

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**REPORTABLE
CASE NO.: 2565/2022P**

In the matter between:

**THE MEC FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL**

APPLICANT

and

NONGOMA LOCAL MUNICIPALITY

FIRST RESPONDENT

THE SPEAKER OF THE FIRST RESPONDENT

SECOND RESPONDENT

ZULULAND DISTRICT MUNICIPALITY

THIRD RESPONDENT

**THE SPEAKER OF THE THIRD RESPONDENT
RESPONDENT**

FOURTH

**THE COUNCILORS OF THE FIRST RESPONDENT
WHOSE NAMES ARE SET OUT IN ANNEXURE NOM2
TO THE NOTICE OF MOTION
RESPONDENT**

FIFTH

**THE COUNCILORS OF THE SECOND RESPONDENT
WHOSE NAMES ARE SET OUT IN ANNEXURE NOM2
TO THE NOTICE OF MOTION**

FURTHER RESPONDENTS

ORDER

I make the following order:

1. The application is dismissed.
2. Each party shall bear its own costs.

JUDGMENT

NOTYESI AJ

Introduction

[1] This application arises out of a dispute between the applicant, the MEC for Co-Operative Governance and Traditional Affairs for KwaZulu-Natal, and the first and third respondents, Nongoma Local Municipality and Zululand District Municipality, relating to the decisions by the first and third respondents to reduce the number of their executive committee members, following the determination of the numbers of these executive committees at inaugural council meetings. The central dispute concerns the interpretation of the provisions of ss 43(1), 45, 46, 47 and 53 of the Local Government: Municipal Structures Act (the “Structures Act”)¹ dealing with the establishment of executive committees.

[2] The applicant (hereinafter referred to as the “MEC”) seeks an order declaring the resolutions passed on 14 December 2021 and 7 January 2022 by the councils of the first and third respondents (hereinafter referred to as “NLM” and “ZDM”, respectively) in terms of which the two municipalities had reduced the number of their executive committee members, to be unlawful. The MEC also seeks a declaratory order that municipal councils may not reduce or increase the number of members of their executive committees once it has been determined at an inaugural council meeting held after elections, unless all the members of the executive committee are removed in accordance with the provisions of s53(2) of the Structures Act. The MEC contends that the resolutions of the two municipalities, which had reduced the number of members of the executive committees, should be set aside.

¹ Local Government: Municipal Structures Act 117 of 1998.

[3] The application is opposed by ZDM only. Initially, NLM had opposed the application. To that end, it had filed an answering affidavit. Later, NLM filed a notice to abide the court's decision. It, however, did not withdraw its answering affidavit and, therefore, NLM's answering affidavit is before this court and the allegations made therein shall be considered.

[4] NLM had raised several grounds of opposition to the relief sought by the MEC: first, non-joinder; second, non-compliance with the Intergovernmental Relations Framework Act² ("the IRFA"); third, *locus standi* and fourth, rationality of the impugned resolutions. ZDM opposed the application on the basis that the MEC's interpretation of s43(1), read with s 45 of the Structures Act, is erroneous and inconsistent with the autonomy of municipalities. ZDM had contended that municipalities are vested with executive and legislative authority and, therefore, may pass any resolutions that are in accordance with the Constitution.³

Material facts

[5] The facts are largely common cause. The local government elections were conducted on 1 November 2021. The results were declared on 9 November 2021. In terms of the Structures Act, the municipalities were obliged to hold their first meetings within 14 days from the date of declaring the results of the elections. In the case of a district municipality, it must hold its first meeting within 14 days of the last local municipal council meeting in its district. In that first meeting, the council must elect the Speaker, constitute the executive committee, and elect the Mayor and the Deputy Mayor. Similarly, the district municipality, would in its first meeting, elect the Speaker, constitute the executive committee, and elect the Executive Mayor and the Deputy Mayor.

[6] Councillors were elected for NLM and ZDM in those elections. The total number of councillors for NLM is 45, whilst those of ZDM is 37. Following the elections, NLM and ZDM held their respective inaugural council meetings. At those

² Intergovernmental Relations Framework Act 13 of 2005.

³ The Constitution of the Republic of South Africa, 1996.

inaugural meetings, NLM and ZDM determined the size of their executive committees. This is what followed in respect of the two municipalities, according to the MEC.

[7] NLM determined its number of executive committee members to be 20 per cent of 45 councillors. Following a formula of calculation based on 20 per cent of 45 council members, the determination for the number of the executive committee was nine seats. These seats must be allocated proportionally to political parties. Following the formula, the seats were allocated, and the results were as follows: the IFP was allocated four seats; the NFP was allocated three seats and the ANC was allocated two seats. The allocation gives a total of nine. Although the IFP has the majority of members in the executive, it does not have the majority on its own.

[8] Following the first council meeting, the NLM held a special council meeting on 14 December 2021. At the meeting, a resolution was passed for the reduction of the number of executive committee members from nine to seven. In terms of the resolution, two members of the executive committee had to be removed. The result of this reduction is that the formula based on a seven member seat would work differently. The outcome based on the seven seats was: IFP, four seats; NFP, two seats and ANC, one seat. The reduction of the number of members of the executive committee resulted in the IFP becoming a majority party alone in the executive committee.

[9] In respect of ZDM, the municipality had a total of 37 councillors. The inaugural council meeting was held on 26 November 2021. At that meeting, the council determined that the number of members for its executive committee should be six. On 29 December 2022, Councillor Sibusiso Nkwanyana raised a motion for consideration by the council for the removal of one executive committee member and the reduction in numbers of the members of the executive committee from six to five.

[10] On 7 January 2022, a council meeting was convened. The motion on the reduction of the executive committee members was considered. Following that meeting, the council resolved to reduce the size of the executive committee from six

to five. The five seats were recalculated for allocation to the political parties. The recalculation of the seats resulted in the ANC losing one seat in the executive committee. The result was that one out of two of the ANC councillors in the executive committee was removed.

[11] The MEC alleges that he received complaints from the NFP that the council had reduced the number of members of the executive committee in NLM. He also received a similar complaint from the ANC that ZDM had reduced the number of members of the executive committee. There is no confirmatory affidavit from the alleged complaining parties. The MEC obtained legal advice and, based on that legal advice, contended that the conduct of the two municipalities was contrary to the provisions of the Structures Act and, accordingly, unconstitutional.

[12] In its answering affidavit, NLM contends that the MEC has no *locus standi* to seek the relief. In this regard, NLM contends that the MEC has no powers of oversight or control of municipal councils and that he has no power to interfere with the decision-making process of municipal councils unless he is acting in terms of limited instances specified in the Constitution. According to NLM, the municipalities are autonomous from the national or provincial government. NLM contended that the application by the MEC is not *bona fide* and is intended to advance the political interests of the ANC and the NFP, which are his political allies. According to NLM, the MEC seeks an interpretation of the Structures Act that would increase the number of members serving on the executive committee to the political benefit of his political party, the ANC and its ally, the NFP.

[13] NLM also contended that the relief sought by the MEC has a direct legal effect on all municipalities in KwaZulu-Natal and, therefore, the MEC ought to have joined all the municipalities in KwaZulu-Natal or at least given notice.

[14] NLM has further contended that the MEC's application is raising a dispute involving the power of the municipal council to determine the size of its executive committee. It alleged that the MEC was obliged, in terms of s 41(3) of the Constitution, to make every effort to settle the dispute by means of mechanisms and

procedures provided for that purpose and until such mechanisms were exhausted, the MEC was precluded to approach a court of law.

[15] NLM avers that it has acted lawfully when passing the resolution. The resolution was passed to save costs and to improve the effectiveness of the executive committee. It alleges that the executive of nine members was large. The municipality had a small budget. On this basis, NLM contended that its decision to reduce the size of the executive committee was to give effect to circular no. 10/2019 which had provided for the municipal cost containment regulation.

[16] ZDM alleged that its communities are underdeveloped. It further alleged that the territory of the district incorporates local municipalities of Nongoma, Uphongolo, Dumbe, Vryheid and Ulundi. ZDM alleges that the local municipalities within its jurisdiction are relatively poor and derive very little revenue from the services that they provide. For its existence, it largely depends on various grants received from the National Treasury. In response to the allegation of the MEC, ZDM confirms that it held its first meeting on 26 November 2021. It determined the number of executive committee members to be six.

[17] The resolution to reduce the number of its executive committee from six to five was subsequent to a motion raised by the council in terms of its standing orders and procedures. The motion was considered by the council and the following factors were taken into account:

- (a) financial constraints;
- (b) the need for budget funding and planning of the municipality; and
- (c) the cost-cutting measures.

[18] ZDM alleges that the resolution to reduce the number of its executive committee members is in line with the Municipal Costs Containment Regulations of 2019. On this basis, ZDM alleges that the reduction of the number of its executive committee members is rational in that there would be a saving in costs and

expenditure. It contends, in this regard that the saved costs would be utilized for service delivery and other obligations of the municipality. It alleged that it conducted a financial analysis to quantify the financial implications of having an executive committee of six members as against that of five members. ZDM had disputed the allegations that it had aimed at a particular political party when reducing the number of its executive committee members. ZDM contended that the resolution to reduce the number of members of its executive committee was necessary for the effective and efficient governance of the municipality and that the resolution was passed lawfully.

The issues for determination

[19] The issues for determination are:

- (a) whether the MEC has locus standi;
- (b) non-joinder;
- (c) resolution of intergovernmental disputes; and
- (d) whether or not a municipality may reduce the size of its executive committee after a determination at the inaugural council meeting.

Whether the MEC has *locus standi*

[20] The main relief sought by the MEC in the notice of motion is couched in these terms:

‘That it be and is hereby declared that upon a proper interpretation of s 45 of the Local Government Municipal Structures Act, 1998 read with s 46, s 43(1) and s 53(2), a municipal council may not reduce or increase the number of members of the executive committee once it has been determined in terms of s45 unless all the

members of the executive committee are removed in terms of s 53(2) of the said Act.'

[21] To establish *locus standi*, the MEC relied on the provisions of s 154 of the Constitution, which provides:

'The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.'

[22] In bringing this application, the MEC is seeking a decision of the court regarding the proper interpretation of ss 43 and 45 of the Structures Act. The construction to be placed upon those sections will be in the interest of the MEC and the municipalities in managing their own affairs and exercising and performing their functions. That will surely support the municipalities. The MEC is empowered to support the municipalities in this regard. He has a legal interest in the proper functioning of the municipalities. I agree with the submission of Mr *Pillemer*, counsel for the MEC, that the bringing of the application was a necessary measure to be taken in order to resolve the dispute about the power of a municipal council to reduce the size of its executive committee.

[23] Section 154 read with s 155(6)⁴ of the Constitution empowers the provincial government with the oversight role over local municipalities. The relief sought by the MEC is in accordance with the duties of the provincial government in terms of the Constitution. In the founding affidavit, the MEC has averred:

'I bring this application in the exercise of the oversight role of monitoring and providing support to municipalities conferred on the provincial government in terms of s154 and 155(6) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").'

⁴ Section 155(6) of the Constitution provides: 'Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-

(a) provide for the monitoring and support of local government in the province; and
(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.'

[24] In my view, the MEC has a direct and substantial interest in local government within the municipalities. This interest is derived from the Constitution and is statutorily entrenched.⁵ This position was confirmed in *Member of the Executive Council of the Eastern Cape responsible for Local Government and Traditional Affairs v Inkwanca Local Municipality and Others*.⁶

[25] I therefore find that the MEC has the *locus standi* to bring the application and seek the relief set out in the notice of motion. To the extent that the issue of *locus standi* was raised in NLM's answering affidavit, it must fall away.

Whether there is non-joinder

[26] In *Bowring NO v Vrededorp Properties CC and Another*⁷ it was held:

'Though the Trust may well be right in its analysis of the effect of Vrededorp's claim, the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657). The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned (see eg *Aquatour (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A) at 62A-F; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) paras [64] – [66].'

[27] NLM and ZDM reduced the number of executive committee members by way of resolutions. It is those resolutions that prompted the MEC to institute these proceedings. There is no evidence that other municipalities have passed similar resolutions. The substance of the application is whether or not the municipalities are empowered to reduce the number of their executive committees following the first council meeting in which such number was determined. This is a legal issue. Its

⁵ Sections 105 and 106 of the Local Government: Municipal Structures Act, 2000.

⁶ *Member of the Executive Council of the Eastern Cape responsible for Local Government and Traditional Affairs v Inkwanca Local Municipality and Others* [2014] ZAECHGHC 82.

⁷ *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21.

determination would not adversely affect municipalities. I agree that all municipalities have an indirect interest in the outcome of the proceedings. That is, however, not the test for joinder.

[28] The test for joinder has been stated in *Judicial Service Commission and Another v Cape Bar Council and Another*,⁸ where Brand JA said:

‘It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited).’

[29] On the question of non-joinder, I conclude that to the extent that it was raised – it lacks merit and must accordingly also fall away. My conclusion in this regard finds support in *Sookhraj and Another v Municipal Manager of the Umdoni Local Municipality and Others*,⁹ where it was stated:

‘I hold the view that the issue of joinder is not crucial in view of the fact that the declarations sought only implicates and/or triggers the legal issue the court has to decide. The legal issue relates to the exercise of public power and governance in the municipality. The parties who are cited are those who are imbued with exercising that power and responsibility in the implementation of the decisions in council. The third parties or interests not cited are not left out in the cold since they form part of

⁸ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) para 12.

⁹ *Sookhraj and Another v Municipal Manager of the Umdoni Local Municipality and Others* [2024] ZAKZDHC 2 para 31.

the municipality government and exercise their democratic rights within that sphere of government...'

[30] The contention on non-joinder is, therefore, rejected.

Resolution of intergovernmental disputes

[31] It is so that s41 of the Constitution and the provisions of the IRFA require all spheres of government and all organs of state to settle the dispute amongst themselves before approaching the courts. Sections 41(3) and (4) of the Constitution provides:

'(3) An organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

[31] The IRFA is the legislative measure contemplated in s 41(2) of the Constitution. The object of the IRFA is to promote and facilitate intergovernmental relations and also to provide mechanisms and procedures to facilitate the settlement of intergovernmental disputes. In terms of the IRFA, all organs of state must make every effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and must settle intergovernmental disputes without resorting to judicial proceedings.

[32] In terms of the Constitution and the IRFA, the MEC has a constitutional and statutory duty to avoid judicial proceedings. All reasonable steps necessary to resolve the dispute must first be undertaken. These principles of the IRFA were considered in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others*¹⁰

¹⁰ *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others* 2021 (3) SA 47 (SCA).

and the Supreme Court of Appeal, in defining what constitutes a “dispute”, referred to the case of *Williams v Benoni Town Council*¹¹, where it was said:

‘I am unable to agree . . . that there is no "dispute" until the parties are at arm's length. A dispute exists when one party maintains one point of view and the other party the contrary or a different one. When that position has arisen the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any the less a dispute.’

[33] In *Competition Commission v Hosken Consolidated Investments Ltd and Another*,¹² the Constitutional Court held:

‘...The mere fact that parties had a difference of opinion regarding an important jurisdictional issue suggests that there was a live dispute. This is particularly so where the difference of opinion existed between an important statutory entity such as the Commission and parties who are involved in a proposed transaction that may trigger the far-reaching investigative powers of the Commission...’

[34] On the above principles, I turn to consider the application of the IRFA.

[35] NLM submitted, in its answering affidavit, that the MEC was bound by the IRFA and ss 41(3) and (4) of the Constitution to first settle the dispute with the municipalities. The MEC failed to do so. On that basis, NLM contended that the application should fail and be referred back to the parties for resolution. I disagree. On the facts of the present case, there is no room for the resolution of the dispute in terms of the IRFA and s 41 of the Constitution. The issue concerns the interpretation of a statute. It is not the case of the MEC that the municipalities are not entitled to elect or remove the members of their executive committees. This is a very important matter of a legal nature that requires the court’s attention. I accept that there was a dispute of interpretation between the MEC and the municipalities. These need to be decisively resolved by a court. I do sound a warning that organs of the state must,

¹¹ *Williams v Benoni Town Council* 1949 (1) SA 501 (W) at 507.

¹² *Competition Commission v Hosken Consolidated Investments Ltd and Another* 2019 (3) SA 1 (CC) para 23.

always, comply with the provisions of IRFA and s 41 as failure to do so may result in a refusal to hear the matter. That I proceed with the hearing of this matter should not be construed to mean that the intergovernmental disputes should not be exhausted before the court is resorted to.

[36] For the above reasons, whilst I accept that there was a dispute, I am inclined to exercise my discretion in favour of hearing the merits of the application. Accordingly, I reject the defence raised by NLM based on non-compliance with the IRFA.

Whether municipalities may reduce the size of its executive committee after it has been determined at the inaugural council meeting

[37] In addressing the power of municipalities to reduce the number of its executive committee members, it is necessary to make reference to the constitutional and statutory obligations that the municipalities bear. Section 151(1) of the Constitution establishes the local sphere of government, which consists of municipalities throughout the territory of the Republic. Subsection (2) vests the executive and legislative authority of municipalities in its municipal councils. And in terms of subsec (3) each municipality has ‘the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.’¹³

[38] Section 152,¹⁴ in turn, sets out the objectives of local government, which include:

- ‘(a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;

¹³ Section 151(3) of the Constitution.

¹⁴ Sections 152(1) and (2) of the Constitution.

- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.'

Subsection (2) instructs that a municipality must strive, within its financial and administrative capacity, to achieve the objectives set out in the Constitution. In terms of s 153(a), a municipality must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'.

[39] I refer to the above sections for the reason that both NLM and ZDM contended that the reduction of the size of their respective executive committees was brought about as a result of financial constraints and budgeting. Whether that consideration is relevant in the interpretation of ss43 and 45 of the Structures Act, is what this court must consider later.

[40] The powers and functions of municipalities are set out in s 156 of the Constitution. Section 156(5) provides that a municipality 'has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'. Section 43(c) vests the legislative authority of the local sphere of government in municipal councils, as set out in s 156.

[41] Section 160 of the Constitution, in turn, deals with the internal procedures of a municipal council. In terms thereof a municipal council:

- '(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
- (b) must elect its chairperson;
- (c) may elect an executive committee and other committees, subject to national legislation; and

- (d) may employ personnel that are necessary for the effective performance of its functions.’ (My emphasis.)

[42] Pursuant to the constitutional framework and mandate conferred on municipalities, the national government enacted various legislative measures to give effect to the dictates of the Constitution. For present purposes regard must be had to the Structures Act and the Local Government: Municipal Systems Act (“the Municipal Systems Act”).¹⁵

[43] The dispute between the MEC, NLM and ZDM, in this application, turns on the interpretation of ss43, 45, 46, 47 and 53 of the Structures Act. These sections deal with various aspects of the executive committee and membership to that committee:

- (a) s43 deals with the composition of executive committees for municipalities;
- (b) s45 deals with the determination of members of executive committees;
- (c) s46 deals with the term of office of members;
- (d) s47 deals with vacancies in the executive committee; and
- (e) s53 deals with the removal from office of executive committees.

[44] In terms of s43(1)(a) of the Structures Act, ‘if the council of a municipality establishes an executive committee, it must determine a number of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors (fractions to be disregarded) or 10 councillors, whichever is the least, are determined’.

[45] In terms of s45, a council must determine the members of its executive committee from among its members at a meeting that must be held:

¹⁵ Local Government: Municipal Systems Act 32 of 2000.

- '(a) within 14 days after the council's election;
- (b) if it is a district council, within 14 days after the last of the local councils has appointed its representatives to the district council; or.
- (c) ...

[46] In terms of s46, the members of an executive committee are determined for a term ending, subject to s47, when - the type of the municipality has changed; and the next municipal council is declared elected. Section 47 deals with vacancies and provides that:

'(1) A member of an executive committee vacates office during a term if that member:

- (a) resigns as a member of the executive committee;
- (b) is removed from office as a member of the executive committee in terms of section 53; or
- (c) ceases to be a councillor, and

(2) The filling of a vacancy in an executive committee is subject to section 43.'

[47] Section 53 deals with removal from office of executive committee members as follows:

'(1) A municipal council may, by resolution remove from office one or more or all the members of its executive committee. Prior notice of an intention to move a motion for the removal of members must be given.

(2) If all the members of an executive committee are removed, a new determination of members must take place, and a new election of the mayor and, if the municipality

has a deputy mayor, the deputy mayor, must be held in terms of sections 45 and 48, respectively.

(3) The election of a member or members of an executive committee following a removal from office in terms of this section, is subject to section 43.'

Discussion

[48] The starting point is the Constitution. The Constitution declares its own supremacy which pervades all law.¹⁶ Mr *Madonsela*, counsel for ZDM, correctly so in my view, submitted that s151 of the Constitution establishes the 'autonomy' of municipalities. I agree, for indeed the section vests both the legislative and executive authority of the municipality to the council. The provisions of s151 must be read with s43(c) of the Constitution which confirms that the legislative authority of the local sphere of government is vested in the municipal council, as set out in s156. The Constitutional Court in *Cape Town City v Independent Outdoor Media (Pty) Ltd and Others*¹⁷ held:

'In considering the impugned provision, one needs to consider the empowering provisions of s43(c) of the Constitution, which provides that the legislative authority of the local sphere of government is vested in the Municipal Councils, as set out in s156. This entitlement connotes a regulatory and policy-making role more than a mere authority to administer and implement prescripts. This position was confirmed by this court in *Fedsure*, where it was held that municipal councils are deliberative, legislative assemblies with constitutionally guaranteed legislative powers.'

(Footnotes omitted.)

[49] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁸ it was held:

¹⁶ Section 1(c) of the Constitution provides: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(c) Supremacy of the constitution and the rule of law.'

¹⁷ *Cape Town City v Independent Outdoor Media (Pty) Ltd and Others* 2024 (1) SA 309 (CC) para 45.

¹⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 26.

‘Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself. Whilst it might not have served any useful purpose under the previous legal order to ask whether or not the action of a public authority was “administrative”, it is a question which must now be asked in order to give effect to section 24 of the interim Constitution and section 33 of the 1996 Constitution. The cases referred to by Milne JA are of little assistance in dealing with this question.’

[50] The scheme of the constitutional provisions under Chapter 7 of the Constitution confers both the executive and legislative authority of the municipalities. In interpreting legislation that gives effect to the provisions under Chapter 7, one should avoid interpreting such legislation in a manner that would subvert the provisions of the Constitution under Chapter 7. In other words, the interpretation of any national or provincial legislation must be within the context of the constitutional provisions under Chapter 7. By now, it is well settled that municipalities enjoy both legislative and executive autonomy from other spheres of government. That position is constitutionally ordained.

[51] The national or provincial government is expressly prohibited from compromising or impeding a municipality’s ability or right to exercise its powers or perform its functions.¹⁹ In my view, where the municipality is empowered by the Constitution to perform a particular function, irrespective of whether the national legislation or provincial legislation makes provisions for the performance of such functions, a municipality is not acting unlawfully or unconstitutionally if the power can be sourced from the Constitution.

[52] Mr *Madonsela* submitted that the relief sought by the MEC is a mere attempt to interfere with the autonomy and independence of ZDM for impermissible political reasons. In this regard, Mr *Madonsela* placed reliance on the provisions of s160(c) of the Constitution which grants discretion to a municipal council to elect an executive committee and other committees, subject to the national legislation. Section 160(c):

¹⁹ Section 151(4) of the Constitution.

‘A Municipal Council-

(c) may elect an executive committee and other committees, subject to national legislation.’

[53] The contention, in this regard, was that when a municipality establishes an executive committee, it exercises an original constitutional power. The essence of the contention was that the discretion to establish an executive committee is in the context of the autonomy of the municipality granted by s151(2) of the Constitution. In such circumstances, so the contention goes, if the council has the discretion to establish an executive committee, inherently that power includes the power to change the size of its executive committee for as long as, in doing so, the council acts lawfully. The discretion of the council to form and determine the size of its executive committee is conferred as well by s43(1) of the Structures Act. I agree and I must elaborate. The latter section requires that the council decide whether to establish an executive committee and once it decides, ‘it must determine the number of councillors necessary for effective and efficient government’; and that the number of councilors for the executive committee must not be more than 20 per cent of councillors or 10 councillors, whichever is the least. These numbers reflect the statutory prescribed upper and lower limits of the executive committee. There is no provision in the Structures Act that prohibits the council from reducing the number of its executive committees. There is merit in the submission by Mr *Madonsela*. In my view, if the council is empowered to determine the number of members of its executive committee with the qualification that the number must be necessary for effective and efficient government, there can be no question that the council can reduce the number for the same reasons of effective and efficient government.

[54] Mr *Pillemer* contended that s43(1) must be read together with s45 of the Structures Act. In this regard, he submitted that once the number of the executive committee has been determined in the meeting held within 14 days after the council’s election in a local municipality, and in a district council within 14 days, after the last of the local councils had appointed its representatives to the district, such determined number cannot be reduced or increased. According to the submission,

the number can only be reduced if all the members of the executive committee are removed in terms of s53(2) of the Structures Act.

[55] Mr *Pillemer* contended that the other provisions of s53 cannot be used as a means of reducing the size of the executive committee. He contended that those provisions are specific for their purpose. The submission was that the other provisions of s53 must be read with ss47 and 46 of the Structures Act. Mr *Pillemer* submitted that s46 fixes the term of the executive committee that has been determined under s45. The essence of the submission is that the term of a member elected to the executive committee that has been determined will only end if the municipality changes its type; and the next council is declared, subject to s47. Section 47 gives three instances where a member of the executive committee vacates office during a term, and these are;

- (a) if he resigns as a member of the executive committee;
- (b) is removed from office as a member of the executive committee in terms of s53; or
- (c) ceases to be a councillor.

[56] In a nutshell, Mr *Pillemer* contended that a municipality 'may not exercise a discretion' to change the size of its executive committee after it had been determined at the start of the term of the council following elections. The submission by Mr *Pillemer* was that the only exception, where the council can change the size of its executive committee, is when all the members of the executive committee are removed in accordance with s53(2).

[57] I am not persuaded by the submissions of Mr *Pillemer* that a municipality cannot reduce the size of its executive committee after the determination in the first meeting of the council. Were that construction to be accepted, it would mean that the municipality is stuck with its original determined number or size of the executive committee, irrespective of its legislative mandate to determine the number of

councillors for the executive committee that is necessary for effective and efficient governance. In my view, local government structures are given greater autonomy which is derived from the Constitution. In *City of Cape Town and Another v Robertson and Another*²⁰ it was held:

‘The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, “inviolable and possesses the constitutional latitude within which to define and express its unique character” subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now, the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.’ (Footnotes omitted.)

[58] That being so, the legislative and executive authority of municipalities are not boundless, for, a municipality’s right to govern remains subject to national and provincial legislation.

[59] The national legislation in this case is the Structures Act. On the MEC’s interpretation of s45 of the Structures Act, once the council has determined the number of councillors for the executive committee in its inaugural meeting, it would be stripped of its discretion to reconsider the number of committee members necessary for effective and efficient government as provided for by s43(1), unless the entire executive committee is removed in terms of s53(2). The interpretation of the MEC is not without difficulties. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*²¹ it was held that the present state of the law can be expressed as follows:

²⁰ *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) para 60.

²¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

‘...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ (Footnotes omitted.)

[60] The background to the Structures Act is the Constitution. In terms of the Constitution, municipalities are autonomous. They have been given a discretion under s 160(c) to elect executive committees. In terms of the section, there are no window periods for the election of the executive committee. It is sensible to read ss43(1) and 45 in the context of s160(c) and the entire Chapter 7 of the Constitution. In my view, these are the obligations of councils in its first meetings after elections, to decide whether:

- (a) it establishes an executive committee;
- (b) if it does so, to determine the number of councillors for effective and efficient government; and

- (c) in terms of s 45 to do so within a period of 14 days after the council's elections in the case of local municipalities and within 14 days after the last meeting in the case of a district municipality.

There can be no doubt that these strict provisions are intended to ensure that the issue of municipal governance is discussed and settled at the commencement of the council. Insofar as the establishment of the executive committee, the determination of the number of such executive committees is left to the council. Such determination is subject to the prescribed upper and lower limits. I do not read the statute to mean that the council is saddled with the number for its executive committee as determined in the first council meeting. Based on its executive and legislative powers, the council may rescind its resolutions for as long as, in doing so, it acts lawfully.

[61] The preferred interpretation by the MEC would lead to absurdity and unbusinesslike results. I say so for the reason that the interpretation will result in a situation where the municipality would be saddled with the decision that was made in the first meeting of the council in circumstances where the council was not yet familiar with the needs of the municipality. Secondly, it is easy to infer that the council, within a period of 14 days after the elections, is not well vested with all the measures that would ensure effective and efficient government, which s43(1) of the Structures Act requires from the council when determining the number of councilors in the executive committee. In *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*²² it was stated:

‘As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible

²² *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (1) SA 1 (CC) para 36.

interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.’ (Footnotes omitted.)

[62] In *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another*²³ it was held:

‘The principles that guide our approach to interpretation have often been stated: interpretation is a unitary exercise that takes account of text, context and purpose. Frequently, lawyers have recourse to dictionaries as the repository of the ordinary meaning of words. This is often a good starting point. But the lawyer’s reverence for dictionaries has limits. As this court has observed, to stare blindly at the words used seldom suffices to yield their meaning in a statute or contract. Dictionaries record the history of how (often disparate) language communities have used words. There is no straightforward attribution of a dictionary meaning of a word as the word’s ordinary meaning so as to construe a statute, subordinate legislation or a contract. The dictionary meaning of a word will often give rise to further questions: for whom is this the ordinary meaning, as used in which community? And the different shades of meaning with which a word has been used, over time, quite often lead to selectivity bias. That is to say, the interpreter chooses the dictionary meaning that best suits the preferred outcome of the case, rather than the meaning that shows the greatest fidelity to the meaning that best fits what has been written, given what we know as to the institutional originator of the words, what the words are used for, and the larger design of the instrument we are called upon to interpret.’

[63] I, accordingly, in this regard, hold the view that the power of the municipal council to change the size of its executive committee is in line with the powers of municipalities in terms of ss 43(c), 151(2) and 156 of the Constitution. The exercise of the powers granted by the aforesaid sections are confirmed by the discretion granted to the council under s43(1) of the Structures Act. The discretion of the council, in terms of s43(1), accords with s160(1)(c) of the Constitution. Accordingly, when councils reduce the size of its executive committees, it exercises its original power conferred by the Constitution. In such circumstances, the MEC has no

²³ *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another* 2024 (1) SA 103 (SCA) para 15.

oversight powers over the municipalities, provided that the municipalities are acting within the prescripts of the law.

[64] Insofar as NLM and ZDM had passed resolutions in terms of which they reduced the number of their executive committee members, they have stated that the number was reduced as a result of budgetary constraints and that the reduction was for purposes of effective and efficient government. The MEC has not attacked the underlining reasons for the resolutions and the process followed by the municipality. Absent the attack on the legality of the resolutions, they should stand. In terms of s 53(1) of the Structures Act, a municipal council may, by resolution, remove from office one or more or all the members of the executive committee. All that the council is required to do when removing a member of the executive committee or all members of its executive committee, is to give a prior notice of intention to remove the member(s).

[65] In this case, the resolutions were preceded by a motion to reduce the size of the executive committee. Once the resolutions were passed, the formula was used for the determination of the seat allocations. The seats were determined based on the agreed new numbers for NLM and ZDM. The seats were accordingly allocated to political parties. None of the political parties have challenged the legality of the resolutions. The resolutions were passed in properly convened council meetings and there is no complaint about the procedures that had been followed. The resolutions were passed by the majority of the council members and that is in terms of the Constitution. There is merit in the suggestion by the ZDM that the MEC is attempting to interfere with the affairs of the two municipalities. Based on all these reasons, I reject the MEC's interpretation of ss43(1) and 45 of the Structures Act. I have read the judgment of *Sookhraj and Another v Municipal Manager of the Umdoni Local Municipality and Others*,²⁴ where the issue before the court was not about the power of the council to reduce the size of its executive committee. It is, therefore, distinguishable from the present case. I have not found another case that deals with the power of a council to reduce the size of its executive committee after it has been determined in the inaugural meeting.

²⁴ *Sookhraj and Another v Municipal Manager of the Umdoni Local Municipality* [2024] ZAKZDHC 2.

[66] In *MEC KZN for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others*,²⁵ where it was held:

‘[23] Finally, that the ultimate choice of who should be on the executive committee vests in the council, and not in a party or interest represented in the council, is reinforced by section 53(1) of the Act which provides for the removal of a member of the executive committee by way of council resolution after notice of such a resolution has been given. This provides a clear indication that the Legislature intended the council to determine whether any particular person should be on its executive committee. If a minority party could merely override the majority of a municipal council by re-nominating a councillor removed from the executive committee, not only would it have the absurd result of negating the power extended to the council under section 53(1) of the Act, but it should nullify the council’s constitutional and democratic right to determine who should be on that committee.

[24] In the light of all these considerations, it is clear that the council was vested with the choice to determine who should be on its executive committee, and that the members of that committee are to be appointed by way of a majority vote. The word “elect” in section 43(1) of the Act is to be ascribed that meaning rather than that which the appellant puts forward...’

Conclusion

[67] For the foregoing reasons, I conclude that the council has the power to reduce the size of its executive committee, provided that, in doing so, it follows a lawful process and complies with the prescripts of the Structures Act and the Constitution. The council cannot increase the number of its executive committee beyond 20 per cent of its councillors or may not have more than ten councillors in the executive committee. The council has the discretion to determine the number for as long as it complies with the upper and lower limits of the number as determined by the statute. Section 53(1) confers a discretion to the council to remove one or more of its

²⁵ *MEC KZN for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others* [2011] 1 All SA 401 (SCA).

executive committee members. The reason for removal is not required. All that is required from the council is to ensure that it gives prior notice of intention to move a motion for the removal of member(s) from the executive committee. These reasons may include the reduction of the number of the executive committee.

[68] The MEC has failed to make out a case for the relief sought and the application falls to be dismissed.

Costs

[69] To sum up, both NLM and ZDM have acted lawfully in reducing the size of their executive committees. The relief sought by the MEC cannot stand and the result is that the application should fail. Regarding costs, both parties have agreed that there should be no costs order. The MEC was acting in the public interest. I assume, without deciding, that the application was *bona fide*. In these circumstances, each party will pay its own costs.

Order

[70] In the result, I make the following order:

1. The application is dismissed.
2. Each party shall bear its own costs.

M NOTYESI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicant	:	<i>M Pillemer SC</i>
Instructed by	:	Xaba Attorneys Pietermaritzburg

Counsel for the first and second respondents	:	<i>Z Ndimande</i>
Instructed by	:	Nxumalo & Partners c/o Nhlapho Attorneys Pietermaritzburg
Counsel for the Third Respondent	:	<i>TG Madonsela SC</i>
Instructed by	:	Garlicke & Bousfield Inc c/o Stowell & Company Pietermaritzburg
Heard on	:	23 April 2024
Judgment delivered on	:	31 July 2024