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

CASE NO: 20763/13

In the matter between:

KANNALAND MUNICIPALITY **Applicant**

and

THE MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS & DEVELOPMENT
PLANNING IN THE WESTERN CAPE **1st Respondent**

COUNCILLOR ALBERTUS JOHANNES ROSSOUW **2nd Respondent**

JUDGMENT :

TRAVERSO, DJP :

[1] This is an application in terms whereof the applicant applies to review the decision of the first respondent refusing to remove the second respondent as a councillor of the applicant Municipality.

[2] The request to remove the second respondent was made in terms of Item 14(2)(e) of the Code of Conduct for Councillors ("*the Code*"), which is contained in Schedule 1 of the Local Government: Municipal Systems Act, No. 32 of 2000 *("the Systems Act"*).

[3] The facts giving rise to this application are, in the main, common cause. I will summarise them hereunder.

[4] The application was triggered by the bridging of the second respondent's electricity meter. Bridging is a term used to connote the bypassing of an electricity meter resulting in the recipient of the electricity not being charged for it.

[5] The second respondent experienced problems with the supply of electricity to his office, as a result whereof he contacted the Head of the applicant's electricity department, a certain Mr. de Jongh, to assist him with the problem. Mr. de Jongh and two Municipal officers attended the second respondent's office and bridged the meter as an interim measure so that the electricity supply to his office was not interrupted. The second respondent is a practicing attorney, who, in May 2011, was elected as a councillor of the Kannaland Municipal Council, where he still serves.

[6] The bridging of the meter took place in late November, early December 2011. The second respondent was assured by Mr. de Jongh that this was a temporary measure and designed only to ensure the continued supply of electricity to his practice.

[7] In December 2011 the second respondent closed his office for a period of approximately a month over the festive season and during that period did not use any electricity. Upon his return from holiday he noticed that his electricity meter had not yet been replaced. He immediately took this up with Mr. de Jongh, who gave him the assurance that he would prioritise the matter. The matter was however not attended to, and Mr. de Jongh left the employment of the applicant in March 2012, without having attended to the replacement of the meter.

[8] Following a Council meeting held on 3 April 2012 the second respondent again approached a Municipal official, namely the

Temporary Director for Technical Services, one Pieter van der Heever. The second respondent informed him that the electricity meter at his office had been bridged and that, despite undertakings by Mr. de Jongh, had not been replaced. Mr. van der Heever sent electricians to inspect the meter who confirmed that the meter had been bridged. The meter was then replaced. Mr. van der Heever reported this to the Municipal Manager, who in turn advised the Speaker.

[9] The Speaker conducted a preliminary investigation into the second respondent's conduct and reported the matter to the Council at a meeting held on or about 25 April 2012. The Council resolved that a full investigation should be conducted and that a special committee of three councillors be established to make recommendations to the Council.

[10] An investigation was undertaken on behalf of the Council by a firm of attorneys appointed to assist the Speaker. They compiled an investigation report, and the second respondent was given an opportunity to reply in writing to the allegations.

[11] The applicant resolved that a special committee should complete the investigation into the allegations and that the second respondent had breached the Code of Conduct for Councillors.

[12] The special committee held a disciplinary enquiry over a number of days during 2012. The second respondent was charged with six counts of contravening the Code, he pleaded not guilty to all of these charges and was ultimately convicted of the following four charges:

12.1 Charge 1: Contravening the provisions of clause 2 of the Code of Conduct by making use or allowing the use of an illegal electricity [connection] at erf 358 Ladismith for the period 18 October 2011 to 13 April 2012 and thereby compromising the credibility and integrity of the Municipality;

12.2 Charge 2: Contravening the provisions of clause 2 of the Code of Conduct by effecting and or causing and or allowing an illegal electricity connection and thereby compromising the credibility and integrity of the Municipality;

12.3 Charge 4: Contravening the provisions of clause 2 of the Code of Conduct by effecting and or causing and or allowing to be effected an illegal electricity connection and thereby acting in a dishonest manner in the execution of his functions as a Councillor;

12.4 Charge 6: Contravening the provisions of clause 12 of the Code of Conduct by effecting and or causing and or allowing to be effected an illegal electricity connection and thereby obtaining a benefit from the assets of the Municipality.

[13] At a special Council meeting held on 6 December 2012 the special committee recommended that the Council request the MEC to remove the second respondent from office in terms of Item 14(2)(e) of the Code. In a letter dated 11 December 2012 the Speaker requested the MEC to remove the second respondent from office.

[14] On 14 January 2013 the Deputy Director: Governance in the Department of Local Government, Environmental Affairs and Development Planning *(“the Department*”), Mr. Mario Baatjes, contacted the Speaker and requested a transcript of the disciplinary hearing.

[15] On 8 February 2013 the recording of the hearing, which had in the interim been received from the Applicant, was handed to the service provider for transcription. After the record of the disciplinary inquiry had been transcribed, the Department prepared a letter to the second respondent enclosing copies of the documents received by the MEC and requesting him to comment on them within 21 days.

[16] The second respondent made his representation to the MEC and in an emailed reply dated 27 March 2013. The MEC considered the matter, discussed it in weekly meetings he had with senior managers, including the Director: Municipal Governance in the Department, Mr. Seraj Johaar.

[17] The MEC then considered the documents relevant to the matter, including the submission prepared by Mr. Johaar, which reflected their deliberations since the second week of April 2013 with the benefit of having had the relevant parts of the transcript drawn to his attention by Mr. Johaar and Mr. Baatjes.

[18] Based on the evidence presented at the disciplinary hearing, the MEC formed the opinion that the evidence did not establish that:

18.1 on charges one, two and four, the second respondent:

(a) had effected, caused or allowed an illegal electricity connection;

(b) compromised the credibility and integrity of the Municipality or acted in a dishonest manner in the execution of his functions as a councilor; and

18.2 on charge six, the second respondent:

(a) had effected, caused or allowed an illegal electricity connection; or

(b) obtained a benefit from the assets of the Municipality.

[19] On 15 May 2013 the MEC informed the Speaker that after considering the relevant information supplied to him, he was unable to accede to the request to remove the second respondent from office. He also stated that he was of the opinion that the evidence presented at the disciplinary committee did not support a finding that the second respondent was guilty of having caused or allowed the illegal bridging of the electricity meter.

[20] On 11 June 2013 the MEC was requested to provide reasons for his decision. In a letter dated 10 July 2013 the MEC reiterated his view that the evidence did not, on a balance of probability, support a guilty finding in respect of charges one, two, four and six.

[21] I will now deal with the provisions of Item 14 of the Code, which provides:

> ***"(1) A municipal council may-***
>
> ***(a) investigate and make a finding on any alleged breach of a provision of this Code; or***
>
> ***(b) establish a special committee-***
>
> ***(i) to investigate and make a finding on any alleged breach of this Code; and***
>
> ***(ii) to make appropriate recommendations to the council.***
>
> ***(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-***
>
> ***(a) issue a formal warning to the councillor;***
>
> ***(b) reprimand the councillor;***
>
> ***(c) request the MEC for local government in the province to suspend the councillor for a period;***
>
> ***(d) fine the councilllor; and***
>
> ***(e) request the MEC to remove the councillor from office.***
>
> ***(3) (a) Any councillor who has been warned, reprimanded or fined in terms of paragraph (a), (b) or (d) of sub-item (2) may within 14 days of having been notified of the decision of the council appeal to the MEC for local government in writing setting out the reasons on which the appeal is based.***
>
> ***(b) A copy of the appeal must be provided to the council.***
>
> ***(c) The council may within 14 days of receipt of the appeal referred to in paragraph (b) make any representation pertaining to the appeal to the MEC for local government in writing.***
>
> ***(d) The MEC for local government may, after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.***
>
> ***(4) The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code***

and to make a recommendation as to the appropriate sanction in terms of sub-item (2) if a municipal council does not conduct an investigation contemplated in sub-item (1) and the MEC for local government considers it necessary.

(5) The Commissions Act, 1947 (Act 8 of 1947), or, where appropriate, applicable provisional legislation, may be applied to an investigation in terms of sub-item (4).

(6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may-

(a) suspend the councillor for a period and on conditions determined by the MEC; or

(b) remove the councillor from office.

(7) Any investigation in terms of this item must be in accordance with the rules of natural justice."

[22] The legal "*architecture*" of Item 14 has been analysed by this Court in Van Wyk v. Uys N.O., 2002 (5) SA 92 (C). The provision confers a discretion on a municipal council to investigate and make a finding on an alleged breach of the Code or to establish a special committee for this purpose. If the Council or committee finds that the Code has been breached, the Council itself may issue a formal warning, reprimand or fine the councillor, or alternatively, it may request the MEC for local government to suspend the councillor or remove the councillor from office. (Van Wyk, (*supra*) at 98 A – C).

[23] The rationale is that when the municipality seeks to impose the more stringent sanctions of suspension or removal from office in terms of Items 14(2) (c) or (e), it is required to refer the matter to a higher authority, namely the MEC. (Van Wyk, *(supra*) at 99 G).

[24] The MEC is entitled either to form an opinion on the papers in terms of Item 14(6), which would represent a judicially considered view, or he or she can make use of a committee or person in terms of Item 14(4) to investigate the matter and make appropriate recommendations. (Van Wyk, *(supra)* at 99 F – H).

[25] It is apparent from the above analysis that where an MEC makes a decision in terms of Item 14(6), the decision is the culmination of a multi-stage process. In the present matter, the Item 14 process consisted of three stages:

25.1 The investigations by the special committee and its recommendations to the Council in terms of Item 14(1);

25.2 The Council's request to the MEC in terms of Item 14(2)(e); and

25.3 The MEC's decision in terms of Item 14(6).

[26] In Van Wyk, *(supra)* the respondent contended that Items 14(4) and (6) entitled the MEC to act *mero motu*, notwithstanding any decision which the Council may have taken with regard to an alleged breach. (Van Wyk, (*supra)* at 98 F). This Court rejected the submission, holding that nothing in Items 13 or 14 permitted the MEC to suspend a councillor *mero motu* (i.e. in the absence of a Council request in terms of Item 14(2)(c) or (e)), particularly in circumstances where the Council was in the process of taking action in respect of the allegations. (Van Wyk, *(supra)* at 100 C).

[27] Mr. Arendse, who appeared for the applicant, sought to distinguish Van Wyk (*supra)* from the present matter on the basis that Item 14(4) was amended subsequent to the Van Wyk judgment. Accordingly he argued that despite it being a decision of 2 Judges, I am not bound by it.

[28] It is common cause that Item 14(4) was amended. At the time of the Van Wyk judgment Item 14(4) read:

> ***"The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office."***

The Item has now been amended to read:

> ***"The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation as to the appropriate sanction in terms of sub-item (2) if a municipal council does not conduct an investigation contemplated in sub-item (1) and the MEC for local government considers it necessary."*** (my emphasis)

[29] Mr. Arendse submitted that by virtue of this amendment the MEC now has self-standing disciplinary powers over local councillors which can be exercised *mero motu*. He further argued that the subsequent judgment of this Court in Andile Lili v. Independent Electoral Commission, (Case No. 3671/2013), is therefore clearly wrong. In particular, he attacked the finding of the Court that on a proper reading of Item 14 the Minister has no self-standing disciplinary powers over local councillors which can be exercised *mero motu*, and suggested that the Court disregarded the amendment.

[30] This argument is flawed. Sub-item 4 must be interpreted contextually. Item 14, read with Item 13, clearly supports the notion of co-operative government. The effect of these provisions is that the powers granted to the MEC constitute a safeguard and form part of a system of checks and balances applied to disciplinary proceedings against councillors. Before an MEC can appoint a person or a committee there must be an alleged breach of a provision of the Code. The MEC cannot *mero motu* decide that there has been a breach of the Code.

[31] The amendment, in my view, is aimed at providing for the dilemma alluded to in Van Wyk *(supra)*, namely that an MEC would be powerless to act in circumstances where a Council, for whatever reason, refuses to institute proceedings in respect of an alleged breach of the Code of Conduct. This sub-item merely provides for a lacuna which previously existed. The MEC must still act within the general scope of these two items. When he makes a decision in terms of Item 14(6), it will still be a culmination of a multi-stage process.

[32] The Item 14(6) procedure applicable in more serious cases is broadly equivalent to an administrative appeal process, in that the person charged has the benefit of the matter being re-considered by a higher authority before far-reaching sanctions can be implemented. This provides an obvious safeguard against disciplinary proceedings being used to pursue what in certain instances may be viewed as political agendas. The Item 14(6) process shares many of the beneficial qualities of an internal appeal, by providing an immediate and cost-effective forum for disciplinary proceedings to be reconsidered without having to resort to litigation and enhancing the constitutional values of accountability, responsiveness and openness. (See the judgment of this Court (per Le Grange, J) in Andile Lili v. Independent Electoral Commission & Others, (*supra*) at paras. 39 and 40.)

[33] The applicant contends that the legislature did not intend the MEC to reconsider the merits of the charges – all that he is required to do is implement the Council decision once he has been satisfied that the necessary jurisdictional requirements have been met. It is suggested that it was not open to him to reconsider the evidence led in the disciplinary inquiry or second-guess the findings of the special committee.

[34] This submission cannot be reconciled with Item 14(4) which makes it quite clear that an MEC may, if appropriate, appoint a person or committee to investigate any "*alleged breach*" of the Code and to make recommendations on whether suspension or removal from office constitute appropriate sanctions.

[35] Item 14(6) requires the MEC to form an opinion on:

35.1 whether the Code has been breached; and, if so, 35.2 whether the breach warrants suspension or removal from office.

[36] The Constitutional Court pointed out in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others, 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) para. [168], fn 132, that the judgment of Corbett, J in South African Defence & Aid Fund & Another v. Minister of Justice, 1967 (1) SA 31 (C), is still the leading case on jurisdictional facts in our law.

[37] In the South African Defence & Aid Fund case (*supra)* it was a necessary condition for the exercise of a statutory power that the State President should be satisfied that one or more of the five conditions in section 2(2) of the Suppression of Communism Act, no. 44 of 1950 were present. Corbett, J noted at p. 34 F-G that the *"content of this kind of condition is often referred to as a 'jurisdictional fact'"* in that *"it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one.*"

[38] Corbett, J then stated, at p. 34 H – p. 35 E, that:

"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purposed exercise of the power … On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter." (emphasis supplied)

[39] The MEC's powers under Item 14(6) of the Code are similar to the State President's powers considered by Corbett, J. The Systems Act granted the MEC the "*sole and exclusive*" function of determining whether or not the second respondent breached the Code, and, if so, whether his removal from office was warranted. Once he had determined these jurisdictional facts, he was entitled to exercise his powers accordingly. The grounds upon which this Court can intervene in the exercise of a discretion of this nature are narrowly circumscribed: Corbett, J limited such grounds to *mala fides*, ulterior motive and a failure to apply one's mind. In light of the constitutional right to just administrative action, these requirements would now also include rationality and reasonableness. See for example, MEC for Environmental Affairs & Development Planning v. Clairison's CC, 2013 (6) SA 235 (SCA) para. 22.

[40] The applicant does not allege *mala fides*, ulterior motive or a failure by the MEC to apply his mind. Rather it is alleged that his decision was irrational and unreasonable.

The distinction between review and appeal

[41] In an ordinary appeal, the only issue for determination is whether the decision appealed against was right or wrong. However, when a Court is requested to review an administrative decision, the fundamental constitutional principle of the separation of powers is implicated, a consideration which does not arise in an appeal against a decision of an inferior court.

[42] The separation of powers requires that where the Constitution or legislation has entrusted specific powers and functions to a branch of government, courts may not usurp those powers or functions by reconsidering the issues and making decisions according to their own preferences. This would frustrate the balance of power inherent in the principle of the separation of powers. The primary responsibility of a court entrusted with review jurisdiction is not to make decisions falling within the domain of other branches of government, but to ensure that the relevant branches of government exercise their authority within the limits of the Constitution. (See Doctors for Life International v. Speaker of the National Assembly & Others, 2006 (6) SA 416 (CC), para. [37]; International Trade Administration Commission v. SCAW South Africa (Pty) Ltd, 2012 (4) SA 618 (CC), para. [95]; National Treasury & Others v. Opposition to Urban Tolling Alliance & Others, 2012 (6) SA 223 (CC), para. [63].)

[43] The principle of the separation of powers furthermore requires courts to treat the decisions of administrative officials with respect and, *inter alia*, to be sensitive to the practical and financial constraints under which they operate.

[44] When an administrative decision-maker is entrusted with a discretion, both the weight to be attached to the relevant factors and how far a particular factor affects the eventual determination of the issue, are matters for the decision-maker to decide and if he or she acts in good faith, reasonably and rationally, a court cannot interfere with the decision in the exercise of its review jurisdiction. (See <u>MEC for Environmental Affairs & Development Planning v. Clairison's CC</u>, (408/2012) [2013] ZASCA 82 (31 May 2013), para. [22].)

[45] The applicant's attack on the MEC's decision, as set out in its founding affidavit, is based on the grounds that:

45.1 the MEC was not authorised to make the decision;

45.2 relevant considerations were not taken into account, the decision was irrational and unreasonable; and

45.3 the reasons given by the MEC were inadequate.

[46] Item 14(6) of the Code provides that the MEC, if he *<u>"is of the opinion</u> that the councillor has breached a provision"* of the Code, may, if the sanction is warranted:

“(a) Suspend the councillor for a period and on conditions determined by the MEC; and

(b) Remove the councillor from office.”

<u>No breach of the Code</u>

[47] In my view, the MEC’s findings were entirely consistent with the evidence before him. He found that:

47.1 The bridging of the second respondent’s electricity meter took place on the instructions of Mr. de Jongh, the head of the electricity department at the municipality. The second respondent was under the impression that it was a temporary measure, which had been put in place to ensure the continuation of the power supply to his attorneys practice. He had previously called an electrician who had advised him that only municipal officers could open the meter.

47.2 The substance of second respondent’s evidence was confirmed by Mr. de Jongh, who stated that the meter was bridged on his instructions as there were no meters immediately available which had been properly programmed. The second respondent's evidence was also confirmed, in material respects, by Mr. Ian Braak and Mr. Petrus Adams, the two officials in the electricity department who had attended to the bridging of the meter.

47.3 There is no evidence that the second respondent at any stage attempted to conceal the bridging of his meter. To the contrary, he stated that after the bridging of the meter, he informed the two officials from the electricity department that they should fix the meter as quickly as possible, as he wanted to pay for his electricity.

47.4 In December 2011 the second respondent closed his office for at least a month and he used no electricity in this period. On his return from holiday he could not understand why the municipality had not replaced the meter and he again took the issue up with Mr. de Jongh. Mr. de Jongh gave him the assurance that he would prioritise the matter, but nothing happened before he (Mr. de Jongh) left the municipality in approximately March 2012.

47.5 On 3 April 2012 the matter had still not been addressed by the municipality and the second respondent raised the issue again with Mr. van der Heever. The meter was replaced the same day.

47.6 Mr. de Jongh confirmed that the second respondent was told immediately after the bridging of the meter that it would be replaced, a new one would be installed, and that he sent someone to attend to the matter a day or two later, but the job was not done and he confirmed that he was requested by the second respondent to fix the bridged meter in or about January 2012.

47.7 The second respondent stated that when the new meter was installed in April 2012, he automatically accepted that he would be sent an account, based on his average consumption, for the period when his meter was bridged. The second respondent in fact received an account for the period based on his average consumption and he paid it in full.

47.8 The second respondent stated that the bridging of the electricity meter was authorized by the head of the electricity department, Mr. de Jongh and carried out by Council employees. Municipal officials came to his office to address the problem, opened the box, said that the meter was burnt out, that they did not have meters available, bridged the meter and said that it was being done in accordance with the policy of the municipality. The second respondent accepted this explanation and hence did not regard it as an illegal connection.

47.9 The second respondent also stated that he had no idea what the Council's policy was concerning the repair of defective meters as he did not know how the electricity department functioned and as a councillor he was not permitted to interfere with its work.

47.10 The second respondent testified that he was advised that the reason for bridging was to ensure a continuous supply of electricity for the business and that as soon as there was a meter available, his meter would be replaced. He was satisfied with this explanation as it was the only logical response. It was reasonable and understandable and had been given by the head of the electricity department in the presence of other officials in the department. He had no reason to believe that it was an unlawful operation. As the bridging had been performed by an authorized official, there was no question of tampering with his meter.

47.11 The second respondent was again corroborated on this issue by Mr. de Jongh, who testified that although there was no bylaw which stated that the meter must be bridged, there was also no bylaw which stated that an official could not bridge the meter. The bridging of meters is a practice which was in place in order to further service delivery. Mr. de Jongh pointed out that there is no regulation which says which piece of equipment he must use to fasten a wire and that the bridging of the meter was part of his work, it was what was expected of him.

[48] Mr. Arendse placed considerable reliance on the statement in the applicant's replying affidavit that it does not condone the practice of bridging electricity meters by municipal officials. However, it cannot seek to impugn the MEC's decision, taken on the basis of the evidence before him in May 2013, on the basis of positions or policies subsequently adopted by the applicant.

[49] The evidence before the MEC was that:

49.1 The bridging of the second respondent's meter was authorised by Mr. de Jongh, the Head of the applicant's electricity department at the time;

49.2 Mr. de Jongh stated that although there was no bylaw which stated that the meter must be bridged, there was also no bylaw which stated that an official could not bridge the meter;

49.3 The bridging of meters by municipal officials was a practice which was in place in order to further service delivery. It was standard practice; and

49.4 Mr. de Jongh also testified that the applicant's finance department co-operated in the practice of billing for electricity provided to consumers via council sanctioned bridged meters by calculating the amount payable under these circumstances on the basis of the average monthly consumption of electricity.

[50] The second respondent had testified that he had been advised that the reason for the bridging was to ensure a continuous supply of electricity to his practice and that as soon as a new meter was available, his meter would be replaced. He was satisfied with this explanation, which was the only logical response to the situation. The explanation was furnished to him by the head of the applicant's electricity department in the presence of other officials in the department. He had no reason to believe that the bridging of the meter was unlawful.

[51] Although the applicant states in its replying affidavit that it does not condone the bridging of meters by members of the electricity department in such circumstances, the record before the MEC disclosed no clear bylaw or policy prohibiting what appeared to be a widely used and accepted practice.

[52] In the circumstances:

52.1 the MEC cannot be faulted for accepting the second respondent's explanation for his conduct as reasonable and plausible; and

52.2 there is no merit in the applicant's claims that the MEC's decision was irrational or unreasonable.

The reasons given were adequate

[53] The applicant contended that the MEC failed to furnish adequate reasons for his decision, and that when he was requested to provide fuller reasons the MEC merely repeated the terse explanation previously provided for his decision, namely that in his view the evidence did not justify a guilty finding.

[54] The MEC's decision was based largely on the transcripts of the evidence presented at the disciplinary inquiry. The applicant was represented by an attorney at all times in this matter and had a copy of the transcripts. In the circumstances, it was sufficient for the MEC to indicate that the evidence presented at the disciplinary hearing, on a balance of probability, did not support guilty findings on the four charges under consideration.

[55] In the circumstances I am of the view that this application has no merit and it is accordingly dismissed with costs, such costs to include the costs of two Counsel.

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TRAVERSO, DJP

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[3] The facts giving rise to this application are, in the main, common cause. I will summarise them hereunder.

[4] The application was triggered by the bridging of the second respondent's electricity meter. Bridging is a term used to connote the bypassing of an electricity meter resulting in the recipient of the electricity not being charged for it.

[5] The second respondent experienced problems with the supply of electricity to his office, as a result whereof he contacted the Head of the applicant's electricity department, a certain Mr. de Jongh, to assist him with the problem. Mr. de Jongh and two Municipal officers attended the second respondent's office and bridged the meter as an interim measure so that the electricity supply to his office is not interrupted. The second respondent is a practicing attorney, who in May 2011, was elected as a councillor of the Kannaland Municipal Council, where he still serves.

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[8] Following a Council meeting held on 3 April 2012 the second respondent again approached a Municipal official, namely the Temporary Director for Technical Services, one Pieter van der Heever.

The second respondent informed him that the electricity meter at his office had been bridged and that, despite undertakings by Mr. de Jongh, had not been replaced. Mr. van der Heever sent electricians to inspect the meter who confirmed that the meter had been bridged. The meter was then replaced. Mr. van der Heever reported this to the Municipal Manager, who in turn advised the Speaker.

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[12] The special committee held a disciplinary enquiry over a number of days during 2012. The second respondent was charged with six counts of contravening the Code, he pleaded not guilty to all of these charges and was ultimately convicted of following four charges:

12.1 Charge 1: Contravening the provisions of clause 2 of the Code of Conduct by making use or allowing the use of an illegal electricity [connection] at erf 358 Ladismith for the period 18 October 2011 to 13 April 2012 and thereby compromising the credibility and integrity of the Municipality;

12.2 Charge 2: Contravening the provisions of clause 2 of the Code of Conduct by effecting and or causing and or allowing an illegal electricity connection and thereby compromising the credibility and integrity of the Municipality;

12.3 Charge 4: Contravening the provisions of clause 2 of the Code of Conduct by effecting and or causing and or allowing to be effected an illegal electricity connection and thereby acting in a dishonest manner in the execution of his functions as a Councillor;

12.4 Charge 6: Contravening the provisions of clause 12 of the Code of Conduct by effecting and or causing and or allowing to be effected an illegal electricity connection and thereby obtaining a benefit from the assets of the Municipality.

[13] At a special Council meeting held on 6 December 2012 the special committee recommended that the Council request the MEC to remove the second respondent from office in terms of Item 14(2)(e) of the Code. In a letter dated 11 December 2012 the Speaker requested the MEC to remove the second respondent from office.

[14] On 14 January 2013 the Deputy Director: Governance in the Department of Local Government, Environmental Affairs and Development Planning *("the Department*"), Mr. Mario Baatjes, contacted the Speaker and requested a transcript of the disciplinary hearing.

[15] On 8 February 2013 the recording of the transcript, which had in the interim been received from the Applicant, was handed to the service provider for transcription. After the record of the disciplinary inquiry had been transcribed, the Department prepared a letter to the second respondent enclosing copies of the documents received by the MEC and requesting him to comment on them within 21 days.

[16] The second respondent made his representation to the MEC and in an emailed reply dated 27 March 2013. The MEC considered the matter, discussed it in weekly meetings he had with senior managers, including the Director: Municipal Governance in the Department, Mr. Seraj Johaar.

[17] The MEC then considered the documents relevant to the matter, including the submission prepared by Mr. Johaar, which reflected their deliberations since the second week of April 2013 with the benefit of having had the relevant parts of the transcript drawn to his attention by Mr. Johaar and Mr. Baatjes.

[18] Based on the evidence presented at the disciplinary hearing, the MEC formed the opinion that the evidence did not establish that:

18.1 on charges one, two and four, the second respondent:

(b) had effected, caused or allowed an illegal electricity connection;

(b) compromised the credibility and integrity of the Municipality or acted in a dishonest manner in the execution of his functions as a councilor; and

18.2 on charge six, the second respondent:

(c) had effected, caused or allowed an illegal electricity connection; or

(d) obtained a benefit from the assets of the Municipality.

[19] On 15 May 2013 the MEC informed the Speaker that after considering the relevant information supplied to him, he was unable to accede to the request to remove the second respondent from office. He also stated that he was of the opinion that the evidence presented at the disciplinary committee did not support a finding that the second respondent was guilty of having caused or allowed the illegal bridging of the electricity meter.

[20] On 11 June 2013 the MEC was requested to provide reasons for his decision. In a letter dated 10 July 2013 the MEC reiterated his view that the evidence did not, on a balance of probability, support a guilty finding in respect of charges one, two, four and six.

[21] I will now deal with the provisions of Item 14 of the Code, which provides:

> ***"(1) A municipal council may-***
> ***(c) investigate and make a finding on any alleged breach of a provision of this Code; or***
> ***(d) establish a special committee-***
> ***(iii) to investigate and make a finding on any alleged breach of this Code; and***
> ***(iv) to make appropriate recommendations to the council.***
> ***(2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-***
> ***(a) issue a formal warning to the councillor;***
> ***(b) reprimand the councillor;***
> ***(c) request the MEC for local government in the province to suspend the councillor for a period;***
> ***(d) fine the councilllor; and***
> ***(e) request the MEC to remove the councillor from office.***
> ***(3) (a) Any councillor who has been warned, reprimanded or fined in terms of paragraph (a), (b) or (d) of sub-item (2) may within 14 days of having been notified of the decision of the council appeal to the MEC for local government in writing setting out the reasons on which the appeal is based.***
> ***(b) A copy of the appeal must be provided to the council.***
> ***(c) The council may within 14 days of receipt of the appeal referred to in paragraph (b) make any representation pertaining to the appeal to the MEC for local government in writing.***
> ***(d) The MEC for local government may, after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.***
> ***(4) The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code***

> ***and to make a recommendation as to the appropriate sanction in terms of sub-item (2) if a municipal council does not conduct an investigation contemplated in sub-item (1) and the MEC for local government considers it necessary.***
> ***(5) The Commissions Act, 1947 (Act 8 of 1947), or, where appropriate, applicable provisional legislation, may be applied to an investigation in terms of sub-item (4).***
> ***(6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may-***
> ***(a) suspend the councillor for a period and on conditions determined by the MEC; or***
> ***(b) remove the councillor from office.***
> ***(7) Any investigation in terms of this item must be in accordance with the rules of natural justice.***"

[22] The legal "*architecture*" of Item 14 has been analysed by this Court in Van Wyk v. Uys N.O., 2002 (5) SA 92 (C). The provision confers a discretion on a municipal council to investigate and make a finding on an alleged breach of the Code or to establish a special committee for this purpose. If the Council or committee finds that the Code has been breached, the Council itself may issue a formal warning, reprimand or fine the councillor, or alternatively, it may request the MEC for local government to suspend the councillor or remove the councillor from office. (Van Wyk, (*supra*) at 98 A – C).

[23] The rationale is that when the municipality seeks to impose the more stringent sanctions of suspension or removal from office in terms of Items 14(2) (c) or (e), it is required to refer the matter to a higher authority, namely the MEC. (Van Wyk, (*supra*) at 99 G).

[24] The MEC is entitled either to form an opinion on the papers in terms of Item 14(6), which would represent a judicially considered view, or he or she can make use of a committee or person in terms of Item 14(4) to investigate the matter and make appropriate recommendations. (Van Wyk, *(supra)* at 99 F – H).

[25] It is apparent from the above analysis that where an MEC makes a decision in terms of Item 14(6), the decision is the culmination of a multi-stage process. In the present matter, the Item 14 process consisted of three stages:

25.1 The investigations by the special committee and its recommendations to the Council in terms of Item 14(1);

25.2 The Council's request to the MEC in terms of Item 14(2)(e); and

25.3 The MEC's decision in terms of Item 14(6).

[26] In Van Wyk, *(supra)* the respondent contended that Items 14(4) and (6) entitled the MEC to act *mero motu*, notwithstanding any decision which the Council may have taken with regard to an alleged breach. (Van Wyk, (*supra)* at 99 F). This Court rejected the submission, holding that nothing in Items 13 or 14 permitted the MEC to suspend a councillor *mero motu* (i.e. in the absence of a Council request in terms of Item 14(2)(c) or (e)), particularly in circumstances where the Council was in the process of taking action in respect of the allegations. (Van Wyk, *(supra)* at 100 C).

[27] Mr. Arendse, who appeared for the applicant, sought to distinguish Van Wyk (*supra)* from the present matter on the basis that Item 14(4) was amended subsequent to the Van Wyk judgment. Accordingly he argued that despite it being a decision of 2 Judges, I am not bound by it.

[28] It is common cause that Item 14(4) was amended. At the time of the Van Wyk judgment Item 14(4) read:

> ***"The MEC for local government may appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office."***

The Item has now been amended to read:

> ***"The MEC for local government may appoint a person or a committee to investigate an alleged breach of a provision of this Code and to make a recommendation as to the appropriate sanction in terms of sub-item (2) if a municipal council does not conduct an investigation contemplated in sub-item (1) and the MEC for local government considers it necessary."*** (my emphasis)

[29] Mr. Arendse submitted that by virtue of this amendment the MEC now has self-standing disciplinary powers over local councillors which can be exercised *mero motu*. He further argued that the subsequent judgment of this Court in Andile Lili v. Independent Electoral Commission, (Case No. 3671/2013), is therefore clearly wrong. In particular, he attacked the finding of the Court that on a proper reading of Item 14 the Minister has no self-standing disciplinary powers over local councillors which can be exercised *mero motu*, and suggested that the Court disregarded the amendment.

[30] This argument is flawed. Sub-item 4 must be interpreted contextually. Item 14, read with Item 13, clearly support the notion of co-operative government. The effect of these provisions is that the powers granted to the MEC constitute a safeguard and form part of a system of checks and balances applied to disciplinary proceedings against councillors. Before an MEC can appoint a person or a committee there must be an alleged breach of a provision of the Code. The MEC cannot *mero motu* decide that there has been a breach of the Code.

[31] The amendment, in my view, is aimed at providing for the dilemma alluded to in Van Wyk *(supra)*, namely that an MEC would be powerless to act in circumstances where a Council, for whatever reason, refuses to institute proceedings in respect of an alleged breach of the Code of Conduct. This sub-item merely provides for a lacuna which previously existed. The MEC must still act within the general scope of these two items. When he makes a decision in terms of Item 14(6), it will still be a culmination of a multi-stage process.

[32] The Item 14(6) procedure applicable in more serious cases is broadly equivalent to an administrative appeal process, in that the person charged has the benefit of the matter being re-considered by a higher authority before far-reaching sanctions can be implemented. This provides an obvious safeguard against disciplinary proceedings being used to pursue what in certain instances may be viewed as political agendas. The Item 14(6) process shares many of the beneficial qualities of an internal appeal, by providing an immediate and cost-effective forum for disciplinary proceedings to be re-considered without having to resort to litigation and enhancing the constitutional values of accountability, responsiveness and openness. (See the judgment of this Court (per Le Grange, J) in Andile Lili v. Independent Electoral Commission & Others, (*supra*) at paras. 39 and 40.)

[33] The applicant contends that the legislature did not intend the MEC to reconsider the merits of the charges – all that he is required to do is implement the Council decision once he has been satisfied that the necessary jurisdictional requirements have been met. It is suggested that it was not open to him to reconsider the evidence led in the disciplinary inquiry or second-guess the findings of the special committee.

[34] This submission cannot be reconciled with Item 14(4) which makes it quite clear that an MEC may, if appropriate, appoint a person or committee to investigate any "*alleged breach*" of the Code and to make recommendations on whether suspension or removal from office constitute appropriate sanctions.

[35] Item 14(6) requires the MEC to form an opinion on:

35.1 whether the Code has been breach; and, if so, 35.2 whether the breach warrants suspension or removal from office.

[36] The Constitutional Court pointed out in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others, 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) [168], fn 132, that the judgment of Corbett, J in South African Defence & Aid Fund & Another v. Minister of Justice, 1967 (1) SA 31 (C), is still the leading case on jurisdictional facts in our law.

[37] In the South African Defence & Aid Fund case (*supra)* it was a necessary condition for the exercise of a statutory power that the State President should be satisfied that one or more of the five conditions in section 2(2) of the Suppression of Communism Act, no. 44 of 1950 were present. Corbett, J noted that the *"content of this kind of condition is often referred to as a 'jurisdictional fact'"* in that *"it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one.*"

[38] Corbett, J then stated, at p. 34 H – p. 35 E, that:

> ***"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purposed exercise of the power … On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter."*** (emphasis supplied)

[39] The MEC's powers under Item 14(6) of the Code are similar to the State President's powers considered by Corbett, J. The Systems Act granted the MEC the "*sole and exclusive*" function of determining whether or not the second respondent breached the Code, and, if so, whether his removal from office was warranted. Once he had determined these jurisdictional facts, he was entitled to exercise his powers accordingly. The grounds upon which this Court can intervene in the exercise of a discretion of this nature are narrowly circumscribed: Corbett, J limited such grounds to *mala fides*, ulterior motive and a failure to apply one's mind. In light of the constitutional right to just administrative action, these requirements would now also include rationality and reasonableness. See for example, MEC for Environmental Affairs & Development Planning v. Clairison's CC, (408/2012) [2013] ZASCA 82 (31 May 2013) [22].

[40] The applicant does not allege *mala fides*, ulterior motive or a failure by the MEC to apply his mind. Rather it is alleged that his decision was irrational and unreasonable.

The distinction between review and appeal

[41] In an ordinary appeal, the only issue for determination is whether the decision appealed against was right or wrong. However, when a Court is requested to review an administrative decision, the fundamental constitutional principle of the separation of powers is implicated, a consideration which does not arise in an appeal against a decision of an inferior court.

[42] The separation of powers requires that where the Constitution or legislation has entrusted specific powers and functions to a branch of government, courts may not usurp those powers or functions by reconsidering the issues and making decisions according to their own preferences. This would frustrate the balance of power inherent in the principle of the separation of powers. The primary responsibility of a court entrusted with review jurisdiction is not to make decisions falling within the domain of other branches of government, but to ensure that the relevant branches of government exercise their authority within the limits of the Constitution. (See <u>Doctors for Life International v. Speaker of the National Assembly & Others</u>, 2006 (6) SA 416 (CC) [37]; <u>International Trade Administration Commission v. SCAW South Africa (Pty) Ltd</u>, 2012 (4) SA 618 (CC) [95]; <u>National Treasury & Others v. Opposition to Urban Tolling Alliance & Others</u>, 2012 (6) SA 223 (CC) [63].)

[43] The principle of the separation of powers furthermore requires courts to treat the decisions of administrative officials with respect and, *inter alia*, to be sensitive to the practical and financial constraints under which they operate.

[44] When an administrative decision-maker is entrusted with a discretion, both the weight to be attached to the relevant factors and how far a particular factor affects the eventual determination of the issue, are matters for the decision-maker to decide and if he or she acts in good faith, reasonably and rationally, a court cannot interfere with the decision in the exercise of its review jurisdiction. (See MEC for Environmental Affairs & Development Planning v. Clairison's CC, (408/2012) [2013] ZASCA 82 (31 May 2013) [22].

[45] The applicant's attack on the MEC's decision, as set out in its founding affidavit, is based on the grounds that:

45.1 the MEC was not authorized to make the decision;

45.2 relevant considerations were not taken into account, the decision was irrational and unreasonable; and

45.3 the reasons given by the MEC were inadequate.

[46] Item 14(6) of the Code provides that the MEC, if he *"is of the opinion that the councillor has breached a provision"* of the Code, may, if the sanction is warranted:

“(a) Suspend the councillor for a period and on conditions determined by the MEC; and

(b) Remove the councillor from office.”

<u>No breach of the Code</u>

[47] In my view, the MEC’s findings were entirely consistent with the evidence before him. He found that:

47.1 The bridging of the second respondent’s electricity meter took place on the instructions of Mr. de Jongh, the head of the electricity department at the municipality. The second respondent was under the impression that it was a temporary measure, which had been put in place to ensure the continuation of the power supply to his attorneys practice. He had previously called an electrician who had advised him that only municipal officers could open the meter.

47.2 The substance of second respondent’s evidence was confirmed by Mr. de Jongh, who stated that the meter was bridged on his instructions as there were no meters immediately available which had been properly programmed. The second respondent's evidence was also confirmed, in material respects, by Mr. Ian Braak and Mr. Petrus Adams, the two officials in the electricity department who had attended to the bridging of the meter.

47.3 There is no evidence that the second respondent at any stage attempted to conceal the bridging of his meter. To the contrary, he stated that after the bridging of the meter, he informed the two officials from the electricity department that they should fix the meter as quickly as possible, as he wanted to pay for his electricity.

47.4 In December 2011 the second respondent closed his office for at least a month and he used no electricity in this period. On his return from holiday he could not understand why the municipality had not replaced the meter and he again took the issue up with Mr. de Jongh. Mr. de Jongh gave him the assurance that he would prioritise the matter, but nothing happened before he (Mr. de Jongh) left the municipality in approximately March 2012.

47.5 On 3 April 2012 the matter had still not been addressed by the municipality and the second respondent raised the issue again with Mr. van der Heever. The meter was replaced the same day.

47.6 Mr. de Jongh confirmed that the second respondent was told immediately after the bridging of the meter that it would be replaced, a new one would be installed, and that he sent someone to attend to the matter a day or two later, but the job was not done and he confirmed that he was requested by the second respondent to fix the bridged meter in or about January 2012.

47.7 The second respondent stated that when the new meter was installed in April 2012, he automatically accepted that he would be sent an account, based on his average consumption, for the period when his meter was bridged. The second respondent in fact received an account for the period based on his average consumption and he paid it in full.

47.8 The second respondent stated that the bridging of the electricity meter was authorized by the head of the electricity department, Mr. de Jongh and carried out by Council employees. Municipal officials came to his office to address the problem, opened the box, said that the meter was burnt out, that they did not have meters available, bridged the meter and said that it was being done in accordance with the policy of the municipality. The second respondent accepted this explanation and hence did not regard it as an illegal connection.

47.9 The second respondent also stated that he had no idea what the Council's policy was concerning the repair of defective meters as he did not know how the electricity department functioned and as a councillor he was not permitted to interfere with its work.

47.10 The second respondent testified that he was advised that the reason for bridging was to ensure a continuous supply of electricity for the business and that as soon as there was a meter available, his meter would be replaced. He was satisfied with this explanation as it was the only logical response. It was reasonable and understandable and had been given by the head of the electricity department in the presence of other officials in the department. He had no reason to believe that it was an unlawful operation. As the bridging had been performed by an authorized official, there was no question of tampering with his meter.

47.11 The second respondent was again corroborated on this issue by Mr. de Jongh, who testified that although there was no bylaw which stated that the meter must be bridged, there was also no bylaw which stated that an official could not bridge the meter. The bridging of meters is a practice which was in place in order to further service delivery. Mr. de Jongh pointed out that there is no regulation which says which piece of equipment he must use to fasten a wire and that the bridging of the meter was part of his work, it was what was expected of him.

[48] Mr. Arendse placed considerable reliance on the statement in the applicant's replying affidavit that it does not condone the practice of bridging electricity meters by municipal officials. However, it cannot seek to impugn the MEC's decision, taken on the basis of the evidence before him in May 2013, on the basis of positions or policies subsequently adopted by the applicant.

[49] The evidence before the MEC was that:

49.1 The bridging of the second respondent's meter was authorised by Mr. de Jongh, the Head of the applicant's electricity department at the time;

49.2 Mr. de Jongh stated that although there was no bylaw which stated that the meter must be bridged, there was also no bylaw which stated that an official could not bridge the meter;

49.3 The bridging of meters by municipal officials was a practice which was in place in order to further service delivery. It was standard practice; and

49.4 Mr. de Jongh also testified that the applicant's finance department co-operated in the practice of billing for electricity provided to consumers via council sanctioned bridged meters by calculating the amount payable under these circumstances on the basis of the average monthly consumption of electricity.

[50] The second respondent had testified that he had been advised that the reason for the bridging was to ensure a continuous supply of electricity to his practice and that as soon as a new meter was available, his meter would be replaced. He was satisfied with this explanation, which was the only logical response to the situation. The explanation was furnished to him by the head of the applicant's electricity department in the presence of other officials in the department. He had no reason to believe that the bridging of the meter was unlawful.

[51] Although the applicant states in its replying affidavit that it does not condone the bridging of meters by members of the electricity department in such circumstances, the record before the MEC disclosed no clear bylaw or policy prohibiting what appeared to be a widely used and accepted practice.

[52] In the circumstances:

52.1 the MEC cannot be faulted for accepting the second respondent's explanation for his conduct as reasonable and plausible; and

52.2 there is no merit in the applicant's claims that the MEC's decision was irrational or unreasonable.

The reasons given were adequate

[53] The applicant contended that the MEC failed to furnish adequate reasons for his decision, and that when he was requested to provide fuller reasons the MEC merely repeated the terse explanation previously provided for his decision, namely that in his view the evidence did not justify a guilty finding.

[54] The MEC's decision was based largely on the transcripts of the evidence presented at the disciplinary inquiry. The applicant was represented by an attorney at all times in this matter and had a copy of the transcripts. In the circumstances, it was sufficient for the MEC to indicate that the evidence presented at the disciplinary hearing, on a balance of probability, did not support guilty findings on the four charges under consideration.

[55] In the circumstances I am of the view that this application has no merit and it is accordingly dismissed with costs, such costs to include the costs of two Counsel.

TRAVERSO, DJP