IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case No: 18577/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

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SIGNATURE

29/04/2020
DATE

In the matter between:

DEMOCRATIC ALLIANCE	**1ST APPLICANT**
RANDALL MERVYN WILLIAMS	**2ND APPLICANT**
CHRISTO MAURITZ VAN DEN HEEVER	**3RD APPLICANT**
ZWELIBANZI CHARLES KHUMALO	**4TH APPLICANT**

and

THE PREMIER FOR THE PROVINCE OF *GAUTENG*	**1ST RESPONDENT**

THE EXECUTIVE COUNCIL FOR THE PROVINCE OF GAUTENG	2ND RESPONDENT
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	3RD RESPONDENT
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	4TH RESPONDENT
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG	5TH RESPONDENT
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	6TH RESPONDENT
AFRICAN NATIONAL CONGRESS	7TH RESPONDENT
ECONOMIC FREEDOM FIGHTERS	8TH RESPONDENT
CONGRESS OF THE PEOPLE	9TH RESPONDENT
AFRICAN CHRISTIAN DEMOCRATIC PARTY	10TH RESPONDENT
PAN AFRICANIST CONGRESS OF AZANIA	11TH RESPONDENT
FREEDOM FRONT PLUS	12TH RESPONDENT
ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ANC	13TH RESPONDENT

ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE EFF	**14TH RESPONDENT**
THE REMAINING TSHWANE COUNCILLORS	**15TH RESPONDENT**
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	**16TH RESPONDENT**
ELECTORAL COMMISSION	**17TH RESPONDENT**

JUDGMENT

THE COURT

INTRODUCTION

[1] This matter is brought before Court on an urgent basis and has its genesis in the 10 March 2020 decision of the Gauteng Executive Council (the Gauteng EC), the second respondent, to dissolve the City of Tshwane Metropolitan Municipality (the Municipal Council), the sixth respondent. The applicants request that this decision (the dissolution decision) be reviewed, declared invalid and set aside.

[2] The applicants are the Democratic Alliance (DA), a political party and three councillors, who are its members, serving in the City. For ease of reference we will refer to the applicants collectively as "the DA."

[3] The relief sought to review and set aside the dissolution decision is in the main against the first to sixth respondents being the Premier of Gauteng (Premier), the Gauteng EC, the Minister for Co-Operative Governance and Traditional Affairs (Minister), the Chairperson of the National Council of Provinces (Chairperson) and the MEC for Co-Operative Governance and Traditional Affairs, Gauteng (MEC) respectively. The Speaker of the Gauteng Provincial

Legislature filed a notice to abide by the Court's decision. The Minister and Chairperson did not oppose the application.

[4] The further relief is an order sought against the thirteenth respondent, All Tshwane Councillors who are members of the ANC, (the ANC councillors) and the fourteenth respondent, All Tshwane Councillors who are members of the EFF, (the EFF councillors) that they be ordered to attend and remain in attendance at all meetings of the Municipal Council unless they have a lawful reason to be absent. The ANC, the seventh respondent, opposed the application and belatedly filed an opposing answering affidavit. There was no opposition from the remaining respondents.

URGENCY

[5] Although on the papers the urgency of the application is disputed, in oral argument urgency was not in issue. We are persuaded that the matter is urgent.

STANDING

[6] In the answering affidavit the point was taken on behalf of the Gauteng EC that the DA does not have standing to bring this application. The basis advanced for this ground of attack is simply that an application of this nature can only be brought by a Municipal Council or by individual councillors if they form a quorum. The issue is whether the applicants have a direct and substantial interest in the matter. Clearly they do, being the political party with a substantial representation in the Municipal Council and three of its members who are councillors. Our view is that the point raised by the Gauteng EC disputing the standing of the DA to institute these proceedings cannot be substantiated in law or fact and must be rejected. As elected Councillors and a Political Party represented in the Municipal Council, there is nothing barring the applicants from bringing this application in which they have a direct interest in the relief sought. The DA therefore has the necessary *locus standi* to bring the application.

THE COMMON CAUSE FACTS AS BACKGROUND TO THE MATTER

[7] The Municipal Council has reached a dead-lock; no parties therein can win an argument or gain an advantage and no action can be taken by the Municipal Council. The Municipal Council has no Mayor, Mayoral Committee and no Municipal Manager. Simply put, it is unable to conduct its business and cannot serve its residents.

[8] The reason for the dead-lock can be located in the Municipal Council's inability to convene and run council meetings to transact and take necessary decisions in line with its responsibilities. This situation exists as a direct consequence of the disruption of its meetings due to the walkout from council meetings by ANC and EFF councillors thus depriving the Municipal Council of the necessary quorum. Whether done for good or bad reasons does not alter the fact that the walkouts have rendered the City powerless.

[9] As will become apparent later, the result of the dissolution decision is that the Municipal Council is immediately dissolved and an Administrator takes over the functions and fresh elections throughout Tshwane have to take place within three months.

[10] The inability of the City to convene and retain the necessary quorum dates back to 27 September 2018. There were further failed council meetings in 2019 starting on 25 April, 25 July and 29 August. This trend continued on 28 November 2019 when Council convened and the Speaker disallowed a Motion of No Confidence in the Mayor. The ANC and EFF councillors walked out and the meeting lost its quorum.

[11] On 5 December 2019 a special meeting of Municipal Council called for a Motion of No Confidence in the Speaker and to proceed with the Motion of No Confidence in the Mayor. The Speaker recused herself, but the ANC and EFF councillors prevented the acting Speaker from fulfilling his duties and the meeting was adjourned after a resolution was passed to appoint a new acting Speaker.

[12] The next day, 6 December 2019, the MEC wrote to the Speaker effectively laying the blame on her table for the collapse of the Council meeting the previous day. In this letter the MEC stated that the Speaker had recused herself from presiding over that Council meeting without a valid reason. The MEC accused the Speaker of failing to execute her duties in contravention of item 2 of the Code of Conduct for Councillors found in Schedule 1 of the Local Government: Municipal Systems Act[1] (the Systems Act).

[13] On the same date the Gauteng EC resolved to invoke section 139(1) read with section 154 of the Constitution of the Republic of South Africa, 1996 (the Constitution). This decision was conveyed to the new acting Speaker by means of a letter dated 6 December 2019 through the MEC, and the relevant part reads as follows:

> *"The Provincial Executive Council invokes the provisions of section 139(1) read together with section 154 of the Constitution, by taking appropriate steps to support and strengthen the capacity of the City of Tshwane to effectively execute the constitutional obligation of the provincial government as embedded in section 152 of the Constitution, and The Gauteng Department of Co-operative Governance and Traditional Affairs ('COGTA'), must immediately develop a cogent plan that must expose the appropriate steps to be taken in order to give effect to the constitutional obligation of the provincial government in terms of section154 that will culminate in proper and meaningful support to the City of Tshwane."*[2]

[14] The Gauteng EC stated that it took this decision upon consideration of a detailed report on the state of affairs in the Municipal Council with reference to Financial Management, Service Delivery, Governance (including issues of maladministration and corruption) and Institutional Capacity (Administration).

[15] On 18 December 2019 the Speaker responded to the MEC's letter, inter alia, setting out that a section 139 intervention was not the most appropriate method

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[1] 32 of 2000, as amended.
[2] Annexure FA14.

to ensure service delivery to the residents. The Speaker *inter alia* complained that no reasons were advanced in the MEC's letter meeting the necessary requirements for the imposition of a section 139(1) intervention and that no engagement took place with the Municipal Council prior to the decision being taken. The Speaker further complained that the MEC's letter was exceptionally vague and that it was impossible to determine whether the intervention was in terms of sub-section (1)(a),(1)(b) or (1)(c). The Speaker's response further pointed out that the MEC's letter failed to identify the executive obligation(s) that the Municipal Council had not complied with. The response went further to point out that the Gauteng EC had also not engaged with the Municipal Council to provide dedicated support to assist it in addressing any of the matters raised in the intervention. The Speaker further provided detailed answers to the concerns raised in the MEC's letter relating to service delivery in the informal areas, service delivery in regions 5 and 7, the provision of mobile drinking water tankers and alternatives for the supply of water, sanitation services and the issue of the water quality in Hammanskraal.[3]

[16] On 27 December 2019 the DA succeeded in this Court, before Tuchten J, to suspend the resolution taken at the Council meeting of 5 December 2019, in which the acting Speaker was prevented from presiding in the meeting and where a new acting Speaker was appointed, pending the review of that decision amongst others.[4]

[17] On 14 January 2020 the MEC responded to the Speaker's letter, disputing her competence to provide such a response on the basis that it was unclear if his earlier letter containing the intervention notice had served before Council. The MEC further reiterated that the earlier decision to intervene through plans developed by the department of COGTA, was the appropriate decision in the circumstances and was not to be disturbed. In this letter the MEC further annexed a document containing what are termed directives to the Municipal Council. We quote the following from the MEC's letter:

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[3] Annexure FA15.
[4] Annexure FA11.

"In conclusion, the Constitution as the supreme law of the land has relevant provisions in section 139(1) read and applied with section 154(1) to assist in providing practical solutions. It is worthy to note that the golden rule of interpretation, the Constitutional provisions are interpreted differently from enabling statute or legislation as same derive their authority from the supreme law of the land (the Constitution).

It is therefore my considered view that it is not necessary to disturb the EXCO decision to intervene in the manner that it has but to proceed accordingly. In the circumstances, I hereby, in terms of section 138(1)(a) of the Constitution, as an appropriate step, issue the directives as embedded in the attached ***Annexure "A"*** *which I would implore the City to comply with within the specified timeframes."*

[18] The directives are set out in a spreadsheet with column headings. The main headings in bold are:

"-Failure to execute or render uninterrupted services for communities.
-Failure to adequately address water and electricity losses.
-Inadequate revenue Collection and debtor management.
-Weaknesses in governance and accountability:
-Corruption and Maladministration,
-Unauthorised, Irregular Fruitless and Wasteful Expenditure (UIFW)
-Weak Contract management (Glad Africa: Aurecon Tender, Fuel tender fraud.
-Wonderboom Airport.
-Smart meter.
-Recurring Audit issues and Implementation of Audit Plans.
-Inability of the City to spent [sic] on grants.
-Failure to fill Senior Management Positions (i.e. City Manager.
-Failure to finalize disciplinary proceedings of senior managers (i.e. Head EMS)
-Lack of transparency and compliance with regards to the separation agreement between former City Manager and Municipal Council.
-Delayed ward committee establishment.
-Connectivity failures in Centurion Satellite Disaster Managerment [sic] Centre.
-Inadequate capacity in Municipal Disaster Management Centre (MDMC) due to high vacancy rate.
-Recurring audit issues and implementation of audit plans."[5]

[5] Annexure FA16.

[19] These directives in effect set out what, according to the Gauteng EC, were the areas that required attention as mentioned in the headings referred to in the preceding paragraph. These directives set out what was the required action plan as well as when these remedial actions were to be finalised on certain specified dates ranging from 31 January 2019 to March 2020.

[20] On 16 January 2020 a Council meeting was convened to consider the Motion of No Confidence against the Mayor, the Speaker and the Acting Speaker and the Chair of Chairs. Once again the meeting lost its quorum because the ANC and EFF councillors left in protest after the Speaker ruled against a number of points of order raised by ANC and EFF councillors regarding the order in which the motions of no confidence were to be dealt with.

[21] On 23 January 2020 the MEC issued a press statement suspending the Speaker as a member of Council. The next day the Speaker and DA launched an application to set aside that decision. On 27 January 2020 the MEC, on advice from counsel, rescinded the decision to suspend the Speaker. On 28 January 2020 the MEC wrote to the Chief Whip stating that the Speaker had committed misconduct and the Municipal Council had to urgently convene a disciplinary hearing against the Speaker. The Chief Whip in a letter dated 29 January 2020 informed and explained to the MEC that he did not have the authority to issue a directive pertaining to disciplinary steps.

[22] On 30 January 2020 once again a properly convened Council meeting had to be postponed due to a walkout by ANC and EFF councillors resulting once more in a loss of the necessary quorum.

[23] On 7 February 2020 the Speaker responded to the directives attached to the MEC's letter dated 14 January 2019, with a 188 page document. In this document the Speaker detailed action plans and programmes undertaken by the Municipal Council to address the directives issued by the Gauteng EC through the office of the MEC.

[24] On 12 February 2020 the MEC appointed Advocate Makola SC to investigate whether the Speaker had breached the Code of Conduct. The DA responded by launching an application to review the appointment of Advocate Makola SC on 21 February 2020.

[25] A further meeting of the Council convened for the 19 February 2020 was once again postponed as not enough councillors attended to form a quorum. On 26 February 2020 the Executive Mayor resigned. On 27 February 2020 a Council meeting again lost its quorum due to the walkout of ANC and EFF councillors. On 28 February 2020 another council meeting could not proceed as there was no quorum due to non-attendance, excepting of two councillors, by the ANC and EFF.

[26] On 4 March 2020 the MEC wrote to the Speaker enquiring whether the section 139 (1)(a) directives had served before the Council. The MEC granted the Speaker three days to respond. Despite the three day response period, on the same day, the Gauteng EC took the dissolution decision.

[27] On 5 March 2020 the Premier issued a press statement announcing the resolution of the Gauteng EC to dissolve the Municipal Council and place it under administration in terms of section 139(1)(c).

[28] On 10 March 2020 the DA and the City, for the first time, were presented with the Dissolution Notice dated 6 March 2020.

[29] In the Dissolution Notice the critical issues "*affecting the functionality of the city*"[6] are set out as "*Pillars*". The "*observations*" set out are the reasons for the Dissolution Decision. As these observations form the crux of the main relief sought they are described below when addressing the substantive validity or invalidly of the dissolution decision.

[30] The question that now remains is whether the dissolution decision is liable to be reviewed, declared invalid and unlawful and liable to be set aside?

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[6] Paragraph 2 of Annexure FA8.

SUBSTANTIVE INVALIDITY

[31] Both Counsel for the Gauteng EC and the DA commenced their argument with whether the dissolution decision was substantively invalid and we find it prudent to follow the same approach. The approach and opposition of the ANC will be addressed later on in the judgment.

[32] Although there is final and alternative interlocutory relief sought pertaining to the review as well as the setting aside of the dissolution decision, the argument was focused on the final relief sought, we deem it prudent to consider and pronounce on the final relief first.

[33] The dissolution decision was taken in terms of section139 of the Constitution which reads as follows:

"139 Provincial intervention in local government

(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -

(a) Issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) Assuming responsibility for the relevant obligation in that municipality to the extent necessary to -

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) Dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared, if exceptional circumstances warrant such a step."

[34] Also referred to by the Gauteng EC is section 152 of the Constitution which reads:

> **"152 Objects of local government**
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> (1) The objects of local government are -
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a sustainable manner;
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> (c) to promote social and economic development;
>
> (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.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[35] The dissolution decision was taken in terms of section 139(1) (c). The jurisdictional fact necessary to invoke this provision is either the inability to fulfil an executive obligation or the failure of the Municipal Council to fulfil an executive obligation. Section 139(1)(c) has an additional jurisdictional fact in that it provides that dissolution can only be resorted to should there be exceptional circumstances warranting it. A Court can interfere with the dissolution decision if objectively the jurisdictional facts were not present at the time the decision was made, thus a review based on the principle of legality. This means that there must be a direct correlation between the exercise of the power, i.e. the decision to dissolve the Municipal Council, and the objective sought to be achieved i.e. the fulfilment of the stated executive obligation. The decision must thus ensure the fulfilment of the executive duty, i.e. the dissolution will ensure that the relevant obligation will be fulfilled. Stated differently, the dissolution decision taken by the Gauteng EC must be rationally related to the fulfilment of the City's executive obligations sought to be achieved through the decision. This much was pronounced in *Albutt v Center for the*

Study of Violence and Reconciliation and Others[7] that the decision-maker has the duty to place sufficient information before the Court to illustrate what executive obligation was breached and/or not fulfilled and how the decision will remedy that.

[36] The decision to dissolve a municipal council and place it under administration and the exceptional circumstances under which it may be taken was discussed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* where it was stated by Jafta J at paras 43 and 44 that:

> "[43] Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and —not assume any power or function except those conferred on [it] in terms of the Constitution.
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> [44] The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed." [8]

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[7] [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.
[8] [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).

In *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* at para 81 it was stated that:

> "As a general observation, it is clear from a reading of paragraph (c) in the context of sub-section (1) as a whole that the form of intervention authorised by paragraph (c) suggests that the dissolution is only appropriate if the fulfilment of an executive obligation cannot be achieved otherwise than by the dissolution of the existing council and its replacement by an administrator until such time as a new council has been elected. There are three aspects that flow from this: the first is that it presupposes, at the very least, that consideration was given to other forms of intervention that are effective and less intrusive, secondly, that there exists a causal connection between the conduct of the municipal council and the continued failure to comply with an executive obligation, and lastly, as in the case of the other two forms of intervention, the question must be asked whether the municipality would be able to fulfil its obligations after the intervention is over. In other words, as a corrective measure, would it be successful in remedying or resolving the particular problem in the municipality? Dissolution of the council and its replacement with a newly elected council would after all serve no purpose if it would not resolve the problems at hand."[9]

[37] The identification of the executive obligation is therefore necessary. For a Court to decide whether an executive obligation was breached the executive obligation must be identified.

[38] Determining and identifying an executive obligation is not a mere formalistic requirement. The particular executive obligation must be substantively identified as an objective fact which can be independently assessed by a Court. This is so because the Provincial Government can only invoke section 139(1)(c) when an executive obligation has not been fulfilled. The Provincial Government does not have a discretion but to invoke section 139(1)(c) regarding a clearly identified executive obligation which, on objective facts, remains unfulfilled. Section 139(1)(c) thus limits the types of failure of a Local Government on which the Provincial Government can interfere by dissolving it. This interpretation of section 139 (1)(c) is in line with the policy of the Constitution to separate the

[9] [2009] ZAECBHC 14.

powers of the three spheres of government applicable herein. Interference from one sphere of government into another sphere, as we have here, is seen as most intrusive and can only be resorted to in exceptional circumstances.

[39] As a starting point one would expect that the executive duty allegedly unfulfilled would reference a specific statutory provision or specific constitutional obligation from which this duty flowed. A Court will still have to determine whether it is an executive duty. We agree with Van Zyl J in *Mnquma Local Municipality* that –

> "Executive obligations must not be confused with statutory obligations or duties that are aimed at ensuring the effective performance by local government of its executive obligations ... Non-compliance with a statutory obligation or duty aimed at ensuring the effective performance of executive obligations would not necessarily result in a failure to fulfil an executive obligation ..."[10] [footnotes omitted]

[40] The question is whether the Gauteng EC has identified the statutory or constitutional obligations which the Municipal Council has not fulfilled. An obligation is a non-discretionary instruction in law to the Municipal Council to exercise a function when a specific set of facts occur. It is only if the function is mandatory and not fulfilled that the Provincial Government can step in.

[41] It is only in the answering affidavit, for the first time, that reference is made to legislation with reference to alleged failure to fulfil executive obligations. It is trite that the decision-maker's decision must be gleaned from the decision itself and cannot *ex post facto* be motivated.[11]

[42] But, even if the Court takes cognisance of the legislation quoted in the answering affidavit then section 152(1) and (2) (scantily referred to in the dissolution decision), as quoted above in para 9, sets out the objects of local government. This is not helpful as section 152 only sets out the objects in

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[10] *Ibid* at para 65.

[11] See *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at para 27 and *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) at para 39.

general. Reference is then also made to section 195(1) of the Constitution listing the principles that public administration must apply. General principles of professional ethics, accountability, transparency and public policy-making once again are not helpful. It must be strived for and attained, but from these principles this Court cannot determine which executive obligations have not been fulfilled.

[43] In the answer further reliance is placed on section 11 of the Systems Act and section 18 of the Local Government: Municipal Structures Act[12] (the Structures Act). Section 18 is relevant to "observation one" and will be discussed later in the judgment. Reliance is placed on the following subsections of the Systems Act: section 11(l), (m) and (n) which read:

> "(l) promoting a safe and healthy environment;
>
> (m) passing by-laws and taking decisions on any of the above-mentioned matters; and
>
> (n) doing anything else within its legislative and executive competence."

This is, simply stated, vague. These sections do not amplify or read as a whole with the observations, nor do they lay a foundation for objective facts on which the Court can determine if an executive obligation was not fulfilled. Neither the objects of a local government set out in section 152 of the Constitution nor the provisions in section 11 of the Systems Act in and of themselves are "executive obligations."

[44] In fact these general statements are on par with what was before Tuchten J in *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* where the Court found the notice of intervention to be exceptionally vague.[13] We are in agreement with the learned Judge that upon a reading of the notice one must be able to grasp what executive obligations were breached. This principle will also be applicable to the decision to dissolve to enable the Municipal Council to challenge the decision by means of judicial review or for

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[12] 117 of 1998.

[13] [2014] 4 All SA 67 (GP) at para 31.

the Cabinet member responsible for local government affairs to set aside the decision.[14]

[45] In this matter the dissolution decision does go a step further in setting out reasons for the decision by adding the observations, unlike the notice in the *Mogalakwena Local Municipality* matter. The question is whether the Court can, from these added observations, determine what executive obligations were breached. In argument for the Gauteng EC much was made that the key observations set out in the Annexure to the dissolution notice were not the only reasons for the decision and that the document must be read as a whole. The vague reference to general principles and the "back to basics strategy document" do not contribute to the observations in a meaningful way. In any event, much of the argument was in fact based on these key observations. It was never denied that these observations are the reasons for the decision and in fact are labelled by the Gauteng EC as "*a summary of the grounds for dissolution.*"[15]

[46] We must consider these observations to ascertain whether they disclose executive obligations and how these were not fulfilled and whether these may constitute exceptional circumstances. We consider these observations in no particular order. When we refer to an executive obligation not "fulfilled" reference includes both failure and/or inability to fulfil.

OBSERVATION 3: UNLAWFUL TENDERS

[47] The Gauteng EC refers to a finding by the Auditor-General that a tender awarded by the Municipal Council to an entity called Glad Africa was unlawful. However, what is not mentioned is that the Municipal Council already launched an investigation into the matter. This averment by the DA is merely baldly denied by the Gauteng EC. The setting aside of the Glad Africa Tender by this Court in February 2019 cannot be a basis for a dissolution decision only taken more than a year later in March 2020.

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[14] Section 139(3)(b) of the Constitution.
[15] Paragraph 96 of answering affidavit.

[48] The Premier, in the answering affidavit, states that there are "*allegations that the Appointment of Aurecon to dispose of municipal property is unlawful.*"[16] The Gauteng EC does not in the decision set out why based on the allegations the tender is in fact unlawful. In any event the Auditor-General has not found this tender to be unlawful. Once again the Premier in the answering affidavit does not address this tender further, excepting for a bare denial.

[49] The tender to PEU Capital Partners simply must be disregarded. It is common cause that this tender was not awarded by this Municipal Council and was set aside in October 2018.

[50] None of these tenders can constitute objective facts on which the Gauteng EC could base its decision to dissolve the Municipal Council. It cannot be disputed that these tenders could never have been relevant as they were awarded by a previous Municipal Council dispensation and have already been addressed and set aside. This Court thus need not even find whether they constituted executive obligations or amounted to exceptional circumstances.

OBSERVATIONS 5 & 6: FAILURE TO SPEND CONDITIONAL GRANTS

[51] The Gauteng EC sets out that the Municipal Council has not fulfilled an executive duty by failing to spend conditional grants resulting in a loss of money to National Treasury. The Premier expanded in the answering affidavit that not utilizing the grants translated to a failure of service delivery. Nowhere in the dissolution decision or the answering affidavit is the source of the Constitutional or Statutory duty identified whereby an obligation is placed on a Municipal Council to spend the grants. What services are being affected by not utilizing the grants are not set out. In any event it is common cause that the Municipal Council made comprehensive submissions on 21 February 2020 to the National Treasury in answer as to why the National Treasury should not reduce grant funding.

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[16] Paragraph 2.2.2.2 of Annexure DD.

[52] It is our view that nowhere in the dissolution decision can one find any identification of the mandatory obligation to spend grants. The answer to the DA's contention that this does not constitute an executive duty is expressed in the following terms by the Premier in the answering affidavit: "*It is also quite startling that the DA contends that 'here is no constitutional or statutory obligation to spend conditional grants.'" The grants must be spent because it is through expenditure that services can be rendered. Failure to spend translates to failure of service delivery.*"[17] This is a general and argumentative statement and does not constitute the identification of an executive obligation not fulfilled. Without reference to the mandatory versus discretionary obligation to spend grants this observation cannot be a ground for dissolving the Municipal Council.

[17] Paragraph 194 of answering affidavit.

OBSERVATION 7: SUSPENSION OF DEPARTMENT HEADS

[53] It is common cause that the City Manager suspended the Head of the Department of Human Settlements and the Head of the Department of Roads and Transport during 2019. They were on suspension for a year. However, despite the denial by the Premier in the answering affidavit that they were since reinstated, this does not assist the Gauteng EC. The DA corroborated its version, which we accept, that they were in fact reinstated with correspondence recording their reinstatement in November 2019 and January 2020 respectively.

[54] No reference is made, or could be made, to any executive obligation not fulfilled on the basis of this suspension issue. This was simply a labour dispute not giving rise to an executive obligation, which had in fact become resolved by the time the dissolution decision was taken. Clearly when the dissolution decision was taken the suspensions had become irrelevant and cannot be relied on as forming the basis of that decision. These suspensions cannot constitute non-fulfilment of an executive obligation.

OBSERVATION 8: WONDERBOOM NATIONAL AIRPORT (WONDERBOOM)

[55] It is undisputed that the there is a crisis regarding Wonderboom. The only factual basis set up in the dissolution decision is: "*widely reported crisis at the Wonderboom National Airport that includes issues of corruption.*"[18]

[56] Acknowledging the crisis regarding Wonderboom, the DA went to lengths to explain what remedial measures the Municipal Council had put in place to address the situation. It explained that such measure would be continued until the crisis has been remedied and Wonderboom could operate at an optimal standard. It explained that service delivery has been reinstated with the grass around the runway having now been cut and new windsocks installed. It also explained that Wonderboom is to be upgraded from category 2 to 5 by

[18] Annexure FA8.

commissioning renovations to the buildings which is in the process of being finalised.

[57] In the answer these facts are baldly denied by the Premier.[19] However, perusal of the answering affidavit shows that there is no reference to Wonderboom anywhere else other than the bald denials of the DA's version and the statement made in the observation. No mandatory executive obligation is identified and there are no facts to gainsay the facts put up by the Municipal Council that the crisis is acknowledged and a process to remedy the situation is implemented. We are of the view that the Wonderboom airport crisis, whilst of concern to the Gauteng EC, could not amount to an unfulfilled executive obligation as the Municipal Council has taken steps to remedy the situation. The Court must thus accept these facts and cannot find that an unidentified executive obligation has not been fulfilled.

OBSERVATION 9: UNAUTHORIED, IRREGULAR, FRUITLESS AND WASTEFUL EXPENDITURE (UIFW)

[58] In the dissolution decision reference is made to the Auditor-General flagging UIFW expenditure and that the Municipal Council has been slow to apply consequence management.

[59] The DA refers to the comprehensive report by the Speaker in response to the MEC"s directives of 14 January 2020 and attached the body of the document to the founding affidavit[20] wherein the issue of IUFW is addressed. The Premier has the following response to this in the answering affidavit: "*I deny that there was any response from the 'Municipality' for the reasons set out above.*"[21] Upon a reading of the "*above*" there is not one specific reference to IUFW as identified by the Auditor-General. There are general statements by the Premier like "*rampant corruption and irregular expenditure amounting to billions of Rands.*"[22]

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[19] Paragraph 197 of answering affidavit.
[20] Annexure FA28.
[21] Paragraph 167 of answering affidavit.
[22] Paragraph 99.8 of answering affidavit.

[60] The Premier did address the response from the Speaker but remarks that it was a personal response from the Speaker and not the Municipal Council and that the PEC Directives were accordingly never before the Municipal Council. It is further disputed that Mayor Mokgalapa could have signed the covering letter to the Speaker's response because he was on special leave at the time.

[61] The Court cannot ignore the response of the Speaker because the content of the response is never denied, except that it is referred to as a "*paperdump*"[23] because it was voluminous. In reply the DA confirms that the Mayor was still in office when he signed the letter. In law there is nothing wrong with two political office-bearers of the Municipal Council, while in office, to respond on behalf of the City. It is common cause that due to the collapse of the Municipal Council meetings as a result of the walkouts nothing could be served before the Council.

[62] The Court must thus accept the version of the DA that the IUFW expenditure had been addressed as set out in the response by the Speaker to the MEC's letter of 14 January 2020 with the appropriate reporting systems addressing any IUFW expenditure. We reiterate that, whether or not there is a failure to comply with an executive obligation involves a factual enquiry that must be determined objectively. The Premier has set out no objective facts upon which this could be said to have been an unfulfilled executive obligation and accordingly it cannot be said that the Municipal Council has failed to fulfil an executive obligation on these facts.

OBSERVATION 4: WATER SUPPLY TO HAMMANSKRAAL

[63] The DA identifies the executive obligation to supply water in terms of sections 27(1)(b) and 27(2) of the Constitution and section 4(2)(d) of the Systems Act. The obligation is formulated as to take reasonable steps to progressively realise the right of access to quality and sufficient water within available resources.[24]

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[23] Paragraph 74.1.1.

[24] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) para 50.

[64] The DA acknowledges that there is a water crisis in Hammanskraal and its surrounding areas. It sets out that the root cause of the problem is the Rooiwater Waste Water Treatment Works (WWTW) that is overloaded and as a result the Temba Water Treatment Plant (WTP) cannot purify the water to the required level.

[65] The DA explains that as an interim measure the eastern part of the area is supplied with piped water sourced from Magalies Water; the western part is supplied with piped water from the Rand Water Board and the central part is supplied water via tankers with water from both Magalies Water and Rand Water Board. It also states that steps have been taken to improve the quality of the water supplied by Temba WTP.

[66] The DA further explains that the Municipal Council was facing challenges from the cancellation of contracts of contractors who had not provided the necessary guarantees as well as the failure of the ANC and EFF members of the section 79 Utilities Oversight Committee to attend the January 2020 meeting, and subsequently the February 2020 meeting also collapsing with no EFF councillors attending and the ANC councillors leaving and blaming the Speaker.

[67] The Municipal Council has awarded a project to address the capacity of the WWTW and is now in phase 1. Phases 2 and 3 will cost more than 2 billion rand and the Municipal Council is engaging the Development Bank of South Africa to request funding.

[68] Annexure FA 36 reflects the memorandum of understanding concluded with the Ekurhuleni Water Care Company, the Department of Water and Sanitation and Magalies Water for interim intervention and maintenance on the WWTW and the WTP.

[69] A special Mayoral Committee was established to address Temba WTP. On 23 September 2019 the Committee brought out a report[25] which sets out a

[25] Annexure FA27.

range of interventions that the City has implemented to alleviate the crisis. In para 5 of the report the Committee concludes that these interventions will provide safe drinking water to Hammanskraal and surrounds.

[70] In response to these facts the Premier makes a bald denial in the answering affidavit. Nowhere else in the answering affidavit are any other facts pertaining to the water crisis in Hammanskraal set out.

[71] We are persuaded that that even though the Municipal Council had done its best to address the water crisis in Hammanskraal, the crisis remains unresolved. It is not in our view a crisis caused by the goings on in the Council meetings. Furthermore, whichever way one looked at this crisis, it must constitute an unfulfilled executive obligation i.e. the provision of quality and sufficient clean water to residents, in this instance, Hammanskraal residents. This is one matter that could have been the subject of targeted intervention by the Gauteng EC, in the spirit of cooperative governance. Instead the Gauteng EC elected to dissolve the Municipal Council, which on the facts before us is legally unsustainable. In our view, this on its own did not amount to enough circumstances to provide the Gauteng EC with the latitude to dissolve the Municipal Council.

OBSERVATIONS 1 AND 2: LEADERSHIP IN TSHWANE

[72] These observations are the high water-mark of the case for the Gauteng EC. It is common cause that there is no Mayor, Municipal Manager and Mayoral Committee and the last 7 meetings of the Municipal Council were not quorate due to the disruptions arising from the walkouts from Council meetings by ANC and EFF councillors thus paralysing the Municipal Council. In argument it was categorised as the best example of exceptional circumstances justifying the dissolution of the Municipal Council.

[73] At first blush dissolution of the Municipal Council on this ground may seem lawful and rational in solving the dead-lock. This must however be determined taking into account the jurisdictional factors in section 139(1)(c).

[74] The relationship between a local government and a provincial government is important in this matter. We need not reinvent the wheel as Van Zyl J in the well-reasoned judgment of *Mnquma Local Municipality* set out this relationship of a City with a Province as follows:

> "[42] On a reading of the provisions that deal with this structure of government there are in my mind four features that stand out: the first is the enhanced status of local government. Placed in historical context, local government under the new constitutional dispensation enjoys a far more enhanced status compared to what was previously the position. As opposed to being 'creatures of statute', in other words, owing their existence to and deriving their powers from provincial ordinances, municipalities now derive their existence and powers directly from the Constitution. Local government is therefore no longer regarded as a functional area of competence of the provinces. It is a distinctive sphere of government which is:
>
> > "... suggestive of an equality as between the concepts of national, provincial, and local governmental structures, as opposed to the more traditional hierarchical levels of power and importance."
>
> In terms of subsection 4 of section 151 the national or provincial government may not "compromise or impede a municipality's ability or right to exercise its powers or perform its functions."
>
> [43] A second aspect is that, while it provides for a governmental structure wherein each sphere of government has its own distinctive status, powers and functions, the constitutional framework establishes a relationship between the different branches of government based on co-operation, which is aimed at the advancement of inter-governmental participation and support.
>
> [44] Thirdly although the constitutional framework seeks to realise a local government structure that is a distinctive and autonomous sphere of government, it is important to recognise that it is not without limitations. Municipalities can only perform such powers and functions that they are legally permitted to perform.
>
> [45] A limitation that is important in the context of this judgement arises from the concept of co-operative government. Co-operative government not only relates to the provision of support and assistance to local government, but also envisages an aspect of supervision. Section 155(6) of the

> Constitution in fact pertinently provides that a provincial government must by legislative or other measures provide, not only for the support, but also for the monitoring of local government. In terms of subsection (7) both the national and provincial governments have legislative and executive authority to "see to the effective performance by municipalities of their functions ..." This provision underlines the fact that the autonomy of municipalities is relative. The duty to perform a monitoring function is accompanied by the right to take corrective measures. Intervention is authorised by the subject-matter of this judgment, namely, section 139 of the Constitution.
>
> [46] A fourth important feature that arises from the structure of government entrenched in section 40 of the Constitution is that it provides a forum for local community participation in the affairs of all levels of government, including local government level. By establishing a local government structure that is distinctive from the other spheres of government, and whose members are democratically elected, it entrenches democracy from the bottom up by providing for, what has been termed, 'grass-roots democracy.' Members of a municipal council are now elected by the members of the community which they serve."[26] [footnotes have been omitted]

[75] Taking the above into consideration, the Province acted rationally in looking into the deadlock in the Municipal Council in a supervisory role. But, what was the most appropriate action to be taken by the Gauteng EC?

[76] What happened is in the first instance the MEC accused the Speaker of misconduct. Then the MEC wrote to the Acting Speaker that the Gauteng EC had resolved to intervene in the Municipal Council in terms of section 139(1) and that the Gauteng Department of COGTA must immediately develop a plan to set out the steps to be taken to give effect to the Gauteng Government's obligation to support the Municipal Council. The MEC then focused his attention on the Speaker, confronting her with allegations of unbecoming conduct, suspended her, but withdrew the suspension then directed the Municipal Council to urgently institute disciplinary proceedings against her. When advised that he did not have the authority to give such instructions, the

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[26] *Mnquma Local Municipality supra* n 9 at paras 42 – 46.

MEC then resorted to asking for reasons from the Speaker as to why he should not in terms of the Code of Conduct for Councillors suspend the Speaker. He then in fact via the State Attorney asked why he should not appoint an advocate to investigate whether the Speaker had breached the Code of Conduct. It is then that Advocate Makola SC was appointed to do just that.

[77] About 5 weeks later, the MEC sent out a further letter to the Speaker in which purported directives in terms of section 139(1)(a) were issued. When confronted with the fact that in terms of section 139(1)(a) only the Gauteng EC could issue directives and not the MEC, the response was that the notice and directives were sent by the MEC *"as the official responsible for local government, on behalf of the entire Provincial Executive."*[27]

[78] The conduct of the MEC must then be seen as that of the official responsible for local government acting on behalf of the Gauteng EC. Although it is argued that the matters revolving around the Speaker are irrelevant, they are not. Instead of trying to resolve the dead-lock almost all of the action adopted by the Gauteng EC and the MEC is directed at the Speaker. If, as reiterated in the answering affidavit *"the issues regarding the misconduct of the Speaker are irrelevant to this case"*[28] why was there so much focus from the Province on the Speaker when it was not, according to the Premier, relevant to the matter at hand; i.e. the dead-lock?

[79] In the Systems Act there are simple ways to address the deviant conduct that bedevilled the Municipal Council. Sections 105 and 106 of the Systems Act gives the MEC the right to monitor a Council and the power to request information and appoint a commissioner to conduct an investigation where he has *"reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province."* The MEC missed an opportunity when

[27] Paragraph 158.
[28] Paragraph 160.

Mr. Noko, an official within his office, reported on the collapse of the meeting of the Municipal Council of 16 January 2020. He reported to the MEC that the Municipal Council showed signs of *"instability and is at risk of dysfunctionality".* His recommendations *inter alia* included that the MEC engage with the Speaker on this recurring collapse of the Municipal Council meetings and enquire into the legal advice provided to the Speaker during Council meetings; that the functionality of council, the multiparty structures, forums and committees be investigated with a view to enhance their effectiveness; that councillors be reminded of their roles and responsibilities, including the importance of ensuring that council business is successfully concluded at all times, (in particular when council meetings are convened); all councillors be trained on the Councillor Code of Conduct to remind them of their duties and responsibilities and that the costs of the collapsed meetings be investigated in order to determine the extent of possible UIFW expenditure.

[80] However the only action the MEC took was to "engage" with the Speaker in a full frontal attack. It is true that this Court need not make a finding on the issues relating to the Speaker, but an issue we can't avoid is to consider why was that the only action the MEC took having been provided with a full picture of what was going wrong in the Municipal Council as well as the recommendations provided in the report compiled for his office. The answering affidavit signed by the Premier sets out in detail that the Gauteng EC was aware of the collapse of Municipal Council meetings as well as the role of ANC and EFF councillors in causing these collapses. No basis is provided in the answering affidavit as to why only the Speaker was targeted for corrective action whilst there were other more and bigger issues at stake.

LESS INTRUSIVE MEASURES

[81] It is our view that the most direct cause of the Council's inability to conduct its business in council meetings was the continued disruptions of council meetings by ANC and EFF councillors staging walkouts. Such conduct was not prioritised nor addressed by the MEC, despite its centrality in the Council's conundrum. It is our view that the most effective manner in which this situation was to be addressed was to invoke the procedures ordained in Schedule 1, items 3 and 4, of the Systems Act, i.e. to address the councillors walking out and to enforce their statutory duty to attend meetings and stay in attendance. These provisions read as follows:

> "**3 Attendance at meetings**
>
> A councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member, except when -
>
> (a) leave of absence is granted in terms of an applicable law or as determined by the rules and orders of the council; or
>
> (b) that councillor is required in terms of this Code to withdraw from the meeting.
>
> **4 Sanctions for non-attendance of meetings**
>
> (1) A municipal council may impose a fine as determined by the standing rules and orders of the municipal council on a councillor for:
>
> (a) not attending a meeting which that councillor is required to attend in terms of item 3; or
>
> (b) failing to remain in attendance at such a meeting.
>
> (2) A councillor who is absent from three or more consecutive meetings of a municipal council, or from three or more consecutive meetings of a committee, which that councillor is required to attend in terms of item 3, must be removed from office as a councillor.
>
> (3) Proceedings for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure which each municipal council must adopt for the purposes of this item. The uniform standing procedure must comply with the rules of natural justice."

[82] An MEC, and the Courts, must not sanction councillors' conduct contrary to their Code of Conduct. Walking out of Council meetings does not serve the councillors' electorate and does not fulfil the constitutional and executive duties they were elected for. Staying in attendance will, due to the nature of the voting process, always result in decisions being taken by the Council. The Premier does not in the answering affidavit address the failure to act against the errant ANC and EFF councillors at all.

[83] The DA accepted that in exceptional circumstances the less restrictive means may not resolve the specific problem, but squarely raised the less restrictive means in the application, submitting that less restrictive means should have been resorted to instead of the drastic measure of dissolving the Council.[29] In opposition the Premier only refers to the less restrictive means with: *"To the extent that the court must consider less restrictive - which I deny is the standard- I submit that these were applied and it was considered that they were inadequate to address the real problem on the ground. The facts set out in the DA's own application do not make out a case for less restrictive means."* [30]

[84] This response does not raise a factual dispute; no facts are set up as to why the application of the Code of Conduct is inadequate. No facts are set out as to why the recommendations of Mr. Noko pertaining to the councillors were not taken seriously and implemented. With no factual dispute to determine, the Court must accept the version of the DA that the less intrusive means should have been applied.

[85] The Premier also relied on section 18 of the Structures Act:

> "(1) Each municipality must have a municipal council.
>
> (2) A municipal council must meet at least quarterly."

The Premier submitted that because the Municipal Council could not hold meetings to elect a mayor, municipal manager and mayoral committees the City is not discharging its statutory or executive obligations.

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[29] Paragraph 121 of the founding affidavit.
[30] Paragraph 17.3 of answering affidavit.

[86] It is common cause that the Municipal Council attempted to hold meetings to fill those very vacancies but the meetings were not quorate due to the walkouts. Not fulfilling one's duty as an elected councillor cannot be equated to exceptional circumstances as required by section 139(1)(c); it is dereliction of duties. The Premier relied on *Seatrans Maritime v Owners, MV Ais Mamas and Another* where the meaning of "exceptional circumstances" was considered:

> "What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of unusual nature; *something which is excepted in the sense that the general rule does not apply to it*; something uncommon, rare or different ..."[31] [our emphasis]

This submission can be neatly disposed of. Where sanctions are provided in the Code of Conduct for failure to attend council meetings then that is the remedy to be applied rather than dissolving the Municipal Council.

[87] What makes matters worse for the Gauteng EC is that the mandamus is not opposed, only the urgency. In this regard the following is stated in the answering affidavit: *"while not entering the merits of the mandamus (both interim and final), it disputes that the relief sought is urgent,* ***and opposes both the mandamus and interim mandamus only to the extent that they are sought on an urgent basis.***" On this aspect, if the council is hamstrung by the walkouts and inquorate meetings and that fact constitutes non-fulfilment of executive duties, it does not constitute exceptional circumstances on the facts, but in any event the less intrusive measures should have been applied. As we have stated above, targeting the errant councillors would have enabled the MEC and the Gauteng EC to address the root cause of the Municipal Council's inability to convene council meetings and thereby transact important council business in that forum.

[88] It bears emphasis that the importance of serving in a municipal council is that party political affiliation and agendas are eschewed for the greater good of the

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[31] 2002 (6) SA 150 (C) at 156H-157C.

communities served by those councils. The essence of this statement is that every municipal councillor must comply with the Constitutional injunction to municipalities, to prioritise the basic needs of local communities and to provide the basic minimum services to all members of such local communities.[32]. The uncontested evidence in this case is that the overarching injunction was lost to the councillors who instead prioritized their own party political agendas and brought the council to its knees. Walking out of council meetings and disrupting such meetings in a concerted manner could never have been in the interests of the Tshwane local community. This conduct is the direct and predominant source of the Tshwane Council's paralysis. It is conduct that the MEC and by extension the Gauteng EC were fully aware of. The MEC as the Provincial leader charged with overseeing the affairs of the Council had the obligation to guide and assist the Council to deliver on its obligations. The MEC had the Systems Act and the Code at his disposal to intervene and assist the Council to remain stable. He could have utilized the Code to bring truant councillors to book. The evidence before us is that he only targeted the Speaker who rebuffed him and he stopped there. Neither the MEC nor the Premier have taken this Court into their confidence and disclosed why they never used the Code in particular to discipline those members of council who were crippling the Municipal Council and preventing it from fulfilling its obligations. This was a more direct form of intervention that would have addressed the core of the challenge faced by the Municipal Council. It was by its nature also less intrusive and more appropriate in the circumstances of this matter.

THE DISSOLUTION DECISION MUST BE CAPABLE OF RESOLVING THE RELEVANT EXECUTIVE OBLIGATION FOR THE PURPOSE FOR WHICH IT WAS ADOPTED

[89] A decision in terms of section 139(1) (c) is only appropriate if it is likely to ensure the relevant obligation will be fulfilled.[33] Appointing an Administrator is a stop gap option that is meant to pave the way for an election. Furthermore, an election as a result of the dissolution decision may in fact result in many of the same councillors returning to their positions again resulting in a hung Municipal

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[32] Section 73(1)(a) and (c) of the Systems Act

[33] *Mnquma Local Municipality supra* n 9 at paras 81 and 82.

Council. There is no guarantee that a fresh election will resolve the relevant obligation. It is an option more reliant on hope than certainty and as such cannot, objectively, be viewed as capable of resolving the problem at hand.

[90] A mandamus, to the effect that errant councillors must attend meetings and stay in attendance absent a lawful excuse , would be an immediate and certain remedy to the inability of the Council to appoint a Mayor, Mayoral Committee and a Municipal Manager. A mandamus will also solve the deadlock of the Municipal council due to a lack of a quorum.

[91] We have further considered the submissions that the dissolution decision was the most drastic under the circumstances, as propounded by the DA. That such a decision is drastic is indisputable. In *Premier of the Western Cape and Others v Overberg District Municipality and Others*[34] the court held that:

> "The reason why dissolving the council is specifically mentioned, as I see it, is that it is the most drastic step the Provincial Executive can take, while the two steps referred to in (a) and (b) are concomitant to the most drastic step."

[92] In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [35] the court held that section 139 sets out a process. This means that, once the Provincial Executive has decided to intervene under section 139(1), it must follow the steps set out in the section: issuance of a directive; assumption of responsibility; and, finally, in exceptional circumstances, dissolution of the council. With each step, the authority of the Provincial Executive increases while that of the municipal council decreases. In the *Mogalakwena Local Municipality* case, the court stated that:

> "Furthermore, s 139(1) provides that an intervention might be effected by the taking of any appropriate steps by the province. Subsections (1), (2) and (3) are only examples of such steps. In my respectful view, a dissolution might well require a prior directive if it would be appropriate that one be given. In

[34] [2011] ZASCA 23; 2011 (4) SA 441 (SCA) at para 20.
[35] [1996] ZACC 24; 1997 (2) SA 97; 1997 (1) BCLR 1 at para 120. See also *Mnquma Local Municipality supra* n 9 at para 17.

> deciding Mnquma, the learned judge considered, convincingly in my respectful view, what the nature of appropriate substantive steps would be but did not, apparently, consider whether a directive or other step would be appropriate before a decision to dissolve was made."[36]

[93] Section 139(5) directs that should a municipality seriously and persistently fail to provide basic services or meet financial commitments as a result of a financial crisis, the Provincial Executive must impose a recovery plan that "binds the municipality in the exercise of its legislative and executive authority".[37] Authors Hoffman-Wanderer and Murray further state that:

> "If the council then fulfils its legislative functions to the extent necessary to give effect to the recovery plan, the Provincial Executive may not assume those functions and may only assume responsibility for the plan's implementation to the extent necessary. If, however, the council does not fulfil its legislative functions — approval of a budget or other revenue raising measures necessary to give effect to the recovery plan — the Provincial Executive is obliged to dissolve the council, appoint an administrator and assume certain, limited legislative functions. In other words, the assumption of legislative functions is permitted only if the council is unable or unwilling to perform such functions itself and, this being the case, the council must first be dissolved."

Section 139(1)(c) in turn states that a province may only dissolve a council in exceptional circumstances.

[94] We have pointed out in this Judgment that there were less intrusive measures that could have been adopted by the Gauteng EC to address the root cause of the Council's inability to fulfil its core responsibilities. Such measures, as we have pointed out, were not considered nor invoked despite a specific recommendation to the MEC in the Noko report. This is what impels us to conclude that taking the dissolution decision was inappropriate.

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[36] *Mogalakwena Local Municipality supra* n 13 at para 22.
[37] Section 139(5)(a)(ii) of the Constitution.

THE OPPOSITION OF THE ANC

[95] The ANC belatedly filed an opposing affidavit with voluminous attachments. The DA opposed the condonation application for the late filing of this affidavit, but did not pursue the condonation application in argument.

[96] Even if the Court should condone the late filing of the affidavit it was of no assistance whatsoever to the Court. The premise of the affidavit was totally misconceived. As counsel for the ANC put it, it was to provide the Court with information that was in the public interest. A Court can only entertain relevant, appropriate, germane and useful evidence to the issues before it. The ANC's answering affidavit sought to deal with issues that were not relevant for the resolution of the dispute between the Council and the Gauteng EC. Its main purpose was to attack the DA and its councillors in the Municipal Council.

[97] An attack on individual DA councillors as acting irregularly pertaining to certain issues, or being labelled as *"not an innocent"*, and not credible has nothing to with the issue before Court. The issue is: must the dissolution decision be reviewed and set aside and the mandamus granted. The dissolution decision does not refer to the conduct of individual councillors as a basis for the decision, nor are councillors addressed in the dissolution decision. All this information is thus irrelevant.

[98] The information provided under the heading; "WHERE THE DA LED GOVERNMENT GOT IT WRONG" is for the exact same reasons as set out in the above paragraph irrelevant. The averred irregular appointments of certain staff members was not a reason for the dissolution decision and must be ignored.

[99] The tenders awarded are referred to in the observations and do form part of the dissolution decision. The ANC however did not put facts before the Court that

were not part and parcel of the reasoning of the decision-maker when making his decision. The ANC cannot justify the decision on behalf of the decision-maker.

[100] The conduct of the Speaker according to the Premier was of no consequence in him coming to his decision and any information pertaining thereto is irrelevant to the issue before us.

[101] We point out that in its affidavit the ANC acknowledges that the walkouts were indeed a challenge to the Council. The affidavit, however, does not provide the Court with an explanation as to what was the objective of this conduct and why this conduct was lawful in view of the Code of Conduct for Councillors.

[102] The ANC referred to the absence of ward committees, but the dissolution decision did not refer thereto and need not be dealt with.

[103] The Court, dealing with urgent matters, cannot refer to all the irrelevant matters and set out why they are irrelevant. It suffices to find that upon a perusal of the content of the affidavit the information therein does not take the matter any further.

THE PROCEDURAL FAIRNESS OF THE DISSOLUTION DECISION

[104] In urgent court time is a luxury. In view of the finding that the dissolution decision was unlawful we do not find it necessary to address whether the process was procedurally unfair and irrational. We did address the need to identify the specific executive obligations.

THE ULTERIOR PURPOSE FOR WHICH THE DECISION WAS TAKEN

[105] Based on all our aforegoing reasons regarding the substantive invalidity of the dissolution decision, we find it unnecessary to pronounce ourselves on whether in taking the dissolution decision, the Gauteng EC was actuated by an ulterior motive. This is largely due to the finding regarding the substantive unlawfulness of the decision.

[106] The DA seeks final relief in the form of a mandamus compelling those ANC and EFF councillors, who have failed to attend meetings or walked out of meetings, to attend and remain in attendance at municipal council meetings. It seeks final relief or, in the alternative, interim relief. In their submissions, the respondents have not dealt with the issue of whether final relief should be granted but only with whether interim relief should be granted. In our view, this is a case that cries out for final relief. Interim relief would not meaningfully address the issue at hand. We have already mentioned in paragraph [92] above some of the duties of municipal councillors. These duties have a statutory basis in section 54 of the Systems Act which provides:

> 'The Code of Conduct contained in Schedule I applies to every member of a municipal council.'

The Code of Conduct in turn provides:

> **Attendance at meetings**
> 3. A councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member, except when-
> a. leave of absence is granted in terms of an applicable law or as determined by the rules and orders of the council; or
> b. that councillor is required in terms of this Code to withdraw from the meeting.'

Although item 4 of the Code provides for sanctions that can be imposed by a municipal council for failure to abide by item 3, as we said, the municipal council is hamstrung from doing so. In these circumstances, a mandamus in the form of final relief is, in our view, an appropriate remedy that this Court should grant.

COSTS

[107] The costs must follow the result; this was the argument of both sets of counsel for the DA and the Premier and the Court sees no reason why there must be a deviation from this trite principle. Counsel for the DA asked for the costs of three counsel. There were four counsel representing the DA and four counsel representing the Premier, the Gauteng EC and the MEC. In view of the importance, the complexity and the copious amount of work, the costs for three counsel are warranted.

[108] In view of the COVID-19 virus pandemic, the suggested draft order contains a suspension of the requested orders until five days after the nationwide lockdown enforced by the National Coronavirus Command Council and announced by the President of the Republic of South Africa on 23 March 2020 is lifted.

[109] In the circumstances the following order is granted:

1. The forms and service provided for in the Uniform Rules are dispensed with and this matter is heard as an urgent application in terms of Uniform Rule 6(12).

2. The decision of the Gauteng Executive Council to dissolve the City of Tshwane Metropolitan Municipality, taken on 4 March 2020 and communicated to the applicants on 10 March 2020 ("the dissolution decision"), is reviewed, declared invalid and set aside.

3. The thirteenth and fourteenth respondents are ordered, in terms of the Code of Good Conduct of Councillors, to attend and remain in attendance at all meetings of the City of Tshwane Metropolitan Municipality Council unless they have a lawful reason to be absent.

4. The orders in paragraphs 2 and 3 are suspended until five days after the level 5 nationwide lockdown, enforced by the National Coronavirus Command Council and announced by the President of the Republic of South Africa on 23 March 2020, has been lifted.

5. During the period of suspension:

5.1 The administrator appointed by the second respondent in respect of the City of Tshwane Metropolitan Municipality shall be entitled to exercise the powers conferred by such appointment; and

5.2 The dissolution decision shall have no impact on the entitlement of the Councillors of the Municipal Council of Tshwane to continue to receive their salaries and benefits.

6. The costs of this application are to be paid by the first, second, fifth and seventh respondents, jointly and severally, including the costs of three counsel.

D. MLAMBO
JUDGE-PRESIDENT OF
THE GAUTENG DIVISION, PRETORIA

I agree

S. POTTERILL
ACTING DEPUTY JUDGE-PRESIDENT OF
THE GAUTENG DIVISION, PRETORIA

I agree

N. RANCHOD
JUDGE OF
THE GAUTENG DIVISION, PRETORIA

DATE OF THE HEARING: 24 March 2020
DATE OF THE JUDGMENT: 29 April 2020

APPEARANCES

FOR APPLICANTS:	ADV. S. BUDLENDER SC
	ADV. N. FERREIRA
	ADV. M. MUSANDIWA
	ADV. I. LEARMONTH
INSTRUCTED BY:	MINDES INC
FOR 1ST, 2ND and 5TH RESPONDENTS:	ADV. T. NGCUKAITOBI SC
	ADV. N. LUTHULI
	ADV. C. TABATA
	ADV. T. RAMOGALE
INSTRUCTED BY:	STATE ATTORNEY, JOHANNESBURG
FOR 7TH RESPONDENT:	ADV. L.A. MMUSI
INSTRUCTED BY:	MAKHUBELE ATTORNEYS INC.