicant relies on breaches observed by the three councillors to mount his application against the respondents. It begs the question why the councillors, or their political party, failed to take the decision of the first and second respondent on review if they felt that strongly about the failure of the first and second respondent to comply with the provisions of the MFMA. As stated earlier, Rev. Mweli's letter of 31 May 2017 gives no indication of a sense of disquiet at the conduct of the first and second respondent supposedly acting contrary to law. Indeed, in an attempt to bolster his case, the applicant relies on a petition from the community as the basis for the wider support of his application. Closer scrutiny of this petition reveals that it consists of no more than 25 petitioners, including Councillor RS Maharaj, who also signed the petition. Many of the petitioners appear to be family members sharing the same residential address. It is hardly the level of support which the applicant contends for in his founding papers, especially when the total population of the area is 122 000. Moreover, any concerns that individual citizens had could have been addressed through their respective ward councillors and tabled before the council.

[19] On 21 June 2017 the applicant saw a copy of the approved final budget and charges in the *Greytown Gazette*. He complained that it contained tariffs which were not part of the council agenda and therefore, in his submission, not passed by the council. In his view the first respondent failed to follow procedures in respect of the drafting and amending of the bylaws. He thereafter dealt with the decision of the first respondent to dispose of two pieces of land, namely Extension 9 and Extension 14, in the district of Greytown. The council took a decision to dispose of this land at a meeting on 28 October 2016 without members of the public being advised of the meeting as they should have in terms of section 14(2) of the MFMA. As I understood this aspect of the application, the applicant sought an interdict to prevent the transfer of the two properties, but without even citing the developer of the property as an

interested party. No notice was given to the Department of Human Settlements (KZN) who also appear to have been part of the initiative to develop the properties.

[20] The applicant recited the provisions of Chapter 4 of the Local Government: Municipal Systems Act, 32 of 2000 for his contention that the municipality is under a duty to develop a culture of participatory governance and democracy at local level, including steps taken in the preparation of a municipal budget. As he received no response from the municipality, he proceeded to engage his attorneys who addressed a letter on 26 June 2017 to the respondents, in which they again recited non-compliance with various legislative prescripts and gave the recipients a period of 72 hours within which to commence the budget process *de novo,* failing which legal action would commence. The applicant relies on an editorial in the *Greytown Gazette* of 7 June 2017 of the 2017/2018 budget and a later article on 21 June 2017 as support for his contention that the first respondent has taken decisions which directly impact on its ratepayers, and those decisions have been taken without proper consultation.

[21] The arguments advanced in favour of a system of participatory democracy at local level and the guaranteeing of ratepayers rights are themes which are consistent with our Constitution. Is equally correct that where procedures set out in the Constitution and in other legislation have been flouted by an arm of government, such non-compliance cannot be condoned. The applicant contends that the breaches committed by the first and second respondent are material and to date, the second respondent has failed to comply with the statutory duties in terms of s55 of the MFMA.

[22] In light of the above the applicant contended that he established a *prima facie* case on the papers for an interdict preventing the implementation of the 2017/2018 budget on 1 July 2017. Further, he contends that the balance of convenience favoured the granting of the order in as much as:

> 'there will be no prejudice to the respondents and in particular to the local community of the first respondent if an interdict is granted as the MFMA sets out the process to be

> followed if any of the steps prescribed by the act has been taken, including the stopping of funds transferred to the municipality.'

Section 38 of the MFMA permits the National Treasury to stop the transfer of funds to municipality, provided that such action does not adversely impact on the provision of basic services within the municipality.

[23] Upon the Order of 30 June 2017 coming to the attention of the respondents, they separately applied to anticipate the rule, whereas the fifth respondent brought an application to clarify the Order. Specifically, the first and second respondents have anticipated the rule and seek an order that it be discharged. The third respondent abides the decision of the Court, while the fourth respondent (MEC for Finance) is opposed to the confirmation of the rule and seeks either that the rule be discharged, alternatively that it be extended but without any form of interim relief. As the fifth respondent's application is largely unopposed, I propose to deal with the grounds of clarification before moving on to the more contentious aspects of this application for reconsideration.

[24] The position adopted by Mr *Tokota* SC for the fifth respondent was that he was not opposed to the rule being extended, but sought clarity as to the interpretation placed on paragraphs 1.7 and 1.8 of the Order, which call upon the fifth respondent to exercise its powers in terms of subsections 38(2)(a) to (c) of the MFMA as it pertains to stopping the supply for funds to municipalities, and the conditions precedent thereto. In particular, the fifth respondent, prior to taking any steps to stop the supply of funds to a municipality *must* in terms of s38(2)(a) of the MFMA give the municipality in question 'an opportunity to submit written representations with regard to the proposed stopping of the funds.' While the fifth respondent takes the view that it is not averse to an Order compelling it to perform its duties, its problems lie in the interpretation of the Order when seen through the lens of s154 of the Constitution and the provisions of s5 of the Division of Revenue Act, 2017 ('DoRA'). While paragraph 1.7 of the Order requires the fifth respondent to act in accordance with s38(2) of the MFMA, paragraph 1.8 goes further and directs the fifth respondent to stop funding 'should the first respondent fail to give written representations within seven (7) of this Order.'

[25] The fifth respondent submits that the Order creates uncertainty as to whether the representations in para 1.7 are to be submitted to the Court or the fifth respondent. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 Wallis JA succinctly summarised the approach towards interpreting contractual or legislative documents having:

> 'regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.'

The Court added in para [18] that:

> 'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12 the Court appropriately noted that:

> 'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.'

[26] In my view the only sensible construction to be placed on the wording used in para 1.7 of the Order was that the first respondent was to be invited by the fifth respondent to make representations to it (the fifth respondent) regarding the transfer of funds. There is no room for the contention that the wording of para 1.7 was for these representations to be received by the Court. What purpose would that serve? It is the National Treasury that must assess the representation in the context of s38(2) of the MFMA. I therefore find no merit in the contention that the wording in para 1.7 was vague. The representations referred to in para 1.7 of the Order must be directed to the fifth respondent.

[27] The further concern of the fifth respondent relates to the calculation of the time period referred to in para 1.8 of the Order. Applying the provisions of Rule 1 of the Uniform Court Rules to the words 'within seven (7) days of this Order', would

entail that the requisite period would expire on Tuesday, 11 July 2017. In essence, the first respondent (in accordance with s38(2)(a) of the MFMA) would have until 11 July 2017 to make representations to the fifth respondent. If no such representations are made, the fifth respondent could stop the transfer of funds the next court day being 12 July 2017. It is in this regard that the problem arises.

[28] As I understood the argument of Mr *Tokota*, with which none of the co-respondents nor the applicant's counsel took issue, it is that the distribution of funds to municipalities is done on an annual basis by the National Department of Co-operative Governance and Traditional Affairs (CoGTA). In terms of s154 of the Constitution, national and provincial governments must take legislative and other means to strengthen and support the capacity of municipalities to manage their own affairs. This object is achieved by the annual distribution of funds to municipalities in terms of s5 of the Division of Revenue Act. The 2017 allocation of funds to local government has been earmarked in three tranches, to take place on 7 July 2017, 1 December 2017 and 19 March 2018. The National Treasury is obliged to comply with these deadlines for payment. The first phase for the transfer of funds for 2017 is therefore predetermined as 7 July 2017, being *a day after* the hearing of this application for reconsideration. The point is made by the fifth respondent in its reconsideration papers is that the National Department of CoGTA had not been joined in these proceedings, despite the order affecting it. To that extent, it contended that the Order is not binding on CoGTA. It is perhaps for this reason that the application brought to join the National Minister for CoGTA was not opposed.

[29] As a matter of common sense, when the funds are distributed by the National Treasury on 7 July 2017, as it is obliged to, the seven-day period in the Order will not have expired. The first respondent therefore comes before this Court on the basis that it is obliged to comply the provisions of the Division of Revenue Act, 2017 to distribute funds to the first respondent by 7 July 2017, and on its interpretation, that distribution does not offend against the provisions of paragraph 1.8. For these reasons, Mr *Tokota* submitted that proverbially the horse has already bolted, and the Order as against the fifth respondent is a *brutum fulmen.* In any event, I am satisfied that if a stoppage of funds were to take place in contravention of the provisions of DoRA, 2017, there would be insurmountable inter-governmental and bureaucratic

problems, least of which would be the immediate impact for the adequate functioning of the first respondent to deliver the necessary services to its community. The fifth respondent's contention is therefore that the provisions of paragraph 1.8 of the Order be expunged as compliance therewith is neither practically nor legally possible.

[30] As set out earlier, there is no opposition to the relief sought on behalf of the fifth respondent and I am in agreement with Mr *Tokota* regarding the impact that paragraph 1.8 would have for the business of the first respondent. For those reasons, I would grant the relief sought by the fifth respondent in its reconsideration application. The fifth respondent seeks no costs against the applicant and to that extent no costs are ordered.

[31] The position of the third respondent is somewhat nuanced in that she abides by the decision of the Court, however the Chief Director: Municipal Finance filed an affidavit to explain that the monitoring of municipal budgets is done by the Municipal Finance section of the KwaZulu-Natal Treasury. If there were issues of non-compliance in the budgetary processes followed by the first respondent in the adoption of its 2017/2018 budget, the KZN Treasury would have been alerted to such fact, and in turn would have contacted the Municipal Finance directorate. It was submitted further that the effect of the Order of 30 June 2017 is that the operations of the first respondent are suspended, together with the cessation of all services and service delivery. To the extent that the order granted compels the third respondent to exercise its powers in terms of section 27(5) of the MFMA, it is submitted that such an order is misplaced as it usurps the prerogative and the discretion of the Provincial Council as to when it may intervene in the affairs of local government, provided for in s139 of the Constitution. Section 139(4) of the Constitution provides for the intervention by the provincial executive:

> '(i)f a municipality cannot or does not fulfil an obligation in terms of the constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget'.

Such a situation does not arise in the present circumstances, nor is there a 'crisis in the financial affairs' of the municipality justifying such intervention. This is a similar argument to that advanced by the first and second respondents, which is considered below.

[32] The position of the first and second respondent in approaching this court on an urgent basis for the reconsideration of the Order or anticipation thereof in terms of Rule 6(12) is that the immediate effect of the Order has been to interdict the implementation of the municipal budget for 2017/2018 – one day before its scheduled implementation. The point is not lost on the timing of the application for the interdict. The effect of the order is that the municipality has ground to a standstill and that it is paralysed by virtue of it being unable to pay or receive revenue in the absence of its budget being implemented. Ms *Gabriel* SC, who appeared for the first and second respondents, indicated that at a practical level the effect of the Order has prevented the municipality paying undertakers to carry out burials as part of a policy to assist poor members of the community unable to afford to bury their dead. Counsel for the applicant objected to this example being introduced as it is not referred to in the papers. The municipal manager was available in Court to give evidence on these matters, I was informed. Even without taking that example into account, I postulated to counsel for the first respondent what would apply to the issuing of fines for traffic violations and others of a similar nature, which would cause revenue to be paid to the municipality. I was informed that in the absence of the budget being implemented, the municipality is unable to receive any revenue, nor for example, to pay councillors holding office, or staff rendering services to it. Counsel submitted that the order has created a constitutional crisis in that approximately 122 000 ratepayers who live within the jurisdiction of the Umvoti Municipality are directly affected by the interim order which was sought by a disgruntled former mayor, without notice to members of the community or the respondents. The first and second respondents accordingly seek that the order be set aside with costs.

[33] Ms *Gabriel* submitted that the provisions of Chapter 4 of the MFMA have been complied with in the preparation of the 2017/2018 budget for the Umvoti municipality including the requirement of consultation with members of the community to give effect to the constitutional principles of participatory democracy. In this regard the first and second respondent annexed to their papers a comprehensive breakdown of the issues on which the community have been consulted in the lead up to the

adoption of the budget. Also annexed is a copy of the 2017/2018 Integrated Development Planning (IDP) process through which municipalities developed strategic plans for a five year period. This process involves extensive consultation with the community, with the outcome being a reflection of the council's vision for the long term development of the municipality. It is not disputed that on 17 August 2016 the municipality placed an advert in the *Greytown Gazette* informing the public that a draft Process Plan had been prepared which would guide the adoption of the IDP and the Budget for 2017/2018. It further informed the public that the documents were available for inspection at the municipality's offices. According to the first respondent, ward meetings were held in each of the 14 wards in the municipality in order for these communities to feed into the budget process. As such, it is submitted that there has been full compliance with section 21 of the MFMA. None of these averments are contested by any credible evidence.

[34] Where there has been non-compliance with any of the provisions of the budgetary processes set out in Chapter 4 of the MFMA, it was submitted that rather than approaching the Court for relief, the legislature has created an alternative mechanism in terms of which the fourth respondent is given wide powers under s27 of the MFMA to ensure compliance. Perhaps most important are the provisions of s27(4) of the MFMA which states:

> '(4) Non-compliance by a municipality with a provision of this Chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy, <u>does not affect the validity of an annual or adjustments budget.'</u> (my emphasis)

In light of the above provision, it would appear that irrespective of whatever the complaint of the applicant is with the budgetary process of the first respondent, the validity of the budget cannot be toppled. If there are deficiencies with the process, he is entitled to proceed by way of a legality review in the normal course. The provisions of section 27(4) only provide a 'band-aid' against challenges to the validity of the budgetary process and others matters set out in Chapter 4. As such, it is submitted by the municipality that the budget adopted on 31 May 2017 remains valid and enforceable, and that s27(4) is a complete answer to defeat the applicant's application.

[35] Ms *Norman* submitted that the first and second respondents (and to an extent the fourth respondent) have conflated the issue in that they misunderstand the applicant's case. Ms *Norman* submitted that s27(4) has no application to the present case as the applicant is not asking for the budget to be reviewed or be invalidated. His case, as it was conveyed to me, is that the respondents have not complied with their statutory obligations and he has approached the court to compel them to do so. I am of the respectful view that this is a rear-guard attempt to defeat the argument of the respondents who rely on s27(4). I say so because in his letters of demand to the respondents on 26 June 2017 the applicant clearly declares:

> 'Should you wish to avoid litigation in this matter, we are instructed that an undertaking to the effect that the process will be started *de novo*.'

He adds further in the penultimate paragraph of his letter:

> 'Should you fail to give the aforementioned undertaking our instructions are to bring an urgent application to have the budget set aside and to seek interdictory relief preventing yourselves from implementing the budget.'

[36] The only sensible interpretation to be placed on these extracts is that the applicant was adamant that the budgetary process was deficient, and it should be set aside and commence afresh. This is a departure from the manner in which the applicant's case came before Bezuidenhout J on 30 June 2017 and how it is now presented. In *Rhino Hotel & Resort (Pty) Ltd v Forbes and others* 2000 (1) SA 1180 (W) it was held that when a reconsideration of a rule is heard under rule 6(12)(c), the matter is re-heard (with the additional advantage of argument from the respondent) on the original application papers, and nothing more. However it is submitted that a more preferred view is that the court reconsidering the order has a wide discretion, inter-alia, to redress imbalances where an injustice and oppression flow from the order granted in the absence of a party, and in the course of this hearing, further affidavits or evidence may be taken into account. See *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd and others* 2002(1) SA 155 (T) at 167-168; *The Reclamation Group Pty Ltd v Smit & others* 2004 (1) SA 215 (SEC) at 218D.

[37] It was argued that the legislative framework set out in the MFMA does not give the applicant the *locus* to approach the court for relief. Instead, our political

dispensation allows him to express his dissatisfaction with the passing of the budget through any five of the ward councillors in areas where he owns property, qua ratepayer. These concerns would have been ushered through his party political structures, which he informs the court, he is a member. As I understood this argument, the mere fact that one citizen is disgruntled with the passing of a municipal budget does not confer on him or her a right to bring the municipality to a grinding halt.

[38] The fundamental problem raised with the applicant's complaint is its lack of particularity – what right or interest is he seeking to protect? He has failed to specify how the alleged deficiencies in the first respondent's budgetary processes have adversely affected his rights. The papers reveal that he owns properties in five different wards. Given that scenario, how does the passing of the budget affect him? He may be aggrieved at certain tariffs or charges being included in the budget. He may be aggrieved that the costs of refuse removal or refuse bags may have increased in the 2017/2018 financial year, despite the municipality failing to specify what the increases are. Does this entail that he has a right to bring an application to stall the entire municipal budget, and even more so, on an urgent basis, one day before the budget can be implemented? I think not. As the court in *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CC) pointed out in para 17 to 18 that:

> '[w]hile the extent of the charges explains the anger felt by some at the new charges, it does not, of itself, provide a legal basis for a challenge to the charges. The City has the statutory power to enact by-laws, pass budgets and impose various charges.'

[39] Referring to the decision in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC), the court in *Rates Action Group* at para 17 and 18 reiterated that decisions pertaining to the passing of tariffs by a municipal council is a decision:

> '… by a democratically elected deliberative body, is inevitably influenced by political considerations. It is for the members of the municipal council, and not the courts, to judge how to weigh the various competing factors and interests ... This is a necessary consequence of the separation of powers.

> [18] The applicant's complaint that the new charges were 'unfair' or 'disproportionate' therefore does not of itself raise a legal question. It raises a political question. The legal question is whether the City acted within its powers in determining those charges.'

[40] The broad brush strokes used by the applicant to impute a disregard for clean and open governance of the Umvoti municipality is not confined to the founding papers. In his replying affidavit the applicant continues the trend stating that:

> 'The culture of illegality and the abuse of the public purse which has taken root in the first respondent, as more fully set out in my founding affidavit, has to be dealt with decisively and the fifth respondent as the guardian of the public purse has to take steps as soon as he becomes aware of the serious breach of the measures set out in section 216 of the Constitution.'

[41] The first and second respondents submit that the interim relief granted by the order puts on hold a constitutionally sanctioned executive and legislative process of the municipality implementing its budget for the 2017/18 financial year. The argument advanced is that this is an impermissible intrusion into exclusive municipal functions, and consequently violates the doctrine of separation of powers. The foundations for this argument lay in *Fedsure* para [45] where the court held:

> 'It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. There is no dispute that the rate, the levy and the subsidy under consideration in this case were determined in such a way. It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, can be classed as administrative action as contemplated by section 24 of the interim Constitution. . . . It follows that the imposition of the rates and the levies and the payment of the subsidies did not constitute "administrative action" under section 24 of the interim Constitution.'

[41] In relation to attacks against budgets based on an increase in rates, the Court had the following to say at para [63], which I consider to be directly relevant to the complaint of the applicant:

> 'Where an amount has been incorrectly but reasonably included as an item of expenditure the fact that it turns out not to be payable at all would in no way invalidate the budget or decisions taken in consequence of its adoption. It follows that where it turns out that the rate levied on property was unnecessarily high, the levy of such a rate would in no way be invalid or subject to attack. The surplus in revenue that the rate might then yield would be a source which the local authority could use to defray any lawful payments which might have to be made during the financial year in question; it could be brought forward to the ensuing financial year; or it could also be used to allow a rebate to ratepayers.'

The Court added that as long as the increases were done in a bona fide manner, their validity could not be attacked.

[42] The first and second respondents submit, with respect, that the court hearing the urgent application on 30 June 2017 was not fully appraised, alternatively failed to take into account, the critical factor of whether the balance of convenience favoured the grant of the relief sought by the applicants. In this regard reliance was placed on the decision in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('*OUTA*'). In considering whether the requirements had been met for an interim interdict the court made reference to *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) where the court was called upon to grant an interim interdict restraining a minister from exercising powers vested in him by statute. The court found that 'in the absence of any allegation of *mala fides*, the court does not readily grant such an interdict.' It went on to add that a 'strong case' had to be made out for such relief, and only when 'exceptional circumstances' exist.

[43] In the matter before me, the applicant obtained an interim order interdicting the first respondent from implementing its budget for the 2017/2018 financial year. The high watermark of the applicant's case appears to be his disgruntlement with the consultation process, or lack thereof, with certain communities prior to the adoption of the present budget. Added to this, he obtained an order interdicting the transfer of two pieces of land belonging to the first respondent. As set out earlier, it is not clear from the applicant's papers what his interest in the budgetary process is, and what interest he has in the sale or allocation for development of the two pieces of land falling within the jurisdiction of the first respondent. The applicant does not allege any

impropriety in respect of the sale of the land or the manner in which such sale is in contravention of existing legislation.

[44] The obvious question which must arise is whether the applicant has made out a 'strong case', and whether any exceptional circumstances exist to have granted an order interdicting the first respondent from carrying out its functions which are vested in statute. The court in *OUTA*, para [45] stated that:

> '…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.'

It is not clear from the applicant's founding papers as to what object of the Constitution would be advanced by the interdict which was obtained.

[45] The point stressed by the counsel for the first and second respondents was that the interim order has effectively paralysed the first respondent. The court in *OUTA* paras 46 to 47 stressed the importance of the balance of convenience test when deciding whether to grant an interim interdict. The court stated"

> '[46] …. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.
>
> [47] The balance of convenience enquiry must now 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 granted only in the clearest of cases and after a careful consideration of separation of powers harm.'

[46] The Constitutional Court in *OUTA* at para 66 sounded a caution that courts must recognise that when they are asked to restrain the exercise of a statutory power within the exclusive domain of a particular branch of government, they must carefully assess the extent to which the interdict will disrupt the executive or legislative functions conferred by law. The Court went on to add:

> 'Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.'

[47] The Court reiterated the earlier position that a proper and strong case has to be made out for the relief, and then only in the clearest of cases. The test is therefore whether it is constitutionally appropriate to grant the interdict.

[48] I am of the view, having assessed the case made out by the applicant in its founding papers, weighed against the impact of the order on the community of Umvoti, that the balance of convenience clearly militated against the granting of such relief, and I would accordingly not have done so.

[49] It is common cause that the application for the interdict was brought on an urgent basis. The order was granted in the absence of representation on behalf of any of the respondents. The first and second respondents state that the application was not served on the municipality by Sheriff as it should have, but rather the attorneys for the applicant sent an email to the address of the second respondent at 15h39 on 29 June 2017, one day before the application, and shortly before the offices of the municipality close for business. The email containing the application papers contains nothing in the subject line which would alert the recipient to the nature and subject matter of the message, and more importantly, whether it requires urgent attention. There is no hint from the contents of the email either that the matter was urgent. On the contrary, it simply reads:

> 'Kindly find attached hereto court application papers for your attention. We trust that you will find all in order.'

If the applicant was constrained because of the urgency of the situation not to effect service by sheriff, the least one would have expected of the applicant was to hand deliver the application, alternatively send it by facsimile to the municipal manager. Where it chose to send the application via email, it should have followed up with a telephone call to confirm that the email has been brought to the attention of the intended recipient, drawing the attention of the person to the urgency of the relief being sought. A hard copy of the application papers were only served on 30 June 2017, the same day on which the order was granted. In the absence of the precautionary measures being taken to ensure that the application papers came to the attention of the respondents, this application in my view came before the court on a basis akin to an *ex parte* application.

[50] In addition there appears to be no compliance with the provisions of s35 of the General Law Amendment Act, 1955 to give the State 72 hours' notice before approaching the court for the *rule nisi*. To this extent, the applicant asks that his non-compliance be condoned. He contends that the respondents were forewarned of the application in his letters of 26 June 2017. I am not persuaded that the threat of an urgent court application referenced in a letter can be a substitute for the giving of a statutory notice. If that were the case, a letter of demand to an organ of state, couched in rather general terms that an application would follow in the event of the demand not being complied with, would constitute a basis to by-pass the provisions of s35. Accordingly, I would not have condoned the non-compliance.

[51] The urgency of the application, in my view, appears to be carefully crafted so as to afford almost no, alternatively, minimal notice, to the respondents to oppose the application which had far reaching consequences. The applicant knew on 31 May 2017 that the budget for 2017/2018 had been formally adopted by council. He has not explained why he waited until 26 June 2017 to issue his ultimatum to the municipality, and what factors prevented him from giving requisite notice to the respondents earlier than he did. The fact that the budget was to be implemented on 1 July 2017 did not necessitate bringing an application overnight, in circumstances where those acting for the applicant would more likely than not have known that the application would not come to the attention of the relevant officials. It was pointed out that the second respondent receives scores of emails daily and there was nothing in the message to have alerted him to the urgency of the matter. In the circumstances, service of the papers by the Sheriff would have been imperative, not only because of the short notice but because of the drastic and far reaching effect of the relief sought.

[52] There was also no basis, in my view, for the need to have brought an urgent application to interdict the transfer of two pieces of land described as Extension 9 and Extension 14, Greytown. This relief was sought without notice to the developer, who has a substantial interest in the matter. The applicant merely states that he was not able to establish the identity of the developer despite the effort of his attorneys. The court is not told what these efforts entailed or whether transfer was imminent. Even if it were, Courts are routinely asked to set aside transfers of property long after the transfer has been completed. Transfer is not an insummountable obstacle standing in the way of appropriate relief. I would not have been persuaded that the application was urgent or that a proper case had been made out for the matter to have ascended to the top of the queue on barely a night's notice. I would have struck the matter off the roll for lack of urgency on this ground alone.

[53] The complaint to the applicant, apart from the allegations of lack of public consultation, is that the municipality led the community to believe that there would be no increases in rates and tariffs, but has gone ahead and done so regardless. One of the tariff's the applicant takes issue with is the increase in the price of refuse bags. This theme is also pursued in an editorial in the *Greytown Gazette* of 21 June 2017. The applicant aligns himself with the editor for raising these matters as they impact directly on ratepayers and should be the subject matter for consultation. In an earlier article on 7 June 2017, the editor raised concerns of cellular phone and petrol allowances of the mayor, speaker and deputy speaker. These are referred to in the applicant's founding papers, as are the increases in the electricity and rates.

[54] It is apparent that the issue of the first respondent adopting new tariffs and municipal expenditure were in the public domain prior to the institution of the application. Where a litigant raises a constitutional issue of a failure by an organ of state to follow proper process in arriving at a budget and seeks relief which has the prospect of bringing that organ of state to a standstill, it is incumbent on such an applicant to give notice of such proceedings in accordance with Rule 16A. This was not done. In the present case, as an alternative the applicant could have used the local newspapers or community radio stations to give notice of his intention to challenge the first respondent in court and in this way achieve the purpose of the

Rule 16A. The point was aptly summed up in para 21 in *Rates Action Group* where the Court held:

> 'The reason for the Rule is that constitutional cases often have consequences which go far beyond the parties concerned. The purpose of the rule is to bring the constitutional challenge to the attention of persons who may be affected, or who may have a legitimate interest in the case: *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC) (2004 (4) BCLR 333) at para [24]. This enables such persons to seek to intervene either as a party, or as *amicus curiae*. While the views of the parties are undoubtedly relevant to the interests of justice, they can, therefore, not be dispositive.'

[55] The interests of justice would not have required that this application be dispensed with on 30 June 2017. I would have struck the matter from the roll for want of compliance with Rule 16A, despite the court in *Rates Action Group*, which concerned the budget of a large city, concluding that the interest of justice dictated that the requirements of Rule 16A be dispensed. where the *application* had received wide notice in the public media, and therefore the attention it received was "considerably greater than would have been occasioned by placing a notice on a notice board at this Court. " [para 21]

[56] Mr *Dickson SC*, who appeared for the fourth respondent, drew to my attention that s21 of the MFMA sets out in detail the time frames which must be complied with in the budget preparation process. The impression created by the applicant in his founding papers is that nothing had been done by the fourth respondent to ensure compliance with the MFMA by the municipality until shortly before the deadline could be reached. This is borne out from the contents of his letter dated 12 June 2017 to the second respondent. The fourth respondent shows, with reference a letter to the second respondent dated 6 September 2016 that it had been vigilant regarding compliance with the time periods set out in s21(1)(b) of the MFMA[1].

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[1] 21. (1) The mayor of a municipality must—

(a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;

(b) at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for—

(i) the preparation, tabling and approval of the annual budget;

(ii) the annual review of—

[57] The letter of 6 September 2016 reflects that as soon as the municipality missed its deadline, the fourth respondent immediately wrote to the municipality indicating that the municipality ought to have tabled its budget by end August 2016. The point stressed by counsel is that there is no basis in law or fact for the applicant to contend that the fourth respondent failed in its duties to monitor and supervise the financial affairs of the first respondent with respect to the passing of the 2017/2018 budget. In light of the letter of 6 September 2016, the first respondent remedied matters when it tabled the 2017/2018 Budget and IDP at a meeting of the Executive Committee, where the minutes of the meeting reflect that Councillor R Maharaj was present and in fact proposed the adoption of the budget.

[58] After the budget was tabled, the fourth respondent wrote to the municipality on 11 April 2017 informing them that they had failed to meet the deadline of 7 April 2017 for submission of hard copies of the Service Delivery and Budget Implementation Plan (SDBIP). Treasury requested compliance with section 22(b((i) of the MFMA by not later than 12 April 2017. This again is proof of the forth respondent ensuring that the municipality complied with its obligations under the MFMA. Upon the municipality submitting its budget to Treasury, the latter on 27 May 2017 sent a detailed letter of its assessment of the budget dealing with aspects of compliance with statute, under the themes of credibility of the budget, relevance (alignment with priorities); sustainability (noting that electricity revenue is budgeted to operate at a surplus of R52,2m and refuse revenue is budgeted to operate at a deficit of R30.9m). The municipality was further warned that in the event of weaknesses being identified in the budget, the fourth respondent reserved the right to stop the transfer of an equitable share of funds to it in terms of section 38 of the MFMA. This demonstrates, in my view, the vigilance which the fourth respondent exercised in the budget process followed by the municipality.

(aa) the integrated development plan in terms of section 34 of the Municipal Systems Act; and
(bb) the budget-related policies;
(ii) the tabling and adoption of any amendments to the integrated development plan and the budget-related policies; and
(iii) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).’

[59] If there was any doubt that the fourth respondent abdicated its responsibilities, this is completely dispelled by the contents of a letter from Treasury to the second respondent, dated 29 June 2017, a day before the applicant obtained the interim order. The letter concerns a high level assessment of the approved budget for the 2017/2018 financial year, noting that the municipality appeared not to take into account the recommendations previously made to reduce non-essential expenditure and implement cost containment measures. It was pointed out that the budget would not be sustainable and that this will impact adversely on the financial viability of the municipality, as well as its ability to deliver services to the community. Accordingly, the Provincial Treasury indicated that it could not support the 2017/ 2018 budget. The fourth respondent went on to point out that she had no choice but to escalate the matter to the National Treasury, should the first respondent not comply with her recommendations.

[60] Mr Donnelly, the deponent to the affidavit on behalf of the MEC for Finance and a director in the Department: Municipal Finance at the Provincial Treasury, confirms the contents of the letter dated 29 June 2017 but adds that a process is underway to ensure that the budget is compliant with national and provincial strictures. As such, government is doing what it is required to do in terms of the in the MFMA and the Treasury regulations. He submits that is not necessary for the applicant to enlist the assistance of the Court to remedy the budgetary concerns which have already been highlighted by the fourth respondent, as well as the National Treasury. However Ms *Norman* submitted that when the applicant wrote to the fourth respondent pointing out various deficiencies in the budgetary process, the fourth respondent was obliged to revert to him and explain that there was an on-going assessment process in place to ensure compliance with the MFMA. The fourth respondent failed to revert to the applicant, causing the latter to approach the court.

[61] Mr *Donnelly* contends that the relief sought for by the applicant, and secured under the interim order, is contrary to the principles of separation of powers, as the court is called upon to compel the fourth respondent to exercise what is purely a

discretionary power contained in the Act, to stop the transfer of funds due to the municipality. Counsel referred to the Constitutional Court's recent decision in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17 (8 June 2017) where it noted at para 5 that:

> 'Permissible judicial intervention is quite distinct from the Judiciary's imposition of its preferred approach to the issues or what it considers to be the best or superior choice in relation to matters that the political arms are constitutionally mandated and therefore best-placed to handle.'

[60] The remaining aspect dealt with by Mr *Donnelly* concerns the disposal of municipal property, which is referred to by the applicant in his founding papers as a further reason for the granting of the interim order in his favour. Section 14 of the MFMA sets out the basis for the disposal of capital assets by a municipality. Mr *Donnelly* points out that the Provincial Treasury has a file on the proposed development of a housing scheme on the portions of land in respect of which the applicant has obtained an interdict, preventing its transfer. A perusal of the documents attached to Mr *Donnelly's* affidavit reflects that there has been compliance with the provisions of section 32 of the Supply Chain Management Regulations and that the developer, Lwazi Project Management, concluded a binding agreement with the municipality in October 2015. The properties in question are intended for the development of a middle income housing project and an upper income housing project, in partnership with the KwaZulu-Natal Department of Human Settlements. In a letter addressed to the National Treasury by the municipal manager of the first respondent, it is pointed out that a survey conducted in the Greytown area revealed that there is a significant number of middle income earners who do not own properties as they earn above the threshold to qualify for low income housing. It is this sector of the population which the municipality wishes to target and to make housing available. There can be no compliant with the municipality pursuing a legitimate objective to provide additional housing. What then is the applicant's basis for seeking to interdict the transfer?

[61] The problem lies with the applicant's founding papers in that he does not specify what his interest is in relation to the two properties, referred to as Extension 14 and Extension 9. He does not indicate whether he is a disgruntled bidder for the

development of the site, or whether he has some or other vested interest in the property being disposed of, nor does he say whether the greater community of Umvoti, whom he purports to represent, are adversely affected by this sale absent him setting out what his precise complaint is, I see no reason why the transfer of this portion of land should have generated an urgent application or why orders interdicting the transfer should have followed.

[62] In light of what I have set out above in relation to the fourth respondent, I am in agreement with Mr *Dickson* that it is appropriate that the order granted on 30 June 2017 be reconsidered, with the interim relief granted by Bezuidenhout J set aside.

[63] Ms *Norman* SC contended that Mr *Donnelly's* affidavit on behalf of the MEC for Finance reveals a persistent failure by the first respondent to arrange its affairs relating to the budget in accordance with the provisions of the MFMA. There is much merit in the submission as it seems that the municipality has significant problems in adhering to Treasury's guidelines. Does that however warrant an application to court by an upset ratepayer? When the applicant came to court, he asked that the fourth respondent be given what I would call a 'judicial-nudge' to do what it is required to in terms of the MFMA. Mr *Donnelly* has now shown, contrary to what was contended for by the applicant, that the fourth respondent has been diligently urging the municipality along the correct path for some time. Courts should be slow, in my view, to enter the terrain where governmental departments are exercising their mandates, albeit somewhat slowly. It is an entirely different scenario if the pace at which a government department is discharging its functions adversely affects a right, for example, the Department of Education failing to timeously conclude a contract with a service provider to ensure the prompt supply of text books to school children, or where the Department of Public Works is dragging its heels on a contract to build a bridge over a river so that children can safely acquire access to school. In am mindful of the Constitutional Court's observation in *United Democratic Movement v Speaker of the National Assembly and Others (Counsel for the Advancement of the South African Constitution and Others* Amici Curiae) 2017 (8) BCLR 1061 (CC) where the following is said at para 63 in relation to separation of powers:

> '…considerations of separation of powers demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms and a refrain from impermissible intrusions.'

[64] In the final result, I am satisfied that on a reconsideration of the Order, I would not have granted the rule issued by my colleague Bezuidenhout J. The matter came before him that morning before the commencement of the Motion Court and his opportunity to reflect of the issues raised in the papers was minimal, if at all. Had he had the benefit of the opportunity that I have had to consider the argument of the parties and the authorities referred to, I am sure that he would not have issued the Order he did..

[65] Ms *Gabriel* urged me to discharge the rule and if the applicant wished to review the processes followed (or not followed) by the municipality he could do so on review. She was insistent that the interim relief be set aside. Mr *Dickson* was not tied to either form of relief, save that he argued for the interim relief to be set aside. He had no issue with a rule in the matter being extended, but without interim relief. Ms *Norman* submitted that even if I was inclined to discharge the interdict in para 1.1, I should retain 1.2; 1.3 and 1.4; 1.5 and 1.6 of the Order. Paragraph 1.8 has been discharged by agreement with the fifth respondent, represented by Mr Tokota.

[66] Having had the benefit of full and comprehensive argument by all counsel, I did not deem it necessary to retain the rule in whole, or in part. In those circumstances I made the following an order:

1. The rule issued on 30 June 2017 is discharged;
2. The applicant is ordered to pay the costs of the respondents, including the costs of two counsel, where so employed.

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M R CHETTY

Appearances

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Date of Order :	6 July 2017
Reasons Delivered	4 September 2017