

REPORTABLE

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THE REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

CASE NO: 4567/2024

*Before **ALLIE, J***

*Hearing: **20 May 2024***

*Judgment Delivered electronically: **3 June 2024***

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	1st Applicant
CORRIE ENGELBRECHT	2nd Applicant
WERNER STEYN	3rd Applicant
And	
CENTRAL KAROO DISTRICT MUNICIPALITY	1st Respondent
GAYTON McKENZIE	2nd Respondent
BOTHA E & ERASMUS Y INC	3rd Respondent
EUGENE BOTHA	4th Respondent
FEZICUBE EVENTS (PTY) LTD	5th Respondent

JUDGMENT:

ALLIE, J:

1. This is an application to compel the Respondents to give their full co-operation to the investigators appointed by the Applicant in terms of section 106 of the Municipal Systems Act 32 of 2000 Act ("the Systems Act").
2. According to Applicant, he and later, the investigators did not receive sufficient co-operation from the First Respondent but subsequent to the launch of these proceedings, the First Respondent gave its full co-operation, hence no relief is sought against First Respondent at the hearing.
3. The relief set out in the Notice of Motion is however still persisted with against Second to Sixth Respondents.
4. The relief set out in the Notice of Motion is as follows:
 - 4.1. The first respondent Municipality, and all those working under it, and under its direction and control, are directed immediately to comply with the investigation initiated by the first applicant in terms of s 106 of the Local Government: Municipal Systems Act No 32 of 2000 and the Western Cape Monitoring and Support of Municipalities Act No 4 of 2014 ("the Western Cape Act").

- 4.2. To the extent that either the second, third, fourth, fifth and/or the sixth respondents are in possession of, or have under their control, documents or any other related sources of information (including in digital format) relating to the investigation initiated by the first applicant, they are directed immediately to comply with the requests made by the second and third applicants who were duly appointed by the first applicant and authorised in terms of s 106(1)(b) of the Systems Act.
- 4.3. In particular, the third and/or fourth respondents are ordered and directed to furnish the following information:
- 4.3.1. copies of agreements, and memoranda of understanding entered into between E Botha and Y Erasmus Inc, and representatives of the first respondent, including the second respondent;
 - 4.3.2. opening documents and bank statements of Account No: 105[...] held at Mercantile Bank in the name of E Botha and Y Erasmus Inc from 19 May 2022 to date;
 - 4.3.3. reports and documents retained on file by E Botha and Y Erasmus Inc including but not limited to the appointment of service providers, agreements signed and payments made to the service providers;
 - 4.3.4. documentation confirming the utilisation of the funds, which should include, amongst others, invoices, receipts, confirmation that services were provided, progress reports and proof of payments;

- 4.3.5. documentation/e-mails, supporting documentation in relation to payments made on specific projects;
 - 4.3.6. documentations/e-mails, supporting documentation in relation to instructions or any purported authority received from representatives of the first respondent and/or second respondent, including instructions received from first and/or second respondent to utilise the trust account to receive funds from the fundraising event held at Sandton Hotel on 21 May 2022, and to effect payment or transfer funds received from the fundraising event; and
 - 4.3.7. copies of agendas and minutes of meetings held with the Mayoral Committee, District Co-Ordinating Forum and/or other representatives of the Central Karoo District Municipality in accounting for thy funds.
- 4.4. In particular, the fifth and/or sixth respondents are ordered and directed to furnish the following information:
- 4.4.1. copies of agreements, and any memorandum of understanding entered into between Fezicube Events (Pty) Ltd and/or Fedile Norah Nhokloanyane and E Botha and Y Erasmus Inc, and representatives of the first respondent, including the second respondent;
 - 4.4.2. reports and documents relating to the appointment of and payments made to service providers on behalf of first respondent,

including the second respondent, in the possession of Fezicube (Pty) Ltd and/or the sixth respondent; and

4.4.3. documentation and/or e-mails relating to the fundraising event held at Sandton Hotel on 21 May 2022, including instructions received from the first and/or second respondent to organise the fundraising event and utilise funds received from the fundraising event.

5. The respondents are directed (jointly and severally, the one paying the other to be absolved), to pay the costs of this application, including the costs of two (2) counsel, on an attorney and client scale.
6. Second Respondent opposes the Application, essentially on the following grounds:
 - 6.1. The Second Respondent had made public utterances promising to undertake certain service delivery initiatives within the first 100 days of his term of office as Mayor;
 - 6.2. The Second Respondent discovered that the First Respondent did not have the funds to give effect to that promise;
 - 6.3. The Second Respondent, with the knowledge and consent of the First Respondent proceeded with fundraising initiatives to implement his promise;
 - 6.4. Those initiatives were known to be his own personal projects;

- 6.5. The projects fell outside of and were different from the structure of the usual financial reporting of Municipal Funds, as provided for in the Local Government: Municipal Finance Management Act, 56 (“MFMA”);
- 6.6. The funds raised were paid into the Trust account of the Third Respondent;
- 6.7. Monies raised were used to buy items such as, toilets, pipes, septic tanks and to hire diggers;
- 6.8. Toilets were installed and swimming pools repaired;
- 6.9. When necessary, he used his own funds over and above monies raised by the fundraiser;
- 6.10. The monies raised were not those of the Municipality, and the Municipality itself contributed no money to the expenditure;
- 6.11. The Municipality did not contract for the services performed;
- 6.12. The raising of the funds, and paying for the projects, could therefore not legitimately be considered to be maladministration of the affairs of the Municipality, for the purposes of an inquiry in terms of Section 106 of the Systems Act;
- 6.13. The personal information of the persons who contributed to the fundraiser are protected by the Protection of Personal Information Act, Act 4 of 2013 [“POPI” Act];

- 6.14. The funds were not municipal revenue and not monies received by the Municipality for the purpose of relief, therefore, the provisions of Section 12 of the local government MFMA do not apply and there is no lawful basis upon which to have instituted an investigation;
- 6.15. The relief pertaining to Third Respondent's bank account is overbroad and extends to a period beyond the relevant period when fundraiser money was paid to it and disbursed by it; and
- 6.16. Third Respondent is obliged to protect the information of its unrelated trust creditors and would only provide the requested information up to the period that the funds were all withdrawn and would redact the information of unrelated persons;
7. Applicant's contentions are as follows:
 8. On 23 August 2023, acting in terms of s 106(1)(b) of the Systems Act read with s 7 of the Monitoring Act, the MEC designated the second and third applicants to investigate allegations of maladministration, fraud, corruption and other serious malpractices at the first respondent.
 9. The MEC's designation of the second and third applicants has not been challenged in a separate application nor in a counter-application, and accordingly must be considered to be valid and lawful.
 10. During the course of the investigation, the second and third applicants reported that the third respondent firm of attorneys has failed and/or refused to hand over

certain information relating to the investigation on the grounds of, *inter alia*, potential breach of POPIA, and attorney/client privilege.

11. The third respondent indicated that it would only hand over the requested information if a Court Order compels it to do so.
12. Third Respondent's primary concern appears to be protecting the confidentiality of its trust creditors, protecting the identity of depositors for the fundraiser that obtained no undue preference or advantage as a consequence of participating in the fundraiser and ensuring that the disclosure of its Trust bank account did not exceed the period in which funds were collected and expended for the fundraiser.
13. On Third Respondent's behalf, it was submitted that Fourth Respondent's *ipse dixit* concerning the amount collected and the amount expended should be accepted.
14. The amounts allegedly collected and spent as *per* Fourth Respondent, do not accord with the amounts alleged by Second Respondent in the papers and in social media posts made by Second Respondent, that were referred to in the papers.
15. Third and Fourth Respondent's impropriety in allowing the funds to be paid into the Fourth Respondent's Trust account and to be expended for what is clearly a Municipal purpose, means that the Applicants are justified in not merely accepting those allegations concerning the amounts without second and third Applicant's verification thereof. In short, Second and Third Applicants ought to be granted the opportunity to conduct their investigation unhindered.

16. The first respondent has co-operated by filing further documentation on 5 March 2024 on the day this application was launched. First respondent has contended that it did not organise the fundraising gala and it did not receive any of the proceeds of the gala organised by the second respondent.
17. Fifth and sixth respondents have not co-operated at all and they have filed a Notice to Oppose without filing answering affidavits.
18. Relying on the case of **MEC for Local Government, Western Cape and Matzikama Local Municipality and Two Others**,¹ Applicants' counsel contends that s 106 is a mechanism by which an MEC may investigate allegations that serious problems have arisen relating to the administration and governance of a municipality.
19. Applicants' counsel submits that the MEC has reason to believe, objectively, that maladministration, fraud, corruption or any other serious malpractices had occurred or were occurring in the Municipality.

Evaluation

20. Section 173 of the Municipal Finances Management Act 56 of 2003 ["MFMA"] provides for a vast array of offences as constituting financial maladministration within a municipality.
21. The Systems Act read together with the MFMA expand the range of criminal offences that may be investigated under section 106.

¹ 2023 (3) SA 521 (SCA)

22. A prerequisite for the appointment of investigators, is objectively ascertainable facts that would lead the Minister to harbour a reasonable belief that fraud or corruption or maladministration had occurred or was occurring in a Municipality.
23. On the facts of this case, what appears to be the operative words are: *“in the Municipality.”*
24. Applicants have elected not to proceed against the First Respondent, the Municipality any longer, because it ostensibly gave it's co-operation to the investigators, albeit , belatedly.
25. Second Respondent's case is based on assertions that all fundraising revenue collected, were not the funds of the Municipality and hence they were deposited into the trust bank account of Third Respondent and Second Respondent was free to use the funds in the manner that he did because it was not maladministration in the Municipality.
26. In a meeting held on 13 April 2022 by the District Co-ordinating Forum, the second respondent in his capacity as Executive Mayor, set out his plan for the 100-day projects. Those projects were referred to as public projects. The Executive Mayor pledged then to clean up the municipality, being the First Respondent as well as other municipalities. Second Respondent did not state that those projects were being undertaken in his personal capacity. Quite the contrary, he made it clear, that he was doing it in his capacity as Executive Mayor and he was doing it in order to *“clean up”* the Municipality. He certainly did not state that he was operating an initiative outside of the Municipal structure nor parallel to it.

27. In the Minutes of the Special Council Meeting held on 19 May 2022, which is headed ***“DISTRICT EXECUTIVE MAYOR’S FUND-RAISING DRIVE FOR EFFECTIVE IMPLEMENTATION OF 100 DAYS’ ACTION PLAN”*** it is recorded that:

“It is therefore imperative that the Executive Mayor involved with the assistance of Council should go out and mobilise funding through approaching financial institutional, public sector and private donors as the strategy of his fund-raising initiative. The first fund-raising event is scheduled to take place at Sandton Hotel in Johannesburg on Saturday, 21 May 2022”.

The Minutes of the same meeting go on to record the following:

“It is hereby submitted that the Executive Mayor intends to facilitate a fund-raising event called “Bring New Life to the Desert” which is to be held on 21 May 2022, in the Sandton Hotel, Benmore Room, starting at 18h30. The cost per table is prices at R20 000.00, cost per person at R2 000.00 and the District Mayoral table at R100 000.00”.

28. The resolution of 19 May 2022 ends with the following words:

“that all funds be accounted and reported by the Executive Mayor to the Mayoral Committee and also to the District Coordinating Forum”.

29. Effect was then given to the promises made by the second respondent, in his capacity as Mayor, at a Special Council Meeting held on 19 May 2022 where it is recorded that it was *“imperative”* that the Executive Mayor *“with the assistance of Council”* should go out and mobilise funding through approaching financial institutions, *“public sector”*, and private donors as a strategy of his fundraising initiative.

30. It is not necessary for this Court to determine precisely which legislation, if any, the Municipality intended to comply with, when it resolved that the Executive Mayor would account for all funds to the Mayoral Committee and the District Co-

ordinating Forum. All that needs to be shown, is that a form of accountability for funds to Municipal Structures or sub-structures was contemplated in the Resolution.

31. This Court is satisfied that the Resolution indeed provides for the second respondent to account to structures within the Municipality. His failure to do so, therefore justified the investigation and he is duty bound to co-operate with the investigators.
32. It is not open to the second respondent to contend that he created a parallel process to first respondent's municipality in order to render services to the public that first respondent is constitutionally and legislatively bound to provide.
33. Chapter 7 of the Constitution of the Republic of South Africa, 1996, provides explicitly for the creation of local government *inter alia*, as stated in section 152(1) (b) of the Constitution: "*to ensure the provision of services to communities in a sustainable manner.*"
34. It was thus clear that the fundraising initiative would be in fulfilment of obligations of the Municipality, and that it would be held in the name of the Executive Mayor, and not in the second respondent's private capacity. The flyer advertising the fundraising event in fact says as much, because people were invited to the event: "*to join the new district mayor of the central Karoo.*"

35. If second respondent's allegations stated above are accepted, then it must follow, that there was no bases upon which he obtained a resolution from the Council of the Municipality to proceed with fundraising. That interpretation will lead to the kind of absurdity that the Court in **Endumeni**² specifically cautioned against. More specifically, in Endumeni it was held as follows:

"[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity"

36. A further difficulty for Second Respondent is the allegation that he makes repeatedly, namely, that his motivation for fundraising and utilising of those funds was purely to honour and fulfil his promises to the public that he would deliver

² Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [25]

certain services to the public within the first 100 days of his term as Mayor of the First Respondent Municipality.

37. Clearly property rights of owners extend to the owners retaining the power to consent or refuse to consent, to improvements being made on its /their property.
38. Second Respondent failed to prove that he obtained the consent of Transnet to use or improve their facilities.
39. Second Respondent alleges that he had meetings with Transnet and they had agreed that he could invite any person interested in using the space for private business. However the lease for the relevant building is held by the Beaufort-West B-Municipality and it falls under the Council of the Beaufort-West B-Municipality. The lease agreement provides that the Municipality may not sub-let the property.
40. Second respondent, on his own version, therefore caused, one Gerard Hutton, and a local mechanic to be placed in the buildings without a proper sub-lease agreement and without any agreement in relation to payment of, for example, utilities such as water and/or electricity. In terms of the lease agreement between Transnet and the B-Municipality, they have to pay the lease as well as the water and electricity on these buildings, and these payments would have come from their budget.

41. On the face of it, therefore, there is a need to establish, in due course, what undue advantage, if any, were granted by Second Respondent to Hutton and a local mechanic.
42. The SCM policy was adopted by the First Respondent's council in terms of section 217(1) of the Constitution and section 111 of the MFMA. The policy must comply with the regulatory framework contained in the Supply Chain Management Regulations.
43. The purpose of the SCM (Supply chain management) policy framework is contained in the Public Finance Management Act, 1999 ["PFMA"] and regulated by regulations to ensure that a transparent, fair and equitable process is followed in employing persons or businesses to render services or supply goods to a Municipality because the latter remains an organ of state subject to the provisions of sections 195 to 197 of Chapter 10 of the Constitution of South Africa, 1996.
44. Maladministration could include the flouting of the Municipal SCM policy with regard to procurement of service providers for services and goods supplied to Municipal land and infrastructure.
45. Second Respondents allegations that he obtained the assistance of friends and family to undertake some of the work on Municipal property in furtherance of Municipal objectives, serves not to shield him from possible violation of the SCM policy but instead it demonstrates a likelihood of constructive violation of the policy.

46. Therefore, the second respondent's contentions that he collected funds outside of the Municipality's structures and used them without channelling them to the Municipality's coffers, do not assist him since on his own admission, he used those funds to discharge the Municipality's obligations, on Municipal land and in furtherance of the discharge of his duties as Municipal mayor.
47. In my view, that conduct, therefore falls within the mandate of the investigators to investigate Municipal fraud corruption and maladministration in the Municipality.
48. That investigation, however, while necessary for the implementation of the Minister's obligations under the Systems Act, does not preclude an investigation by the Public Protector nor by the SAPS.
49. The Councillor Code of Conduct as legislated in the Municipal Systems Act, Schedule 1, is instructive with regard to the role and function of Mayor, whether it be in an A, B or C Municipality. The Code provides, *inter alia*, that the Mayor shall not:
- 49.1. undertake any other paid work if she/he is a full-time councillor, unless the Council has expressly consented thereto;
 - 49.2. act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or,
 - 49.3. use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.
50. The Code provides further that Mayors shall:

- 50.1. Be accountable to the EXCO or the council, as the case may be, and the electorate for their actions;
- 50.2. Administer the council in accordance with National and Provincial legislation and policy, and the bylaws, decisions, resolutions, policies and procedures of council, where applicable;
- 50.3. Act at all times in accordance with the national Constitution in its entirety and in particular with the provisions on co-operative governance;
- 50.4. Provide EXCO or council, as the case may be, with full and regular reports concerning matters under their control.
- 50.5. All mayors shall, in the performance of their functions, be committed to the prevention and the eradication of all forms of unfair discrimination.
- 50.6. All Mayors shall implement in the sphere of their work, the measures and programmes considered to be necessary and which are aimed at redressing historical and all other forms of imbalances and injustice.
- 50.7. Mayors shall, as members of the council perform their duties in the interest of the municipality as a whole and in defence and promotion of the integrity of the nation, avoiding measures that would prejudice the National welfare.
- 50.8. Mayors shall explicitly take the responsibility for the effective and efficient administration of their municipality so as to achieve the aims of government policy and implement the laws of the country.
- 50.9. All Mayors shall, at all times, observe practices that are free from all forms of corruption. Government office, position or privileged information shall not be used to distribute favours or patronage nor to seek or obtain any personal fortune or favour.

- 50.10. Mayors shall not be active in professional associations or societies, unless Council has expressly consented thereto.
- 50.11. In order to facilitate clean government and exemplary behaviour, all Mayors shall declare their assets and financial interests to Council as contemplated in the Councillor Code of Conduct. They shall disclose all consultancies, shareholdings and directorships or any other form of pecuniary benefit received by dependent family members (including those received by their immediate spouses) from an external source.
- 50.12. Mayors shall not play any active role in profit-making Institutions. They shall surrender directorships and their shares shall be held in "blind trusts" which shall be managed by independent trustees. The trustees shall conclude all share transactions and Mayors shall have no influence over these transactions or trustees.
- 50.13. Mayors or immediate dependent members of the families of Mayors, may not serve on the boards of public companies or own shares in companies directly connected with the Mayor's official duties. The test in these cases shall be whether the Mayor could advantage such companies over their competitors, or whether the families could derive improper benefit from such associations with such companies.
- 50.14. Only small gifts and gifts offered on official occasions may be accepted, provided that Mayors have satisfied themselves that the gifts are not being presented to influence them in an improper manner. Mayors shall register any gift received, which in their estimate exceeds the value of R1000,00 or such amount as may be determined by the Minister from time to time. Gifts that are seen to be of a traditional/customary nature, need not be registered.

51. The Code provides as follows concerning its application to Mayors:

“The provisions of this Code of Conduct, shall apply to all Mayors and Executive Mayors, including such councillors that from time to time may perform the duties of the Mayor during his or her absence”.

52. When a public office bearer dishes out largesse, it has the potential to lead to the creation of client / patron relationships. Clientelism in the public sector has the potential to foster corruption and ought to be discouraged. It is therefore imperative that Respondents account for the use of funds in furtherance of the Municipality’s objectives, even if a portion of those funds were the personal funds of any of them.
53. There can be no doubt that an investigation into the conduct of the Mayor, acting in his capacity as Mayor and as an executive officer of a Municipality, is indeed an investigation into conduct occurring in the Municipality.
54. Second Respondent’s allegations that he acted in his personal capacity when attempting to fulfil promises that he made in his capacity as Mayor, is therefore irreconcilable with the duties and functions of a Mayor.
55. There can be no justifiable grounds on which to have resisted the relief sought, save in respect of the disclosure of unrelated trust creditor information in relation to third and fourth respondents.

Costs

56. Counsel for Third and Fourth Respondent submitted that if they were successful in having the terms of the relief sought with regard to disclosure of the trust bank account limited, they ought to be awarded costs.
57. I am of the view that, save for the limitation that needs to be placed on the investigators viewing the information of the unrelated trust creditors, a limitation, that Applicants conceded by filing an Amended Notice of Motion, the limitation sought to be placed on the period for which the investigators may have regard to the relevant bank account is not justified when regard is had to the contradictory statements made by second respondent and fourth respondent concerning the amounts collected and spent.
58. Nor am I persuaded that Third and Fourth Respondent ought to redact information concerning the identity of the fundraiser depositors that are found to have derived no undue benefit for it is only after the investigators know the identity of all depositors and persons to who funds were paid, that they will be able to ascertain whether any undue benefit accrued to them.
59. In my view, a provision in the order to the effect that depositors with no undue benefit must simply not have their identities disclosed in the investigators' report ought to provide sufficient protection to untainted people.
60. In the result, I hold that the fundraiser was intended by all parties involved to be conducted on behalf of first respondent and the funds collected and disbursed, as well as the conduct of the respondents in the fundraiser and its consequential projects are subject to investigation by second and third applicants.

61. The qualification to the relief sought as set out in the draft order attached hereto, adequately protects unrelated trust creditors of third and fourth respondent.
62. I find that the applicants have been substantially successful and therefore costs should follow the result.
63. Scale B is appropriate taking account the complexity of the issues in dispute.

IT IS ORDERED THAT:

An order is made in terms of the attached draft.

JUDGE R. ALLIE

For Applicants:	Adv Norman Arendse SC Yasmin Mohamed
Attorneys:	State Attorney, Ms Colleen Bailey
For 1st Respondent:	Mr L Tshangana
Attorneys:	Tshangana & Associates Inc, Cape Town
For 2nd & 6th Respondent:	Adv David Gess (SC) Adv Naseerah Essa
Attorneys:	Mayet Incorporated