



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Cases CCT 82/20 and CCT 91/20

Case CCT 82/20

In the matter between:

<b>PREMIER, GAUTENG</b>	First Applicant
<b>EXECUTIVE COUNCIL, GAUTENG</b>	Second Applicant
<b>MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG</b>	Third Applicant
and	
<b>DEMOCRATIC ALLIANCE</b>	First Respondent
<b>RANDALL MERVYN WILLIAMS</b>	Second Respondent
<b>CHRISTO MAURITZ VAN DEN HEEVER</b>	Third Respondent
<b>ZWELIBANZI CHARLES KHUMALO</b>	Fourth Respondent
<b>MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS</b>	Fifth Respondent
<b>CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES</b>	Sixth Respondent
<b>CITY OF TSHWANE METROPOLITAN MUNICIPALITY</b>	Seventh Respondent
<b>AFRICAN NATIONAL CONGRESS</b>	Eighth Respondent
<b>ECONOMIC FREEDOM FIGHTERS</b>	Ninth Respondent
<b>CONGRESS OF THE PEOPLE</b>	Tenth Respondent

<b>AFRICAN CHRISTIAN DEMOCRATIC PARTY</b>	Eleventh Respondent
<b>PAN AFRICANIST CONGRESS OF AZANIA</b>	Twelfth Respondent
<b>FREEDOM FRONT PLUS</b>	Thirteenth Respondent
<b>ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE AFRICAN NATIONAL CONGRESS</b>	Fourteenth Respondent
<b>ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ECONOMIC FREEDOM FIGHTERS</b>	Fifteenth Respondent
<b>REMAINING TSHWANE COUNCILLORS</b>	Sixteenth Respondent
<b>SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE</b>	Seventeenth Respondent
<b>ELECTORAL COMMISSION</b>	Eighteenth Respondent

Case CCT 82/20

In the matter between:

<b>ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ECONOMIC FREEDOM FIGHTERS</b>	First Applicant
<b>ECONOMIC FREEDOM FIGHTERS</b>	Second Applicant
and	
<b>DEMOCRATIC ALLIANCE</b>	First Respondent
<b>RANDALL MERVYN WILLIAMS</b>	Second Respondent
<b>CHRISTO MAURITZ VAN DEN HEEVER</b>	Third Respondent
<b>ZWELIBANZI CHARLES KHUMALO</b>	Fourth Respondent
<b>PREMIER, GAUTENG</b>	Fifth Respondent

<b>EXECUTIVE COUNCIL, GAUTENG</b>	Sixth Respondent
<b>MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS</b>	Seventh Respondent
<b>THE NATIONAL COUNCIL OF PROVINCES</b>	Eighth Respondent
<b>MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG</b>	Ninth Respondent
<b>CITY OF TSHWANE METROPOLITAN MUNICIPALITY</b>	Tenth Respondent
<b>AFRICAN NATIONAL CONGRESS</b>	Eleventh Respondent
<b>CONGRESS OF THE PEOPLE</b>	Twelfth Respondent
<b>AFRICAN CHRISTIAN DEMOCRATIC PARTY</b>	Thirteenth Respondent
<b>PAN AFRICANIST CONGRESS OF AZANIA</b>	Fourteenth Respondent
<b>FREEDOM FRONT PLUS</b>	Fifteenth Respondent
<b>REMAINING TSHWANE COUNCILLORS</b>	Sixteenth Respondent
<b>SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE</b>	Seventeenth Respondent
<b>ELECTORAL COMMISSION</b>	Eighteenth Respondent

Case CCT 91/20

In the matter between:

<b>AFRICAN NATIONAL CONGRESS</b>	Applicant
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and

<b>DEMOCRATIC ALLIANCE</b>	First Respondent
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<b>RANDALL MERVYN WILLIAMS</b>	Second Respondent
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<b>CHRISTO MAURITZ VAN DEN HEEVER</b>	Third Respondent
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<b>ZWELIBANZI CHARLES KHUMALO</b>	Fourth Respondent
<b>PREMIER, GAUTENG</b>	Fifth Respondent
<b>EXECUTIVE COUNCIL, GAUTENG</b>	Sixth Respondent
<b>MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG</b>	Seventh Respondent
<b>ECONOMIC FREEDOM FIGHTERS</b>	Eighth Respondent
<b>ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ECONOMIC FREEDOM FIGHTERS</b>	Ninth Respondent

**Neutral citation:** *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* [2021] ZACC 34

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

**Judgments:** Mathopo AJ (majority): [1] to [132]  
Jafta J (dissenting): [133] to [236]  
Mogoeng CJ (dissenting): [237] to [260]

**Heard on:** 10 September 2020

**Decided on:** 4 October 2021

**Summary:** Section 139(1) of the Constitution — dissolution — exceptional circumstances — 14(4) of Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000 — conduct of councillors

Direct appeal— leave to appeal dismissed — jurisdictional facts did not exist to warrant dissolution — dissolution as a last resort

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## **ORDER**

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On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

In CCT 82/20 and CCT 91/20:

1. In respect of the applications for direct leave to appeal:
  - (a) the applications are granted.
2. In respect of the appeals:
  - (a) the applicants' appeals are dismissed;
  - (b) the appeal in relation to the mandamus made by the High Court is upheld; and
  - (c) Paragraph 3 of the order of the High Court is set aside and replaced with the following:

“The Member of the Executive Council for Co-operative Governance and Traditional Affairs, Gauteng is ordered to invoke his powers in terms of item 14(4) of Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000, to appoint a person or a committee to investigate the cause of the deadlock of the City of Tshwane Metropolitan Municipal Council and to make a recommendation as to an appropriate sanction.”
3. The applicants are to pay the respondents costs including the costs of two counsel where so employed.

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## **JUDGMENT**

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Mathopo AJ (Khampepe J, Majiedt J, Theron J and Victor AJ concurring):

[1] “Legality . . . draws its lifeblood from multiple texts of the Constitution and lies at the structural heart of our constitutional democracy.”<sup>1</sup> This case concerns a dispute between organs of state in the provincial and local government spheres. It implicates the constitutionally-ordained powers of a provincial executive to intervene and dissolve a municipality in terms of section 139(1)(c) of the Constitution, on the basis that the City of Tshwane Metropolitan Municipal Council (Municipal Council or Council) failed or was unable to fulfil its executive obligations in terms of the Constitution and related legislation. The genesis of this case is the breakdown of the cooperation agreement between the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF) relating to the Municipal Council.

[2] The DA contests the exercise of power by the Premier of Gauteng (Premier), the Provincial Executive authority responsible for the dissolution of the Municipal Council. In turn, the Premier asserts that he validly exercised his power to dissolve the Municipal Council in terms of section 139(1)(c) of the Constitution. This divergence involves, inter alia, a debate about the interpretation of section 139(1)(c), which provides:

“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—

...

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

[3] These issues emanate from an application by the Premier and the EFF for leave to appeal directly to this Court against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). In its judgment and order, the

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<sup>1</sup> Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 613.

High Court reviewed and set aside the decision of the Gauteng Executive Council to dissolve the Municipal Council (dissolution decision).<sup>2</sup> It further ordered the African National Congress (ANC) and EFF councillors “in terms of the Code of Good Conduct of Councillors, to attend and remain in attendance at all meetings of the Municipal Council unless they have a lawful reason to be absent”.<sup>3</sup>

### *Parties*

[4] There are three applications. In the first application, filed on 7 May 2020, the Premier, the Gauteng Executive Council and the Member of the Executive Council for Co-operative Governance and Traditional Affairs, Gauteng (MEC), are the first, second and third applicants. In the second application, filed on 8 May 2020, All Tshwane Councillors who are Members of the EFF, and the EFF, are the first and second applicants respectively. In the third and final application, dated 20 May 2020, the ANC is the applicant. In all three applications the DA, Randall Mervyn Williams, Christo Mauritz van den Heever and Zwelibanzi Charles Khumalo are the first, second, third and fourth respondents, respectively. They will collectively be referred to as the DA or the respondents. The remaining respondents did not participate in these proceedings.

### *Factual background*

[5] On 4 March 2020, the Gauteng Executive Council resolved to dissolve the Municipal Council. The dissolution decision was based on the fact that the Municipal Council had reached a deadlock. No parties therein could win a debate or gain an advantage, and no action could be taken by the Municipal Council. The Municipal Council had no Mayor, Mayoral Committee and no Municipal Manager. Thus, the Municipal Council was unable to conduct its business and could not serve its residents. The result of the dissolution decision was that the Municipal Council was immediately dissolved and an administrator had to be appointed. Fresh elections throughout the City

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<sup>2</sup> *Democratic Alliance v The Premier for the Province of Gauteng* 2020 JDR 0700 (GP) (High Court judgment) at para 109.

<sup>3</sup> *Id.*

of Tshwane Metropolitan Municipality (Municipality) were meant to take place within three months of the dissolution of the Municipal Council.<sup>4</sup>

[6] The deadlock manifested in the Municipal Council's inability to convene and conduct council meetings, transact, and take necessary decisions in line with its responsibilities. This situation existed as a direct consequence of the disruptions of its meetings and the walkouts by ANC and EFF councillors – thus depriving the Municipal Council of the necessary quorum.

[7] The inability of the Municipal Council to convene and retain the necessary quorum dates back to 27 September 2018. There were further failed council meetings on 25 April, 25 July and 29 August 2019. This trend continued on 28 November 2019 when the Municipal 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.

[8] In a special meeting on 5 December 2019, the Municipal Council called for a motion of no confidence in the Speaker, and to proceed in a similar motion against the Mayor. The Speaker recused herself, but the ANC and EFF councillors prevented the acting Speaker from fulfilling his duties. The meeting was adjourned after a resolution was passed to appoint a new acting Speaker.

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<sup>4</sup> This is the automatic effect of section 159 of the Constitution which provides that:

- “(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
- (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
- (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.”



[9] On 6 December 2019, the MEC wrote to the Speaker, effectively laying the blame on her for the collapse of the Municipal Council meeting the previous day. In this letter, the MEC stated that the Speaker recused herself from presiding over that council meeting without a valid reason. The MEC further accused the Speaker of failing to execute her duties in contravention of item 2 of Schedule 1 of the Code of Conduct for Councillors (the Code) of the Local Government: Municipal Systems Act<sup>5</sup> (Systems Act).<sup>6</sup>

[10] On the same day, the Gauteng Executive Council resolved to invoke section 139(1), read with section 154(1) of the Constitution.<sup>7</sup> This decision was conveyed by the MEC to the acting Speaker in a letter dated 6 December 2019. In that letter, the Gauteng Executive Council stated that it took the decision upon consideration of a detailed report on the state of affairs of the Municipal Council, with reference to finance management, service delivery, governance (including issues of maladministration and corruption) and institutional capacity.

[11] On 18 December 2019, the Speaker responded to the MEC's letter, inter alia, stating that a section 139 intervention was not the most appropriate method to ensure service delivery to the residents. The Speaker complained that the letter was vague and that it was impossible to determine whether the intervention was invoked in terms of section 139(1)(a), (b), or (c). It further pointed out that the letter failed to identify the executive obligations that the Municipal Council had not complied with, and that no reasons fulfilling the necessary requirements for the imposition of a section 139(1) intervention were advanced. The response stated that no engagement took place with the Municipal Council prior to the decision being taken and the Gauteng Executive Council failed to engage with the Municipal Council to provide dedicated support to

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<sup>5</sup> 32 of 2000.

<sup>6</sup> High Court judgment above n 2 at para 12.

<sup>7</sup> Section 154(1) of the Constitution reads:

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

assist it in addressing any of the matters raised. Lastly, the Speaker provided detailed answers to the concerns raised in the MEC's letter relating to service delivery, the provision of mobile drinking water tankers, sanitation services and the issue of the water quality in Hammanskraal.

[12] On 27 December 2019, the DA succeeded in suspending the resolution taken at the council meeting of 5 December 2019. 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 the Municipal Council. He further reiterated that the earlier decision to intervene, through the plans developed by the Department of Co-operative Governance and Traditional Affairs (COGTA), was appropriate in the circumstances and was not to be disturbed. The letter in the relevant part provides:

“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 139(1)(a) of the Constitution, as an appropriate step, issue the directions as embedded in the attached Annexure “A” which I implore the City to comply with within the specified timeframes.”

[13] In that letter, the MEC annexed a document containing what are termed directives to the Municipal Council. The directives set out the failings of the Municipal Council as follows:

- (a) Failing to execute or render uninterrupted services for communities.
- (b) Failure to adequately address water and electricity losses.
- (c) Inadequate revenue collection and debtor management.
- (d) Weaknesses in governance and accountability:

- (i) Corruption and maladministration.
- (ii) Unauthorised, irregular, fruitless and wasteful expenditure (UIFW).
- (iii) Weak contract management (Glad Africa: Aurecon tender fraud, fuel tender fraud, Wonderboom airport, smart meter).
- (iv) Recurring audit and implementation of the audit plans.
- (v) Inability of the City to spend on grants.
- (vi) Failure to fill senior management positions.
- (vii) Failure to finalise disciplinary proceedings of senior managers.
- (viii) Lack of transparency and compliance with regards to the separation agreement between former City Manager and Municipal Council.
- (ix) Delayed ward committee establishment.
- (x) Connectivity failures in Centurion Satellite Disaster Management Centre.
- (xi) Inadequate capacity in Municipal Disaster Management Centre (MDMC) due to high vacancy rate.

[14] These directives in effect set out what, according to the Gauteng Executive Council, were the areas that required attention, as well as deadlines for the formulation, implementation, and reporting on action plans or requisite remedial action. These deadlines ranged from 31 January 2020 to 30 September 2020.

[15] On 16 January 2020, a Municipal Council meeting was convened to consider the motion of no confidence against the Mayor, the Speaker, 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 several points of order raised by the councillors regarding the order in which the motions of no confidence were to be dealt with. The Speaker contended that the rules and by-laws of the Municipality empowered her to determine the order of business.

[16] Mr Matsobane Nkoko, an official from the office of the MEC, was sent to observe and report on that meeting. He produced a report in which he concluded that the Speaker did not appear concerned that her refusal to cite anything other than the law as her reason for refusing to reorder the meeting agenda was likely to result in the meeting collapsing. The councillors did not provide reasons for wanting the agenda reordered either. Mr Nkoko further concluded that the Municipal Council showed serious signs of instability and the risk of dysfunctionality; and that councillor walkouts appeared to be a common occurrence that often collapsed council meetings. He therefore recommended that the MEC engage with the Speaker; that the functionality of the Municipal Council be investigated; and that councillors be reminded of their roles and duties, and be re-trained on the Code.

[17] On 17 January 2020, the MEC wrote to the Speaker requesting an audience with her to discuss the collapse of the Municipal Council meetings held on 5 December 2019 and 16 January 2020. He stated that his primary objective was to ensure the stability of the Municipality, and that he made this request in the spirit of section 154 of the Constitution (in the spirit of co-operative governance). The Speaker did not honour this invitation.

[18] On 23 January 2020, the MEC issued a press statement suspending the Speaker as a member of the Municipal Council. On the following day, the Speaker and the DA launched an application to set aside that decision on the basis that it was made *ultra vires* (without legal authority). On 27 January 2020, the MEC, on the advice of 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 that the Municipal Council had to urgently convene a disciplinary hearing against the Speaker. The Chief Whip, in a letter dated 29 January 2020, explained to the MEC that he did not have the authority to issue a directive pertaining to disciplinary steps.

[19] On 30 January 2020, once again a properly convened Municipal Council meeting had to be postponed due to a walkout by ANC and EFF councillors resulting in a loss

of the necessary quorum. The councillors in question took issue with the fact that the Chief Whip refused to read out the letter that he had received from the MEC on 28 January 2020 *verbatim* (word for word). Again, Mr Nkoko was present at the meeting. He produced another report wherein he found that the Speaker intended to frustrate councillors, through a dispute on the interpretation of the law, and resulted in the Municipal Council meeting, once again, collapsing. He observed that the councillors of the opposition party felt that it was not sufficient for the Chief Whip to merely notify them of his receipt of a letter from the MEC and withhold the contents thereof. Mr Nkoko also found that councillors had a proclivity to walk out and collapse council meetings whenever there were differences in interpretations of the rules, and that the Municipal Council had reached the point of dysfunctionality. Mr Nkoko recommended that, even though the Speaker had refused to meet with the MEC, the MEC should continue to engage with her; a Commission of Inquiry should urgently be established by the MEC to determine the reasons for the council's collapse and dysfunctionality; and that recommendations should be made by the COGTA Legal Service Unit for intervention options available to the MEC.

[20] On the same day as the Municipal Council meeting, the Chief Whips of the ANC and EFF referred the conduct of the Speaker and the Chief Whip of the DA to the MEC, alleging that the Speaker had contravened the Code and requested that urgent disciplinary proceedings be instituted against her.

[21] On 2 February 2020, the Speaker wrote to the MEC, in response to his letter of 16 January 2020, setting out the events of the meeting of 16 January 2020. The MEC responded to the Speaker the following day calling for reasons why he should not intervene in respect of her conduct. On 4 February 2020, the DA responded to the MEC's letter to the Speaker, stating that he had no authority to intervene and that his allegations of misconduct had no merit. On the same day, the ANC launched an urgent application in the High Court seeking to compel the Municipal Council to meet and to compel disciplinary proceedings against the Speaker. The DA filed its answering affidavit on 6 February 2020 and the ANC withdrew its application on the morning of

the hearing. On the same day, the State Attorney, on behalf of the MEC, called for reasons as to why the MEC should not appoint a state advocate to investigate the Speaker's alleged misconduct.

[22] On 7 February 2020, the Speaker responded to the directives attached to the MEC's letter dated 14 January 2020. In this document, she detailed action plans and programmes undertaken by the Municipal Council to address the directives issued by the Gauteng Executive Council through the office of the MEC (February response).

[23] On 19, 27 and 28 February 2020, Municipal Council meetings were postponed as not enough council members attended to form a quorum. On 4 March 2020, the MEC wrote to the Speaker enquiring whether the section 139(1)(a) directives had been presented to the Municipal Council. The MEC gave the Speaker three days within which to respond. However, on the same day, the Gauteng Executive Council dissolved the Municipal Council. On 5 March 2020, the Gauteng Provincial Government issued a press statement announcing the resolution of the Gauteng Executive Council to dissolve the Municipal Council and place it under administration in terms of section 139(1)(c) of the Constitution. On 10 March 2020, the DA and the Municipality, for the first time, were presented with the Dissolution Notice containing nine key observations for the dissolution decision. The decision set in motion an urgent application instituted by the DA.

### *Litigation history*

#### *High Court*

[24] The DA launched an urgent application in the High Court seeking an order reversing the decision of the Gauteng Executive Council to dissolve the Municipal Council on the basis that the action taken by the Premier was drastic and failed to have regard to other less restrictive means. The DA alleged further that the Premier failed to identify executive obligations which the Municipal Council had failed to fulfil. Its submission was that measures were taken by the Municipal Council to address the

unfulfilled obligations that were identified, which were among the nine key observations set out in the Dissolution Notice. Furthermore, the dissolution was not an appropriate step in the circumstances, and there were no exceptional circumstances warranting it. Lastly, it contended that there were a number of textual and contextual indicators in section 139(1)(c), which showed that the power of the Premier to dissolve the Municipal Council had to be preceded by engagement or consultation. Thus, the DA contended, the dissolution decision was irrational.

[25] The Premier opposed the application and argued that the dissolution decision was a sequel to the section 139(1)(a) intervention of December 2019 and the MEC's directives issued in January 2020. He disputed the averment that the decision was not taken in accordance with the requirements of procedural fairness or rationality by contending that the Municipal Council, through the Speaker and the Mayor, failed to properly engage with the concerns of the Gauteng Provincial Executive. Importantly, he contended that the order sought was not competent because section 139(1)(c) gives the Premier the power to dissolve the Municipal Council if exceptional circumstances exist warranting such a step. He added that the collapse of several council meetings showed that the Municipal Council was dysfunctional, and thus unable to fulfil its executive obligations as mandated by the Constitution and relevant legislation. This impacted severely on the residents of the Municipality and, as a result of this protracted impasse, the residents were suffering harm from the inability of the Municipal Council to perform its duties. These failures were out of the ordinary, exceptional and left the Premier with no choice but to invoke section 139(1)(c). He criticised the Speaker and the Chief Whip by describing their actions as obstructive to the efforts of the MEC to resolve the crisis. Finally, the Premier vehemently disputed the assertion that the dissolution decision was taken hastily without any rational basis and that the section required that less restrictive means be considered before dissolving the Municipal Council – an aspect to which I will return later in the judgment.

[26] In a comprehensive judgment, the High Court conducted a detailed examination to determine whether the nine key observations provided in the Dissolution Notice

disclosed executive obligations; whether and how these were unfulfilled; and whether they constitute exceptional circumstances warranting the dissolution of the Municipal Council. These key observations included: (a) unlawful tenders, (b) failure to spend conditional grants, (c) suspension of department heads, (d) Wonderboom National Airport, (e) unauthorised, irregular, fruitless and wasteful expenditure, (f) leadership in the Municipality, and (g) the water crisis in Hammanskraal. The High Court rejected all of them, save for the water crisis in Hammanskraal, which it found gave rise to an executive obligation that the Municipal Council failed to fulfil. However, the High Court found that the water crisis should have been the subject of targeted intervention by the provincial government, in the spirit of co-operative governance; and that such a failure was insufficient to justify dissolution.<sup>8</sup> As for the leadership vacuum, the High Court held that that was attributable to the problems associated with the dysfunctionality of the Municipal Council brought about by the walkout of councillors during meetings, which could have been remedied through the MEC's application of the Systems Act.<sup>9</sup>

[27] As regards the deadlock, the High Court held:

“The reason for the deadlock 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.”<sup>10</sup>

[28] The High Court further held that for the provincial government to dissolve the Municipal Council it had to satisfy three requirements, namely: (a) a failure by the Municipal Council to fulfil an executive obligation; (b) the dissolution must be likely

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<sup>8</sup> High Court judgment above n 2 at para 71.

<sup>9</sup> Id at para 81.

<sup>10</sup> Id at para 8.



to ensure the relevant executive obligation will be fulfilled; and (c) that the provincial government considered less restrictive means.

[29] The Court held that the most direct cause of the Municipal Council's inability to conduct its business in council meetings was the continued disruption of Municipal Council meetings by the ANC and EFF councillors staging walkouts. This conduct was neither prioritised nor addressed by the MEC, despite its centrality in the Municipal Council's conundrum. It held that the most effective manner in which that situation was to be addressed was to invoke the procedures ordained in items 3 and 4 of Schedule 1 of the Systems Act, i.e. to address the councillors walking out and to enforce their statutory duty to attend meetings, and to stay in attendance thereof.

[30] It held that the MEC, and the courts, should not sanction councillors' conduct contrary to the Code. By walking out of council meetings, councillors failed to serve the electorate and fulfil the constitutional and executive duties for which they were elected.<sup>11</sup> It emphasised that staying in attendance would, due to the nature of the voting process, always result in decisions being taken by the Municipal Council. The Premier also did not, in his answering affidavit, address the failure to act against the errant ANC and EFF councillors at all.<sup>12</sup>

[31] Again, so the High Court continued, in the same answering affidavit the Premier did not explain why the recommendations of Mr Nkoko (who was from the office of the MEC), pertaining to the councillors, were not taken seriously and implemented. On the High Court's understanding of the facts, there was no factual dispute or any plausible explanation advanced by the Premier with the result that it accepted the version of the DA that less intrusive means could have been applied. The Court reasoned that section 139(1)(c) had an additional jurisdictional fact which provided that dissolution could only be resorted to when exceptional circumstances warranted it. This

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<sup>11</sup> Id at para 82.

<sup>12</sup> Id.

required an objective enquiry. It characterised this review as one based on the principle of legality. There had to be a direct or rational 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. It concluded that the decision to dissolve had to ensure the fulfilment of executive duties.<sup>13</sup> Additionally, because dissolution was such a drastic step, and intervention by other spheres of government could only take place in exceptional circumstances in compliance with strict procedures, the provincial government was required, by section 139, to apply less intrusive measures before deciding to dissolve a municipality in terms of section 139(1)(c).

*In this Court*

*Premier's submissions*

[32] The Premier submits that section 139(1)(c) imposes that two requirements be established before the dissolution of a municipal council: first, there must be exceptional circumstances warranting the dissolution; and second, the dissolution must be a rational way to address the council's unfulfilled executive obligations. Regarding the second requirement, the Premier argues that there must be a rational connection between the government's objectives and the means chosen to achieve them. On the Premier's construction, this is a narrow question that imposes a minimum threshold of review and does not require proportionality. There is also no need to comply with the requirement of procedural fairness when applying section 139(1)(c) because it is not administrative action. Relying on the textual interpretation of the impugned section, the Premier contends that "appropriate" simply means that the intervention method chosen must be rational because what is rational is always appropriate.

[33] He contended that once a municipality is dysfunctional, deadlocked, and paralysed, as in this case, the municipal council cannot fulfil its obligations, thus dissolution is a rational way to break the deadlock. In such circumstances, it is the duty

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<sup>13</sup> Id at para 35.

of the provincial government to dissolve the municipal council in the interests of the municipal residents. It is not necessary that the Premier exhausts or takes appropriate steps in section 139(1)(a) and (b) before invoking section 139(1)(c).

[34] The second contention raised by the Premier is that the judgment of the High Court must be overturned because it is at odds with common cause facts. In making this argument, it was submitted that section 139(1)(c) does not require the Premier to first consider less restrictive means before dissolving the municipal council. Thus, he submitted, on a plain reading of the section, it is not explicitly stated that such means be considered.

[35] Dealing with the contention that the Municipal Council, councillors or affected parties were not consulted, the Premier submitted that the Municipal Council was provided with an opportunity to engage with the directives issued in terms of section 139(1)(a) and chose to ignore them. He argued that the lack of response by the Municipal Council, together with other factors identified in the key observations, constituted exceptional circumstances warranting the dissolution of the Municipal Council.

[36] Regarding the mandamus, the Premier submits that the High Court's order is far-reaching as it compels councillors to attend council meetings, but does not, and cannot, compel the councillors to vote. The Premier argues that the High Court ignored the mechanisms provided for in the Code for disciplining the councillors and superimposed a judicial regime on the process that effectively removed the MEC's role in disciplining councillors. According to the Premier, this encroaches upon the separation of powers.

#### *EFF's submissions*

[37] The EFF aligned itself with most of the Premier's arguments and argued that on a proper interpretation of section 139(1)(c), once the High Court found that exceptional circumstances had been established through the failure of the Municipal Council to fulfil executive obligations, the only appropriate step to ensure fulfilment thereof was

the dissolution of the Municipal Council. The EFF contends that it is not necessary that section 139(1)(c) is preceded by section 139(1)(a) and (b), and we were urged to accept that the rationality review does not entail a proportionality test or the invocation of less restrictive means. On the EFF's construction, the High Court conflated the two tests. The standard applied by the High Court imposed a reasonableness standard, which is higher than the rationality standard.

[38] The kernel of the EFF's argument is that a distinction must be drawn among section 139(1)(a), (b) and (c). Section 139(1) requires a Court to counterpoise, on the one hand, its purpose against the need to ensure that municipalities are assisted by the provincial government to fulfil executive obligations. Section 139(1)(c) does not impose a duty on the provincial government to first consider whether the steps in section 139(1)(a) and (b) have been taken, but merely states that if exceptional circumstances have been established which justify the dissolution, the Premier's actions will be rational.

[39] As regards the finding that the Dissolution Notice must specifically express the executive obligation that was not fulfilled, the EFF submits that this reasoning is at odds with the plain text of section 139(1)(c), and contends that where the functionality of the Municipal Council is absent, the specificity requirement falls away.

[40] In response to the submission by the DA that the dissolution should have been preceded by consultation or engagement, counsel for the EFF referred us to several sections of the Constitution which, he submitted, provided some guidance on instances where consultation was required. He urged us to accept that since section 139(1)(c) made no provision for consultation or engagement the argument of the DA has no merit.

[41] The EFF finally submits that ordering the councillors to remain in attendance at all meetings in terms of the Code, absent a lawful reason, constitutes impermissible judicial overreach. The submission made is that the mandamus fails to take into account that it was the break down in the co-operative relationship between the EFF and the DA,

and not the delinquency and failure of councillors to attend meetings without lawful cause, which caused the deadlock and created exceptional circumstances. The order places the councillors who fail to attend, without lawful cause, in contempt of court, and at risk of imprisonment as an alternative.

*DA's submissions*

[42] The DA advances two bases for contending that the Premier breached his co-operative governance obligations by dissolving the Municipal Council. The first is the failure to comply with the substantive requirements of section 139(1)(c); and the second is procedural irrationality for not having afforded the affected parties the opportunity to make representations prior to taking the decision to dissolve the Municipal Council. The DA argues that section 139(1)(c) imposes three substantive constraints. The first is that the threshold for the lawful dissolution of a municipal council is high because it is a drastic step that can only be undertaken in exceptional circumstances. As an interpretative exercise, the DA urges us to accept the inclusion of less restrictive means – a requirement of proportionality. The second substantive constraint is that, although it is within the powers of the Premier to invoke section 139(1)(c), he was obliged to first consider using less intrusive means to ensure the fulfilment of executive obligations before dissolving the Municipal Council. The third substantive constraint is that it must be shown that the decision to dissolve will result in the relevant executive obligation being fulfilled. According to the DA, whatever steps a provincial government takes in terms of section 139(1)(c), including dissolution, must be proper, fitting and effective, and must ensure fulfilment of the executive obligation in terms of the Constitution or legislation.

[43] The DA submits that on a proper reading of the language of section 139(1), any step which the Province intends to take in terms of the section must be appropriate. It contends further that because the provisions of section 139(1) are expansive and grant the provincial government the powers to intervene in the affairs of the local government; such powers must be exercised with circumspection because they interfere with the

democratic wishes of the citizens by unseating the councillors through the appointment of the administrator to run the council.

[44] The DA further submits that the process leading up to the Gauteng Executive Council's decision to dissolve the Municipal Council is required to be rationally related to the achievement of the objectives of section 139(1). Therefore, the need for consultation under section 139(1)(c), to ensure procedural rationality, is patently clear because section 41(1)(h)(ii) of the Constitution requires that spheres of government inform and consult one another on matters of mutual interest.

[45] Another important consideration advanced by the DA is that the Dissolution Notice did not address the contents of the February response, nor did the Premier indicate why the response by the Speaker was considered unacceptable. Tellingly, so the argument goes, the Municipal Council was given three days to respond and, before it could do so, it was dissolved. This was done without any input or engagement with the Municipal Council.

[46] The DA submits that the Gauteng Executive Council, and the MEC, had a wide range of obviously less intrusive measures at their disposal. In relation to the water crisis, the provincial government should have assumed responsibility in terms of section 139(1)(b), for this function and left the Municipal Council intact. The provincial government should have used its statutory and constitutional powers to address the misconduct by the ANC and EFF councillors who deliberately collapsed the council meetings. Importantly, the MEC is empowered to appoint a person to investigate such conduct and, if appropriate, to suspend or remove the councillors concerned.

[47] Lastly, the DA urges us to confirm the mandamus, granted by the High Court, compelling the ANC and EFF councillors to attend and remain in attendance at council meetings. It argues that, absent an order compelling same, the cause of the problem in the Municipality will not be resolved. During argument, realising the insurmountable difficulties presented by the mandamus, counsel invited us to fashion an appropriate

remedy as in *Fose*<sup>14</sup> to secure the protection and enforcement of the rights of the Municipal Council to hold meetings.

### *Issues*

[48] The primary question that is pertinently raised in this case is whether the exercise of the Premier's constitutional power to dissolve the Municipal Council offends the principle of legality. That enquiry requires us to determine:

- (a) whether the dissolution decision was lawful; and
- (b) whether the mandamus granted by the High Court is an appropriate remedy.

### *Jurisdiction and direct appeal*

[49] The dissolution of municipalities is becoming a common feature of our democracy and a decision to dissolve a municipality impacts the quality of life of the residents of those municipalities. Section 167(3)(b)(i) of the Constitution confers jurisdiction on this Court to hear constitutional matters.<sup>15</sup> A determination of the validity of a dissolution decision implicates the interpretation and application of section 139(1)(c) of the Constitution. Thus, when a matter concerns the exercise of public power, it will raise a constitutional issue because “[t]he control of public power by the courts through judicial review is and always has been a constitutional matter”.<sup>16</sup> In other words, where the power in question arises from the Constitution, that is

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<sup>14</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

<sup>15</sup> Section 167(3)(b)(i) of the Constitution reads:

“(3) The Constitutional Court—  
 ...  
 (b) may decide—  
 (i) constitutional matters”

<sup>16</sup> *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 33.

accordingly a constitutional matter and the jurisdiction of this Court will be engaged.<sup>17</sup> Therefore, this matter raises a constitutional issue that deserves this Court's attention.

[50] In addition, section 167(6)(b) provides for leave to directly appeal to this Court.<sup>18</sup> This Court in *Democratic Party* set out the relevant factors to consider in such matters, and these are:

“the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and . . . the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.”<sup>19</sup>

[51] The issues before us are not only important to the parties, they also impact the relationship between municipalities and provincial governments country wide. They bring into sharp focus the serious and complex conflict between the power of the provincial government to intervene in the affairs of local government and the autonomy of local government as a separate sphere of government. Importantly, “[i]t needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councilors, but in the continued disruption of basic essential services to the people and communities the Municipality is supposed to serve. The people who may suffer the real harm are not party to these proceedings.”<sup>20</sup> It is the first time that this Court has been called upon to decide this issue. Although it is

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<sup>17</sup> Id.

<sup>18</sup> Section 167(6)(b) of the Constitution states:

“(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

...

(b) to appeal directly to the Constitutional Court from any other court.”

<sup>19</sup> *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*Democratic Party*) at para 32.

<sup>20</sup> *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* [2014] ZACC 31; 2014 JDR 2436 (CC); 2015 (1) BCLR 72 (CC) at para 9.



desirable for this Court to have the benefit of the decisions of other courts, notably the Supreme Court of Appeal, the applicants argued that the Supreme Court of Appeal has already weighed in on the interpretation and application of section 139.<sup>21</sup>

[52] A constitutional issue is clearly at stake here. Granting leave to appeal directly to this Court will ensure the speedy resolution of the matter, and reduce costs, which was one of the purposes for which section 167(6)(b) of the Constitution was enacted.<sup>22</sup> Lastly, it would not be in the interests of justice to allow uncertainty over the proper interpretation of the constitutional provisions at issue to persist. Thus, direct leave to appeal is granted.

[53] In respect of the EFF's application – a party that elected not to participate in the High Court proceedings – a further hurdle must be overcome. I am mindful of what this Court said in *New Clicks*,<sup>23</sup> where it held that the Court would not ordinarily grant leave to appeal to a party who has chosen to abide by the decision of the lower court. This Court held that there must be special circumstances present in order for leave to appeal to be granted.<sup>24</sup> As already stated, the issues raised in these appeals are of great public importance. It would also be in the interests of justice to grant the EFF direct leave to appeal insofar as the legal interpretation of section 139(1)(c) is concerned. This Court would benefit from the EFF's argument, given that the question is already before us in the Premier's application.

[54] The third application, being that of the ANC, has fallen away. The ANC did not pursue the matter beyond its initial application, and did not argue their appeal before this Court. They have effectively chosen to abide this Court's decision in the appeals

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<sup>21</sup> See *Premier, Western Cape v Overberg District Municipality* [2011] ZASCA 23; 2011 (4) SA 441 (SCA).

<sup>22</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 24.

<sup>23</sup> *New Clicks* above n 1.

<sup>24</sup> *Id* at para 9.

brought by the Premier and the EFF. Therefore, no pronouncement needs to be made on whether to grant the ANC leave to appeal.

*Legal framework*

[55] The determination of this case turns on the interpretation of section 139 of the Constitution which regulates the provincial governments intervention in local government. This provision is to be interpreted against the background of the constitutional imperatives of the rule of law, principles of co-operative governance, and inter-governmental relations. The section provides:

- “(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 elected, if exceptional circumstances warrant such a step.”

[56] In respect of section 139(1)(c) specifically, the Court in *Mnquma* held that:

“In the context of subsection (1) . . . the purpose of requiring exceptional circumstances where intervention takes the form of the dissolution of the municipal council is to ensure that no inroads are made without good reason into the autonomy of another sphere of government. The requirement of exceptional circumstances gives recognition to this aspect and the importance of the role and position of this sphere of government in the new constitutional dispensation. What is also clear from the requirement of exceptional circumstances is that it is recognised that the dissolution of the municipal council is the more drastic and far-reaching of the three forms of intervention authorised by subsection (1). Not only must the dissolution be an ‘appropriate’ step to remedy the situation, it can only be resorted to if exceptional circumstances have been found to exist. By reason of these considerations . . . I agree with applicants’ counsel that the phrase must be given a narrow rather than a wide interpretation. Accordingly, to be exceptional within the meaning of the phrase, the circumstances must be ‘markedly unusual or specially different’.”<sup>25</sup>

[57] First, this section serves the limited purpose of enabling the provincial government to intervene by taking appropriate action in circumstances where this is required because a provincial government is unable to fulfill its executive obligations. Second, it empowers the provincial government to intervene in such circumstances for the obligations that have not been carried out, but only to the extent necessary for the purposes referred to section 139(1)(a), (b)(i) – (iii) and (c).

[58] The section is corrective in nature as it seeks to address the problems in the municipality and restore service delivery.<sup>26</sup> Importantly, the Court in *City of Cape Town v Premier, Western Cape* recognised that:

“This section is concerned with omission or inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased.”<sup>27</sup>

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<sup>25</sup> *Mnquma Local Municipality v Premier Eastern Cape* [2012] JOL 28311 (ECB) at para 76.

<sup>26</sup> See Steytler and Visser *Local Government Law of South Africa* (Lexis Nexis, Durban 2018) at 18.

<sup>27</sup> *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) at para 79.

[59] The framers of the Constitution used the word “may” in section 139(1) to not merely confer a discretion, but a power coupled with a duty. The provincial government has a constitutional duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. The purpose of the intervention is to enable the relevant provincial executive, in limited circumstances, to ensure fulfilment of the executive obligation that the municipality could not or did not fulfil. In this constitutional scheme the provincial executive is fully entitled, if not obliged, to do what is necessary to ensure the fulfilment of executive obligations.<sup>28</sup>

[60] The right to intervene is not absolute. It is subject to sections 154(1) and 41(1)(h) of the Constitution.<sup>29</sup> The former provides that “[t]he national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions”. Whereas the latter provides that:

“All spheres of government and all organs of state within each sphere must—

...

- (h) co-operate with one another in mutual trust and good faith by—
  - (i) fostering friendly relations;
  - (ii) assisting and supporting one another;
  - (iii) informing one another of, and consulting one another on, matters of common interest;
  - (iv) co-ordinating their actions and legislation with one another;
  - (v) adhering to agreed procedures; and
  - (vi) avoiding legal proceedings against one another.”<sup>30</sup>

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<sup>28</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) (*Second Certification*) at para 118.

<sup>29</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification*) at paras 264-5.

<sup>30</sup> Section 41(1)(h) of the Constitution.

[61] Chapter 3 of the Constitution has two components. The first is section 40. Section 40(1) states that the three spheres of government, national, provincial and local government are distinctive, interdependent and interrelated. Section 40(2) prescribes that organs of state must comply with the principles of co-operative government set out in Chapter 3. The second component is section 41. Consistent with the principles of co-operative governance and inter-governmental relations, section 41(1)(b) requires that all spheres of government and all organs of state within its sphere must secure the wellbeing of the people of the Republic. Section 41(1)(h) states that they must “co-operate with one another in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest”.<sup>31</sup> Another important provision is that all spheres of government must not assume any power or function except those conferred on them in terms of the Constitution.<sup>32</sup> Section 41(1)(e) provides that one sphere of government must respect the constitutional status, institutional powers and functions of government in other spheres.

[62] In *Johannesburg Metropolitan Municipality*, Jafta J observed that:

“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 in terms of the Constitution’.

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

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<sup>31</sup> Section 41(1)(h)(ii) and (iii) of the Constitution.

<sup>32</sup> Section 41(1)(f) of the Constitution.

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.”<sup>33</sup>

[63] In addition to the constitutional framework, additional statutes regulating the interplay between the provincial and local spheres are relevant. Section 105 of the Systems Act empowers the MEC to monitor the municipalities in her or his province with a view to assessing the support needed to strengthen their capacity to manage their own affairs.<sup>34</sup> Section 106 of the Systems Act deals with the designation of a person where the MEC has reason to believe that a municipality cannot address or does not fulfil a statutory obligation binding on it, or that maladministration, fraud, corruption or any other serious malpractice may occur, or is occurring, in the municipality.<sup>35</sup>

[64] Thus, section 139(1) requires that the provisions, and the powers they impose, must be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power between different levels of government.

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<sup>33</sup> *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at paras 43-4.

<sup>34</sup> Section 105(1) of the Systems Act provides that—

“[t]he MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution to—

- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
- (b) monitor the development of local government capacity in the province; and
- (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.”

<sup>35</sup> Id at section 106(1) reads:

“If an MEC 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 must—

- (a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
- (b) if the MEC considers it necessary, designate a person or persons to investigate the matter.”

*Analysis**Principle of legality*

[65] The current applications are direct appeals brought against the decision of the High Court made in a legality review. Broadly stated, the review is directed at the lawfulness of the Premier's dissolution decision. To determine the validity of the dissolution decision, the principle of legality must first be fully and properly fleshed out.

[66] It is trite that the principle of legality is but one aspect of the rule of law, which is a value enshrined in section 1(c) of the Constitution.<sup>36</sup> In *Fedsure*, this Court held, in respect of the powers of both the legislative and executive arms of government, that:

“it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.

...

It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”<sup>37</sup>

In terms of the principle of legality, the exercise of public power will only be legitimate where lawful. Thus, to exercise more power than what has been conferred in terms of the law would be *ultra vires*. This is now firmly settled in our law.

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<sup>36</sup> Section 1(c) of the Constitution provides that “[t]he Republic of South Africa is one, sovereign, democratic state founded on the . . . values [of] Supremacy of the constitution and the rule of law”.

See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 56.

<sup>37</sup> *Fedsure* id at paras 56 and 58.

[67] The principle of legality has developed significantly in our jurisprudence since *Fedsure* and the grounds for a legality review have expanded along with it. They now include lack of authority,<sup>38</sup> abuse of power,<sup>39</sup> and jurisdictional facts,<sup>40</sup> which are all subcategories of lawfulness. The rationality<sup>41</sup> of the action in question may also be challenged as a further and separate ground of review.

### *Lawfulness*

[68] The first ground of review brought by the DA against the validity of the dissolution decision was that it was substantively invalid, in that the substantive requirements of section 139(1)(c) of the Constitution had not been fulfilled. In other words, the jurisdictional facts of section 139(1)(c) had not been established by the provincial government for it to have lawfully dissolved the Municipal Council. The provincial government, the argument continues, therefore acted *ultra vires*.

[69] Jurisdictional facts are preconditions that must exist, or procedures that must be followed, prior to the exercise of public power.<sup>42</sup> The failure to observe the jurisdictional facts will result in the exercise of power being unlawful. When considering the rider to section 139(1) of the Constitution, along with the wording of subsections (1)(a), (b) and (c), four jurisdictional requirements are identified, for which the same jurisdictional facts must be established. The subsection is divided into four

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<sup>38</sup> See *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) and *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

<sup>39</sup> See *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC); *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC); *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (7) BCLR 725 (CC) and *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

<sup>40</sup> See *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC); and *Law Society of South Africa* id.

<sup>41</sup> See *Law Society of South Africa* id; *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Simelane*); *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC); *Masetlha* above n 39; *Pharmaceutical Manufacturers* above n 16 and *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

<sup>42</sup> *Meyer v South African Medical and Dental Council* 1982 (4) SA 450 (T) at para 454E-F. See also Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 290.



parts: first, a failure to fulfil an executive obligation; second, the taking of appropriate steps including the issuing of directives describing the extent of the failure and stating the steps required to meet the obligations, the assumption of responsibility for the relevant obligation to the extent necessary, or the dissolution of the municipal council; and, in the event of intervention taking the form of dissolution, the third aspect is the existence of exceptional circumstances envisaged in subsection 1(c). The fourth is that the exceptional circumstances must warrant the dissolution. I deal with each jurisdictional requirement in the section in turn.

*Failure to fulfil an executive obligation*

[70] It is evident from the reading of section 139(1) that it concerns a failure by a municipality to fulfil an executive obligation. This is a statutory precondition that requires the provincial executive to sufficiently identify the unfulfilled executive obligation in question to enable the municipality to fulfil it.<sup>43</sup> This is an “essential element in the intervention process” as it determines “the scope of a possible assumption of responsibility by the provincial executive”.<sup>44</sup>

[71] The “executive obligations” are not defined in the Constitution, however, the Court in *Mnquma* enunciated that:

“The term must . . . be given a meaning consistent with the ordinary meaning attributed to it in a democratic dispensation and the executive authority of the national and provincial executives in terms of the Constitution. The obligation of local government is to provide government at a local level and to discharge the functions associated therewith. This obligation is exercised within the functional areas referred to above and extends to the obligation to, within those functional areas, implement and administer legislation in relation thereto, provide the services associated therewith,

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<sup>43</sup> In this regard the High Court judgment above n 2 at para 37-8 found that “[t]he 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. 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.”

<sup>44</sup> Steytler above n 27 at 19.

provide an administration to do so, develop policy in relation thereto and initiating bylaws to effectively govern within those functional areas.”<sup>45</sup>

[72] In addition, the word “executive” in section 139(1) is “used in the context of an obligation that is imposed on a municipality ‘in terms of the Constitution or legislation’. Accordingly, what would constitute an executive obligation must be determined with reference to the Constitution and the legislation referred to.”<sup>46</sup> Furthermore, the word “obligation” was considered to “ultimately depend upon the proper construction of the statutory provision in question, or . . . upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular”.<sup>47</sup>

[73] Section 11(3) of the Systems Act explains the manner in which a municipality, through its municipal council, exercises its executive and legislative authority.<sup>48</sup> This

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<sup>45</sup> *Mnquma* above n 26 at para 64.

<sup>46</sup> *Id* at para 55. See also the objects of local government as set out in section 152(1) of the Constitution, which provides:

“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;
- (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.”

<sup>47</sup> See *Mnquma* above n 26 at para 62 relying on *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A-B.

<sup>48</sup> Section 11(3) of the Systems Act provides:

“A municipality exercises its legislative or executive authority by—

- (a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) promoting and undertaking development;
- (c) establishing and maintaining an administration;
- (d) administering and regulating its internal affairs and the local government affairs of the local community;
- (e) implementing applicable national and provincial legislation and its by-laws;

includes developing and adopting policies; promoting and undertaking development; administering and regulating its and local government's affairs; implementing legislation and by-laws; providing municipal services to local communities; preparing, approving and implementing budgets; and making laws.<sup>49</sup> These are what are considered to be executive obligations – particularly when applied to the functional areas listed in Part B of Schedules 4 and 5 of the Constitution.<sup>50</sup>

[74] It is, however, important to guard against unduly straining the text of section 139(1). Thus, it can be said that executive obligations in this context are:

“legal provisions that instruct (most often with the word ‘must’) the municipality to perform a certain task. They are instructions, located in a law, to do something (e.g. to meet, produce monthly budget statements) or to put something in place (e.g. a system of delegations, a policy). These include instructions that the municipality has given itself in a bylaw (a bylaw constitutes ‘legislation’). For example, a municipality’s failure to adhere to its own rules of order bylaw can constitute the failure to fulfil an executive obligation. . . . Inherent to the obligation to do something or to put something in place is that the law pertaining to that activity or instrument is adhered to.”<sup>51</sup>

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- (f) providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
  - (g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
  - (h) preparing, approving and implementing its budgets;
  - (i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;
  - (j) monitoring the impact and effectiveness of any services, policies, programmes or plans;
  - (k) establishing and implementing performance management systems;
  - (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.”

<sup>49</sup> See *Mnquma* above n 26 at para 62. See also *Hoexter* above n 43 at 238.

<sup>50</sup> *Hoexter* above n 43 at 237.

<sup>51</sup> *Steytler* above n 27 at 23.

[75] It is also necessary that the allegedly unfulfilled executive obligation be set out unambiguously by the provincial executive. The importance of this was highlighted in *Mogalakwena Local Municipality* where it was held that the shortcomings of the municipality must be sufficiently set out to allow it to remedy them and challenge the validity of the provincial executive's intervention.<sup>52</sup> There is no need for the total collapse of the municipality before the provincial executive may intervene. Whether or not there is a failure to comply with an executive obligation is an objective enquiry. The intention of the council is irrelevant. It is enough if it is objectively shown that the municipal council has failed to fulfil an executive obligation. The non-fulfilment of a single executive obligation is sufficient to ground intervention.

*Any appropriate steps*

[76] The second jurisdictional requirement – “any appropriate steps” – is superseded by the word “including” – meaning that the list of options for appropriate steps is non-exhaustive.<sup>53</sup> Section 139(1) then goes on to list possible appropriate steps such as the issuing of directives, the assumption of responsibilities, or dissolution. Legislature provided the provincial government with intervention mechanisms in section 139(1)(a), (b) and (c), to ensure that a municipal council fulfils its obligations. The issuing of directives is a legal instruction to perform and thus “creates an immediate legal obligation on the municipality to take the steps mentioned in the directive”,<sup>54</sup> whereas the assuming of responsibility requires the provincial executive to intervene in order to fulfil the provisions in section 139(1)(b)(i) to (iii).

[77] Section 139(1)(b) imposes a higher standard than merely fulfilling an executive obligation because it provides for the assumption of responsibility where it is necessary to “maintain national standards for the rendering of a service; prevent that Municipal

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<sup>52</sup> *Mogalakwena Local Municipality v Provincial Executive Council*, Limpopo 2016 (4) SA 99 (GP) at para 31.

<sup>53</sup> Id at para 22. The word “including” indicates an addition to or an enlargement of the “appropriate steps” and not a limitation. See *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 430.

<sup>54</sup> Steytler above n 27 at 26.

Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or maintain economic unity”.<sup>55</sup>

[78] Lastly, there is section 139(1)(c) which obliges the provincial executive to dissolve the municipal council and appoint an administrator “until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step”. This is the most drastic form of intervention because the administrator assumes the role of the municipal council until the by-elections; however, it is confined to exceptional circumstances which means that it should not be invoked too swiftly. Its jurisdictional requirements will be dealt with below.

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<sup>55</sup> Steytler above n 27 at 27-8 argues that:

“Essential national standards for governance are primarily found in the Municipal Structures Act and the Municipal Systems Act. Essential national standards for finance are primarily found in the [Local Government: Municipal Finance Management Act 56 of 2003]. Section 216(1)(c) of the Constitution requires ‘measures to ensure both transparency and expenditure control’ and key to those are the ‘uniform treasury norms and standards’. Many of these would constitute ‘essential national standards’.

Secondly, assumption of responsibility may be necessary to meet established minimum standards for the rendering of a service. It is suggested that this refers to the standards that, if met, constitute ‘basic municipal services’. Section 1 of the Municipal Systems Act defines this as ‘a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment’. More specific standards per service exist in various sectoral laws, such as the regulations relating to compulsory national standards and measures to conserve water under the Water Services Act [108 of 1997]. Another important marker for ‘minimum standards for the rendering of a service’ is the Bill of Rights, which determines rights-based minimum standards for basic services such as water, electricity, sanitation, housing and a safe and healthy environment.

Thirdly, it may be necessary to prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole. A dysfunctional municipality can be detrimental to cooperation with other municipalities and can damage processes such as regional planning and service delivery. For example, a municipality’s inability to deal with persistent blockades or damage to a road could render a neighbouring municipality inaccessible. Another example could be pollution or damage to service delivery infrastructure that spills over into neighbouring municipality. It can also seriously obstruct provincial and national programmes administered by the municipality. Moreover, the problems can have a contagious effect on other municipalities, which prejudices the province’s duty to ensure that municipalities are able to govern themselves effectively.

Fourthly, the assumption of responsibility may be necessary to maintain economic unity. This criterion speaks to the detrimental effect that the erratic policies and behaviour of a municipality can have on the economic health of a region, province or even the country as a whole. The requirements of section 139(1)(b) of the Constitution have consequences for both the aim and the scope of the assumption of responsibility. The aim of the assumption of responsibility is to lift the municipality to minimum standards, to prevent it from harming the interests of other municipalities or the province, or to maintain economic unity in the province. The provincial executive can only assume responsibility to the extent necessary to achieve the above.”

[79] A closer look at the section indicates that the word “appropriate” provides a baseline against which to measure the extent of any involvement by the provincial government, so that there is less intrusion into the powers of the local government. The *Second Certification* case<sup>56</sup> is instructive when interpreting appropriate steps. In that case, appropriate steps in section 100 of the Constitution, which empowers national government to intervene in the affairs of provincial government in limited circumstances, was interpreted to mean steps that are in line with the constitutional scheme and sections 41(2) and 41(1)(h) of the Constitution, in particular.<sup>57</sup> Such steps should not be inconsistent with Chapter 3 of the Constitution.<sup>58</sup> In other words, an appropriate step is one that promotes co-operative governance and inter-governmental relations. The steps taken for the purpose of ensuring the fulfilment of executive obligations must not be for ulterior purposes or be inconsistent with the Constitution. The appropriate steps should thus not only be solution orientated, but lawful. Whether the provincial executive elects to issue a directive, assume responsibility or dissolve the municipality, this step should ensure the fulfilment of the executive obligation in question.

[80] This Court in *Economic Freedom Fighters*, although in the context of appropriate remedial action, found that appropriateness “connotes providing a proper, fitting, suitable and effective remedy”.<sup>59</sup> In the context of section 139(1), the Premier conceded in oral argument that appropriateness requires that the step be fitting and effective for purposes of fulfilling the executive obligations of a municipal council. A concession well made in my opinion.

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<sup>56</sup> *Second Certification* above n 29.

<sup>57</sup> *Id* at para 124.

<sup>58</sup> *Id*.

<sup>59</sup> *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 68.

[81] It is evident that appropriate steps require a “balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government” and that:

“Regard must be had to the nature of the executive obligation that was not fulfilled, the interests of those affected by the failure to fulfil an executive obligation, and the interests of the municipality concerned with due regard to the constitutional features of local government. The assessment must furthermore consider the purpose of the power, as a corrective measure to ensure the problems that beset a municipality are resolved.”<sup>60</sup>

Thus, appropriate steps are those that are fitting or reasonably capable of resolving the issue of non-fulfilment of the executive obligation, or suitable in the sense that they fit the situation.<sup>61</sup>

[82] It is incumbent upon the Premier, acting in accordance with the Constitution and related legislation, to decide which step is appropriate in each case to ensure that the obligations are fulfilled by a municipal council. The primary purpose of the intervention by the provincial government is to assist the local government, in the spirit of co-operative governance, to fulfil its executive obligations.

[83] For the avoidance of doubt, I agree with the second judgment that section 139(1) provides that a provincial executive “may intervene by taking *any appropriate steps*” and does not require the provincial executive to take the *most* appropriate step. This simply means that a court may not set aside a decision on the basis that another appropriate step – that is, a step that may have been more fitting and effective – existed and could have been taken.

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<sup>60</sup> *Mnquma* above n 26.

<sup>61</sup> *Id.*

[84] Appropriateness must be determined with reference to the circumstances in which the step was taken. This requires courts to have regard to the nature and extent of the failure and the factual matrix in which the decision to intervene was made. Previous attempts by the provincial executive to address the failure using other means must be considered as well as the conduct of the municipality to address the failure. In other words, appropriateness cannot be determined in the abstract. It cannot be that the same step will be appropriate in every case in which a particular executive obligation goes unfulfilled.

[85] Furthermore, it is important to highlight that the nature of dissolution “implies that it is there to deal with the situation where the municipal council’s conduct is the cause of the continued failure to comply with an executive obligation”.<sup>62</sup> This, as recognised in *Mnquma*, requires that there be a “causal connection between the conduct of the municipal council and the continued failure to comply with an executive obligation”.<sup>63</sup> Thus, the dissolution must be justified by the municipal council’s conduct which caused the failure and as a corrective measure, it must ensure the fulfilment of those executive obligations.

[86] In considering whether section 139(1)(c) is fitting and suitable, one must consider the resultant calling of fresh elections and whether this will result in the municipal council fulfilling its obligations. Care must be taken not to engage in a purely speculative enquiry as to what a fresh election would mean for the municipality. The High Court’s apparent view that dissolution was not likely to ensure the fulfilment of the obligation because a fresh election may, in fact, result in the same councillors being elected and returning to their positions was based on nothing more than sheer speculation as to potential electoral outcomes. The contrary result – that a fresh election would result in the election of different councillors who will behave differently and adopt different strategies for influencing the Municipal Council – is just as likely. Thus,

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<sup>62</sup> Steytler above n 27 at 28.

<sup>63</sup> *Mnquma* above n 26 at para 78.



when determining appropriateness in the context of section 139(1)(c), courts are not required to look into a crystal ball and determine what is likely to happen if dissolution takes place. Instead, they must assess whether dissolution is reasonably capable of addressing the municipal council's failure.

[87] There was extensive debate between the parties as to whether section 139(1)(c) imposes a "less restrictive means" standard, with the consequence that the province cannot resort to dissolution if there are less intrusive means of addressing the failure to fulfil executive obligations. While there is nothing in the language of the section to suggest that the power to dissolve is subject to a less restrictive means requirement, that does not mean that the existence of less intrusive means is irrelevant to the determination of appropriateness. The requirement of appropriateness plainly calls for a contextual assessment of what is fitting and suitable in the circumstances.

[88] Resorting to dissolution may very well be inappropriate in circumstances where there was another step that could have been taken which was reasonably capable of resolving the issue and would have been less invasive of local government autonomy. Where dissolution is resorted to, appropriateness must be determined in light of the fact that it results in the takeover of a democratically elected municipal council by an administrator appointed by the provincial executive. It involves, as counsel for the first respondent put it, the dissolution of one sphere of government by another and this impacts on separation of powers.

[89] That said, a purposive and textual interpretation of section 139(1)(c) leads to the compelling conclusion that the Legislature sought to provide protection to the citizenry both against local government's failure to fulfil executive obligations, and provincial government's interference in local government (and the citizenry's choice of local government). For this reason, the Legislature provided the provincial government with intervention mechanisms in section 139(1)(a) and (b), in order to afford the municipal council an opportunity to remedy the failure. In my view, on a proper reading and interpretation of the section as a whole, read with other sections of the Constitution and

related legislation, section 139(1)(c) cannot be considered in isolation. Wishing away subsections (a) and (b) is to do an injustice to the purpose of section 139(1).

*Dissolve the municipal council if exceptional circumstances warrant such a step*

[90] Section 139(1)(c) obliges the provincial executive to dissolve the municipal council “if exceptional circumstances warrant such a step”. The decision to dissolve a municipality relies on two factors; namely a failure, on the part of the municipality, to fulfil an executive obligation and the existence of “exceptional circumstances”. It is a combination of these grounds that warrant the dissolution of a municipal council.

*Exceptional circumstances*

[91] The third jurisdictional requirement is not defined in the section. In order to ascertain the meaning of exceptional circumstances, regard must be had to the purpose of the provision and the context in which the executive obligation is granted. The interpretative process must give effect to this purpose within the powers of the provincial government, as set out in the Constitution and relevant legislation. Importantly, the provision in question must not be construed in isolation. Exceptional circumstances must be given a contextual constitutional interpretation.<sup>64</sup>

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<sup>64</sup> See *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at paras 36-7, which reads:

“Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it ‘has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.’ Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.

The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.”

[92] The framers' purpose for requiring that exceptional circumstances exist before a municipal council is dissolved was, in my view, correctly enunciated by the Court in *Mnquma* where it held that:

“the purpose of requiring exceptional circumstances where intervention takes the form of the dissolution of the municipal council is to ensure that no inroads are made without good reason into the autonomy of another sphere of government. The requirement of exceptional circumstances gives recognition to this aspect and the importance of the role and position of this sphere of government in the new constitutional dispensation. What is also clear from the requirement of exceptional circumstances is that it is recognised that the dissolution of the municipal council is the more drastic and far-reaching of the three forms of intervention authorised by subsection (1). Not only must the dissolution be an ‘appropriate’ step to remedy the situation, it can only be resorted to if exceptional circumstances have been found to exist. By reason of these considerations . . . the phrase must be given a narrow rather than a wide interpretation. Accordingly, to be exceptional within the meaning of the phrase, the circumstances must be ‘markedly unusual or specially different’.”<sup>65</sup>

[93] An attempt to define what exceptional circumstances are, although in different circumstances, was made in *Seatrans Maritime*,<sup>66</sup> where the Court held that:

- “1. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different: ‘besonder’, ‘seldsaam’, ‘uisonderlik’, or ‘in hoë mate ongewoon’.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

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<sup>65</sup> *Mnquma* above n 26 at para 76.

<sup>66</sup> *Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C).

4. Depending on the context in which it is used, the word ‘exceptional’ has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”<sup>67</sup>

[94] In line with the reading of the relevant provisions of the Constitution as a whole, before the provincial executive dissolves a municipality it must notify the municipal council in writing of its intention to dissolve the council in terms of section 139(1)(c) of the Constitution.<sup>68</sup> Once the dissolution has taken place, the provincial government will also have to notify the Cabinet member responsible for local government, and the relevant provincial legislature and the National Council of Provinces (NCOP).<sup>69</sup> The dissolution will then take effect 14 days from the date of receipt of the notice by the Council unless set aside by the relevant Cabinet member or the Council before the expiry of the 14 days.<sup>70</sup>

[95] What this boils down to is that in the end, exceptional circumstances must be determined on a case-by-case basis in terms of section 139(1)(c) of the Constitution. This exercise demands that exceptional circumstances must be interpreted in the light of the constitutional scheme set out above; and the gradation of the forms of intervention in section 139(1), which are set out from the least to most intrusive.

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<sup>67</sup> Id at 19.

<sup>68</sup> See sections 41(1)(h).

<sup>69</sup> See section 139(3)(a) of the Constitution.

<sup>70</sup> Section 139(3)(b) of the Constitution.

*Warrant such a step*

[96] The last jurisdictional fact is that the exceptional circumstances must warrant such a step. The word *warrant* means “justify or necessitate”.<sup>71</sup> Counsel for the DA argued that, on a purposive interpretation of section 139(1)(c), exceptional circumstances must not only exist, but must – in addition – necessitate or justify the dissolution of the Council.

[97] In light of the above, it cannot be denied that section 139(1)(c) requires more, or is on higher ground, than section 139(a) and (b), as its implications can be drastic and far-reaching. It accordingly calls for a proper and thorough evaluation of all the facts because, once it is invoked, it leads to the appointment of an administrator and possibly fresh elections. The decision to dissolve a municipal council is a step which must only be taken if the exceptional circumstances justify it.

[98] It does not follow, as counsel for the EFF submitted, that if exceptional circumstances are found to exist then dissolution is automatically warranted. There is a balancing exercise that is involved when determining whether dissolution is warranted.

*Whether the dissolution was lawful*

[99] A few observations must be made before I determine whether the dissolution decision was lawful. On 6 December 2019, the MEC issued directives in accordance with section 139(1)(a) in order to bring the municipality to terms. The directives disclosed a wide range of executive obligations which required the municipality’s attention and set out deadlines for the formulation, implementation, and reporting on action plans or requisite remedial action which ranged from 31 January 2020 to

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<sup>71</sup> Pearsall *The Concise Oxford Dictionary* 10 ed (Oxford University Press, New York 1999).

30 September 2020.<sup>72</sup> Section 139(1)(a), as mentioned above, obliges the provincial executive to intervene by issuing directives to the Municipal Council “describing the extent of the failure to fulfil its executive obligations *and* stating any steps required to meet its obligations”. This process is aimed at ensuring that the executive obligations are fulfilled. However, it is important to emphasise that this process alone is insufficient. Issuing of a directive in terms of section 139(1)(a) has no consequences in itself; it only has relevance as part of a process which requires a directive to be issued to ensure the fulfilment of an executive obligation. If the directive is issued in terms of section 139(1)(a), these have to be complied with. This interpretation acknowledges the process and purpose of the intervention as enshrined by the Constitution.

[100] A municipal council has the obligation to provide service delivery in the form of access to basic services, such as water, and to ensure that recipients of social grants receive them. It is now clear from the above legal framework that a failure to fulfil executive obligations warrants an intervention, but will not always result in exceptional circumstances that warrant the dissolution of the municipality. The applicants argue that the Municipal Council failed to fulfil its obligations because, amongst other reasons, the Municipal Council was unable to successfully hold meetings due to it being inquorate. Consequently, it was unable to develop policies and, deliver basic services and implement its decisions. Where the municipal council has failed to deliver basic services, the appropriate step may be to assume responsibility to ensure that the

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<sup>72</sup> Department of Provincial and Local Government: Intervening in Provinces and Municipalities: Guidelines for the Application of Section 100 and 139 of the Constitution at 19 provide that the Executive Council was required to:

- “(a) state that the provincial executive is acting in terms of section 139(1)(a);
- (b) identify the executive obligations in respect of which the municipality is failing;
- (c) respond to any representations made by the municipal council;
- (d) outline the steps to be taken by the municipal council to ensure the fulfilment of the obligations referred to;
- (e) afford a reasonable time period for the municipal council to take such steps;
- (f) instruct the municipal council to report to the provincial executive on the implementation of the directive; and
- (g) state that a failure to implement the steps can be followed up by the assumption of responsibility in terms of section 139(1)(b).”

minimum standards for the rendering of services are met. However, the facts before the provincial executive will determine which step is appropriate.

[101] The executive obligations that the Executive Government provided in their affidavit, that informed the dissolution of the municipality, were the nine key observations which are:

- (a) a leadership crisis that has left the Council “barely able to function”;
- (b) due to this instability the City is without a Mayor, Mayoral Committee or Municipal Manager;
- (c) there has been widespread corruption;
- (d) there is a water crisis in Hammanskraal;
- (e) the City “has not been fulfilling its obligations in respect of grant spending”;
- (f) there is a “grave concern” of returning grants allocated for service delivery due to poor performance;
- (g) the suspension of the heads of the departments of human settlement and roads and transport;
- (i) there is a “widely reported crisis at the Wonderboom National Airport that include[s] issues of corruption and maladministration”; and
- (j) irregular expenditure to the tune of R5 000 000 000.

[102] The question that follows is whether these observations qualify as executive obligations and whether they warranted the dissolution. Executive obligations are those that when unfulfilled will result in “prejudice to essential national standards, established minimum standards for the rendering of a service, economic unity, or national security, or that is prejudicial to the interests of another province or the country as a whole”.<sup>73</sup>

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<sup>73</sup> See section 139(1) of the Constitution and *Second Certification* above n 29 at para 119.

*Whether the nine key observations qualify as executive obligations*

*The leadership crisis that has left the Council “barely able to function” due to this instability the City is without a Mayor, Mayoral Committee or Municipal Manager*

[103] Leadership anywhere is an important driving factor. It ensures that people remain accountable and that they are fulfilling their duties for which they are being remunerated. The lack of leadership can result in dire consequences for any organisation and even worse for municipalities in our country where, without good governance and accountability, the citizens will suffer.

[104] The situation in Tshwane falls into this category. There has not been a Mayor, a Mayoral Committee and a City Manager since the local government elections in 2016. Did these affect the functioning of the municipality? The answer is a resounding yes. The roles of the mayor and mayoral committee are crucial to fulfilling executive obligations and bringing the municipality closer to its constitutional and legislative mandates, and leaving these positions vacant may, in some circumstances, prevent the municipality from effectively fulfilling its mandate.<sup>74</sup> The failure to fill these positions, however, does not amount to a failure to fulfill executive obligations.

[105] Oddly enough, the key observations do not include the councillors’ walkouts, which are crucial to the functioning of the Municipal Council but there is a need to say something about them. The walkouts created an exceptional set of circumstances. The fact that elected officials were unable to be collegial and respectfully engage and disagree with one another is troubling. The fabric of our democracy has been threatened.

[106] Section 18 of the Systems Act requires that “each municipality must have a municipal council” and that “a municipal council must meet at least quarterly”. If a municipal council cannot meet and attend to its business, because it cannot exercise its

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<sup>74</sup> See sections 60 and 99 of the Systems Act.



authority and fulfil the role envisaged by section 11(3) of the Systems Act through its municipal council, this may affect its ability to fulfil its obligations. While a single failure to convene a meeting may not in and of itself amount to a failure to fulfil an executive obligation, if a municipal council is persistently unable to convene meetings and conduct its business, section 139(1) will be undeniably triggered as this may prevent the municipal council from fulfilling its day-to-day obligations and subsequently lead to a failure to fulfil executive obligations which the Constitution and Systems Act expect Council to perform.

[107] I am of the view that the High Court was correct in finding that the political crisis, and more appropriately the walkouts, led to the Municipal Council's failure to fulfil its executive obligations. The enquiry cannot end there though; we are enjoined to consider whether these circumstances, as exceptional as they were, warranted the dissolution. Put differently, did they justify the dissolution? The simple answer to this is no. I will discuss the context within which the dissolution decision was taken, and the patent appropriateness later.

*There has been widespread corruption, the irregular expenditure to the tune of R5 000 000 000 and there is a widely reported crisis at the Wonderboom National Airport that include[s] issues of corruption and maladministration*

[108] In our country corruption has manifested itself into a sickness that requires the full might of the law. Corruption is, however, not the prerogative of the Municipal Council. This is a matter for the South African Police to deal with, not the provincial government. If the provincial executive is of the opinion that there is a financial crisis in the municipality, its recourse is in sections 139(4) or (5) and not 139(1). In terms of section 106(1)(a) of the Systems Act, an MEC who has reason to believe that a municipality in his province cannot or does not fulfil a statutory obligation, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in that municipality, he *must*, by written notice to the municipality request it to supply the MEC with any information he needs. If the MEC considers it necessary,

section 106(1)(b) empowers the MEC to launch an investigation. There is no suggestion that the province used its wide statutory powers, or its influence, to establish the facts or promote an investigation. In this regard, it failed to curb the corruption that has manifested within its municipality.

*The City has not been fulfilling its obligations in respect of grant spending, there is a “grave concern” of returning grants allocated for service delivery due to poor performance and the suspension of the heads of the departments of human settlement and roads and transport*

[109] I have not been directed to, nor have I been able to find any provision in our law which states or implies that “the use of grants” is an executive obligation. The High Court’s reasoning in this regard is unassailable.

*The water crisis in Hammanskraal*

[110] The obligation to provide sufficient water is found in section 27(1)(b) and section 4(2)(d) of the Systems Act. Although this amounts to an executive obligation, the failure to fulfil it did not warrant the dissolution of the municipality. In this matter, this is so for two reasons: the water crisis has been an ongoing issue since 2004 and the municipality had put measures in place to address it.

[111] The Speaker in her letter to the MEC dated 18 December 2019 stated that:

“The aspect of the water quality in Hammanskraal has been highlighted in the press. The City of Tshwane has already committed to an Inter- Governmental Relations (IGR) process in this regard and had a number of engagements with the National Department of Water and Sanitation, which included making joint presentations to Portfolio and Select committees in Parliament. In addition the City of Tshwane entered into MOUs with ERWAT, Rand Water and Magalies Water to collaborate in addressing any challenges in this regard.

There is constant failures in the Temba/Hammanskraal water quality, raw water and Temba distributions, which are Colour, Turbidity, Phosphate, Ammonia, Nitrite and

Nitrate due to the raw water that is abstracted from Leeukraal dam, which is getting water through Apies River from Rooiwal WWTW. Currently Rooiwal WWTW is overloaded and unable to treat the influent up to the required standard. The City of Tshwane has awarded a project, which is Phase 1, in order to address the issue of the capacity of Rooiwal WWTW, that will then improve the effluent quality that goes to Leeukraal dam through the Apies River. The City of Tshwane is supplying water on a portion of Temba from Soshanguve DD bulk pipeline, which is from Rand Water, another portion is supplied through Magalies Water. The remainder of the Central part of Temba is using the water from the Temba Water Treatment Plant for any purposes that is not for consumption and they are being supplied water for consumption through the water tankers that is drawing water from the Magalies Water pipeline.

Again the City of Tshwane is in engagements with the Development Bank of South Africa to request funding for the Phase 2 and 3 upgrade in Rooiwal WNTW, which requires R2,8 billion.

With regards to the interim interventions on the operations and maintenance of the City of Tshwane's Water Treatment Plants (WTPs) and Waste Water Treatment Plants (WWTPs), the City have signed a tripartite Memorandum of Understanding with ERWAT and DWS for the WVVTPs and Magalies Water and DWS on WTPs and Implementation of Capital projects.

The 3 Institutions are in a process of finalising the Service Level Agreements (SLAs) per plant. Priority is taken on the 3 critical wvvrw, which are Rooiwal, Baviaanspoort and Sunderland Ridge and the 3 WTP which are Temba, Roodeplaat and Bronkhorstspuit.”

[112] The above does not show a municipality that is unable or unwilling to fulfil its executive obligations. Instead, it is indicative of a municipality committed to improving the lives of its residents and complying with its constitutional obligations in terms of section 27(1)(b) and section 42(d) of the Systems Act. It entered into co-operation agreements with relevant institutions such as Eskom and Rand Water to implement its plans and ensure service delivery.

[113] In the end, the High Court was correct when it concluded 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 the 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.”<sup>75</sup>

[114] To dissolve a municipality that is doing something about the issues before it is contrary to what our Constitution requires. The provincial government is required to support and strengthen the municipality to manage its own affairs, and in this case, it did not. Therefore, dissolution on this basis was not appropriate because the Municipal Council had already taken steps to ensure its fulfilment.

*Observations on appropriate steps*

[115] In order to dissolve a Municipal Council, section 139(1)(c) requires the existence of jurisdictional facts in order to justify the invocation of the provisions. It is clear that none of the key observations satisfied all of the peremptory requirements contained in section 139(1)(c) and, as a result, none of the key observations could be relied upon to warrant the dissolution.

[116] What constitutes an “appropriate step” must depend on the prevailing circumstances and it cannot be determined in isolation, nor can it be given substance without the benefit of context. Dissolution is a drastic step, and for its appropriateness to be determined we must enquire into the circumstances which prevailed at the time the decision was taken.

[117] We must remind ourselves that as early as December 2019, the Speaker, on numerous occasions, tried to engage with the provincial government. All her efforts were rebuffed by the MEC on the basis that she did not have the authority of the Municipal Council to engage with the MEC. Tellingly, the Premier’s answering

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<sup>75</sup> High Court judgment above n 2 at para 71.

affidavit is devoid of any facts to indicate that the December and February responses were considered before the dissolution decision was taken.

[118] In the spirit of co-operative governance and intergovernmental relations, it was necessary for the provincial government to engage with the Speaker in order to determine whether the executive obligations were unfulfilled and the reason therefor, as well as to provide a solution. Section 41(1)(f) of the Constitution forbids the provincial government and any sphere of government from assuming any power or function except those conferred on them in terms of the Constitution. Section 41(1)(h)(ii) provides that “spheres of government and organs of state must assist and support one another”. The provincial government was constitutionally obliged to investigate and provide solutions to the causes of unfulfilled obligations. In my view, engaging with the Speaker and her response could have easily assisted the Gauteng Provincial Government to resolve the issues plaguing the municipality.

[119] In the answering affidavit the Premier did not advance any legal ground for the reversal of his position, other than to say that the intervention was necessary because the Municipal Council was dysfunctional. It is clear that the decision to dissolve the Municipal Council was a foregone conclusion, and no amount of persuasion or meaningful engagement<sup>76</sup> would have caused the Premier to change his mind. If the decision to dissolve was taken in the absence of engagement, and without considering the prevailing circumstances, it is impossible to see how its appropriateness and lawfulness were evaluated at the time of the decision being taken.

[120] What the Executive Council did does not conform to the Constitution. Its failure is inconsistent with the duty to “support and strengthen the capacity” of the Municipal Council to “manage [its] own affairs, to exercise [its] powers and to perform [its]

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<sup>76</sup> Local government’s opportunity to be heard before a decision is taken against it, in respect of its governance, by the provincial government, is pivotal in line with section 41(1)(h) of the Constitution, and the spirit of co-operative governance. In instances where the provincial government is considering taking a decision against the local government, meaningful engagement requires that they inform and consult one another.

functions”.<sup>77</sup> Weakening the Municipal Council further by failing to support it, only to draw on this weakness to deliver the deathblow of dissolution is contrary to what the Constitution requires. As a result of the Executive Council’s error in interpreting section 139(1)(c), it has offended the principle of legality.

[121] What is disturbing in this matter is that in the process of preparing a response to the directives, the Municipal Council was dissolved on 4 March 2020 and the section 139(1)(a) directives were effectively withdrawn. The Speaker was given three days to respond to a letter from the MEC enquiring whether the section 139(1)(a) directions had served before the Municipal Council. The document prepared by the Speaker and sent to the MEC on 7 February 2020, in response to the directives under section 139(1)(a), was completely disregarded. The decision to dissolve the Municipal Council was taken on the same day without regard to the Speaker’s input, and, importantly, in total disregard of the COGTA’s guidelines and the provincial government’s set deadlines.<sup>78</sup> When the MEC eventually decided to take the dissolution decision, the provincial executive had not yet received a response to its letter of 4 March 2020 from the Municipal Council. It did so before its own deadline for the response. Given the impact that a dissolution would have on the Municipality, one would have expected the Provincial Executive to at least await a response from the Municipal Council, after its letter of 4 March 2020, instead of immediately dissolving the Council. The Provincial Executive blatantly ignored its own deadline.

[122] In the context of section 41 of the Constitution and the principle of co-operative governance, it is equally as difficult to imagine that a lawful decision could have been taken by the provincial government in respect of local government without the involvement of the Municipal Council. If the Municipal Council is to be placed under the control of the provincial government, it must be informed of that decision and consulted. All of these steps require that a reasonable opportunity be afforded to the

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<sup>77</sup> See section 154(1) of the Constitution above.

<sup>78</sup> Section 41(1)(h)(v) requires the provincial government to adhere to agreed procedure. The failure to wait for a response in accordance with its letter is contrary to what the Constitution requires.

Municipal Council to meaningfully participate in resolving its problems. In this case, prior notice of dissolution was neither given, nor was there any meaningful engagement with the Municipal Council.

[123] Finally, the province had not pursued any other means of addressing the political crisis. The Systems Act provides various means by which the truancy and deviant conduct of municipal councillors which hamstrung the Council could be addressed. Sections 105 and 106 of the Systems Act grants the MEC the right to monitor a municipality 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 is also empowered in terms of Schedule 1, item 14(4) and 14(6) of the Systems Act to appoint a person to investigate breaches by councillors to comply with their statutory duties and to suspend or remove them if necessary.

[124] In the circumstances, the question to be asked is whether the decision to dissolve the Municipal Council was appropriate? I think not because the facts do not support such a decision. The water crisis was receiving the attention it deserved and the walkouts caused the Municipal Council’s inability to fulfil its executive obligations. Even where the facts were indicative of an exceptional set of circumstances, exceptionality alone is not sufficient to warrant dissolution where dissolution is, contextually, not justified.

[125] This leads me to one conclusion: the provincial government misconstrued its powers and failed to apply itself to the issues faced by the municipality. It is clear to me that the dissolution decision should be set aside and that the municipality should be allowed to do its job. The dissolution decision falls to be set aside on the basis of offending the principles of lawfulness.

*Concluding remarks*

[126] Section 139(1)(c) must be invoked sparingly, especially given the other options of intervention available to the provincial executive. Giving the provincial executive carte blanche to intervene, in the most drastic manner, where circumstances do not warrant such action, would be contrary to the spirit of co-operation between the provincial and local governments. It would also violate the core principle of the autonomy of local government as enunciated by this Court in *Gauteng Development Tribunal*.<sup>79</sup> This is so because the Constitution requires much more of them. It requires that they cooperate with their counterparts and ensure that they fulfil executive obligations. Our democracy and municipal councils will prevail if elected officials put aside their differences to ensure the delivery of basic services.

*Remedy*

[127] The interpretation of section 139(1)(c) by the provincial executive is one that ignores reality and the issues faced by the people of Tshwane. Clearly, the deadlock was caused by the walkouts of the ANC and EFF councillors, and it created an exceptional set of circumstances. It is also clear that the Municipal Council was both willing and, in certain circumstances, able to fulfil its obligations, but was prevented from doing so by factors beyond its control. It was prevented from doing so by the recalcitrant councillors. So, what can be done? What about the actual cause of the collapse? What should be done to ensure that they fulfil their executive obligations and serve the residents of Tshwane?

[128] To answer the above question, regard must be had to item 14 of Schedule 1 of the Systems Act which provides the MEC with the means to resolve the impasse brought about by truant councillors. The MEC's own representative, Mr Nkoko, who was required to observe the Municipal Council meetings and report back to the MEC, recommended that the functionality of the Municipal Council be investigated; that councillors be reminded of their roles and duties, and be re-trained on the Code; and,

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<sup>79</sup> *Johannesburg Metropolitan Municipality* above n 34.



finally, that a Commission of Inquiry be established to investigate the causes of the walkouts. All these efforts or suggestions by Mr Nkoko were aimed at resolving the impasse. Inexplicably, they were ignored by the MEC. To compound the problem, the MEC refused to invoke the provision of item 14 of Schedule 1 of the Systems Act.

[129] The People of Tshwane must come first. We are dealing with a very difficult situation and are tasked with finding a remedy that will result in the strengthening of the Municipal Council to manage its own affairs and functions. Importantly, it must be a remedy that will stabilise the Municipal Council and enable it to continue to fulfil its executive obligations.

[130] The order of the High Court requiring the councillors to remain and stay in the meetings without lawful excuse cannot stand. It is far-reaching and encroaches on the separation of powers. Ordering councillors to attend Municipal Council meetings and to stay in attendance thereof at the risk of being found in contempt of court takes the mandamus too far.

[131] This Court is granted the discretion to make an order that is just and equitable. Thus, it would be appropriate to substitute the High Court's order with an order compelling the MEC to invoke his powers in terms of item 14(4) of Schedule 1 of the Systems Act, appointing a person or a committee to investigate the cause of the deadlock of the Municipal Council and to make a recommendation as to an appropriate sanction.

### *Order*

[132] The following order is made:

In CCT 82/20 and CCT 91/20:

1. In respect of the applications for direct leave to appeal:
  - (a) the applications are granted.
2. In respect of the appeals:

- (a) the applicants' appeals are dismissed;
- (b) the appeal in relation to the mandamus made by the High Court is upheld; and
- (c) Paragraph 3 of the order of the High Court is set aside and replaced with the following:

“The Member of the Executive Council for Co-operative Governance and Traditional Affairs, Gauteng is ordered to invoke his powers in terms of item 14(4) of Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000, to appoint a person or a committee to investigate the cause of the deadlock of the City of Tshwane Metropolitan Municipal Council and to make a recommendation as to an appropriate sanction.”

- 3. The applicants are to pay the respondents costs including the costs of two counsel where so employed.

JAFTA J (Mhlantla J and Tshiqi J concurring):

[133] I have had the benefit of reading the judgment prepared by my colleague Mathopo AJ (first judgment). Unfortunately, I cannot agree with the outcome and the reasons supporting it. While I agree that leave to appeal must be granted, I think that the appeal should be upheld.

[134] The underlying dispute here is the exercise of political power by members of a municipal council. In our constitutional order, political parties play a vital role in the democratic government. A multi-party system of government is the bedrock of the type of government envisaged in the Constitution.<sup>80</sup> As a result, the majority of

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<sup>80</sup> Section 1 of the Constitution provides:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

representation in legislative bodies is made up by members nominated by political parties.

[135] Apart from passing legislation, these legislative bodies also resolve political disputes by exercising political powers. One of those powers is to remove the executive from office if it no longer enjoys the confidence of the majority in the legislative body concerned. As this is a quintessential political dispute, the Constitution and relevant legislation do not lay down any conditions for the removal. This power is available to members of a legislative body at the national, provincial and local sphere of government. In the national sphere, members of the National Assembly may force the President and his or her Cabinet to resign by a simple majority that supports the passing of a motion of no confidence.<sup>81</sup>

[136] At provincial level, the removal of an executive council from power is regulated by section 141 of the Constitution.<sup>82</sup> This provision is a mirror image of section 102 of

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- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
  - (b) Non-racialism and non-sexism.
  - (c) Supremacy of the constitution and the rule of law.
  - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

<sup>81</sup> Section 102 of the Constitution provides:

- “(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
- (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.”

<sup>82</sup> Section 141 of the Constitution provides:

- “(1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province’s Executive Council excluding the Premier, the Premier must reconstitute the Council.
- (2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.”

the Constitution which applies in the national sphere. But the Constitution does not regulate the removal of executive committees in the local sphere.

[137] The removal from office of the executive committees, including mayors and speakers, is governed by legislation. The Local Government: Municipal Structures Act<sup>83</sup> (Municipal Structures Act) provides for the removal of a speaker, an executive mayor and his or her executive committee. In terms of section 40 of this Act, a municipal council may remove its speaker from office by resolution. Under section 58, a municipal council may remove its executive mayor from office also by resolution. When a mayor vacates office, the executive committee appointed by him or her dissolves.<sup>84</sup>

[138] The golden thread that runs through removal from office in all spheres is simply that the relevant legislative body has lost confidence in its executive. No other reason is required for this political decision. All that is required to implement the decision is that there should be a motion of no confidence, supported by a simple majority. Of course, members of the relevant body are allowed to hold a debate over the motion before it is put to a vote.

[139] The dissolution of the Council with which we are concerned has its genesis in the dissatisfaction with how this Council managed the processing of motions of no confidence against its speaker and executive mayor. Members of opposition parties represented in that Council viewed the conduct of the speaker as hampering the tabling of the relevant motions of no confidence. The lack of cooperation between the speaker and councillors led to an impasse that disabled the Council from exercising its powers and performing its public functions.

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<sup>83</sup> 117 of 1998.

<sup>84</sup> Section 60(5) of the Municipal Structures Act provides:

“If the executive mayor vacates office, the mayoral committee appointed by that executive mayor dissolves.”

*Facts*

[140] The challenges in the Council can be traced back to its meeting of 28 November 2019 wherein a motion of no confidence in the mayor was proposed by councillors from opposition parties, the African National Congress (ANC) and the Economic Freedom Fighters (EFF). The mayor and speaker of the Council came from the Democratic Alliance (DA).

[141] The speaker disallowed the motion of no confidence in the mayor, purportedly acting in terms of rule 19 of the rules and orders of the Council.<sup>85</sup> In protest against this decision, the ANC and EFF councillors left the meeting. It will be recalled that section 58 of the Municipal Structures Act empowers members of a municipal council to remove a mayor from office by resolution. This section does not subject the passing of that resolution to a decision taken by a speaker in terms of rules and orders.

[142] Following the withdrawal of councillors from both the ANC and EFF, the meeting of 28 November 2019 was terminated without completing its business. This was due to lack of a quorum. The next meeting was convened on 5 December 2019. Its agenda related to a motion of no confidence against the speaker and the motion of no confidence against the mayor. In relation to the latter, it was a continuation of the meeting of 28 November 2019. But it is not clear from the papers what became of the speaker's disallowance of the motion.

[143] However, the meeting of 5 December 2019 deteriorated into chaos, following the speaker's recusal from chairing the meeting, in view of the motion against her. Again it is not clear from the papers how an acting speaker was appointed. But the DA tells us that he was prevented from performing functions of a speaker by councillors from the ANC and EFF. Thereafter, according to the DA, the Council purported to

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<sup>85</sup> Rule 19 provides that the speaker "must disallow a motion or proposal if, in his or her opinion, the motion or proposal advances arguments, expresses opinion or contains unnecessary factual, incriminating, disparaging or improper suggestions".

appoint an acting speaker but its decision was later suspended by the High Court, pending a review application.

[144] During the course of the meeting, someone described as the representative of the MEC purported to appoint one of the councillors as acting speaker. This decision too was suspended in the same application before the High Court. Section 41 of the Municipal Structures Act confers the power to appoint an acting speaker on a municipal council.<sup>86</sup> This may be done if the speaker is absent or unavailable to perform functions of a speaker.

[145] It does not appear that motions against the speaker and the mayor were considered on 5 December 2019. It is further not clear from the papers whether a proper meeting was held on that day. The story as told by the DA moves to a notice issued by the MEC on 6 December 2019. The notice informed the Council that the Provincial Executive had resolved to intervene in terms of section 139(1) of the Constitution. By letter of 18 December 2019, the speaker responded and disputed that intervention under section 139 was justified. In a detailed response, the speaker pointed out that some of the issues raised in the notice did not relate to executive obligations. She said that only the service delivery issues fell within the ambit of section 139(1). She also set out steps undertaken by the municipality to address those issues.

[146] Having been aware of the challenges facing the Council in relation to holding council meetings, on 14 January 2020 the MEC issued directives in terms of section 139(1)(a) to the Council. The speaker took the position that the directives were unlawful because they were not issued by the Provincial Executive but by the MEC, even though the MEC is a member of the Provincial Executive. Presumably, those directions were ignored as they were thought to be unlawful.

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<sup>86</sup> Section 41 of the Municipal Structures Act provides:

“If the speaker of a municipal council is absent or not available to perform the functions of speaker, or during a vacancy, the council must elect another councillor to act as speaker.”

[147] What happened next, according to the DA, was a council meeting scheduled for 16 January 2020. Its agenda included the motions of no confidence against the mayor and the speaker. This time around the speaker did not recuse herself from presiding over the meeting. As soon as she called for the motions, including the one against her, points of order were raised by councillors from the ANC and EFF. They were objecting against the order in which the motions appeared on the agenda. The objections were overruled. Eventually councillors from the ANC and EFF left the meeting which became inquorate.

[148] Later that day, the MEC wrote to the speaker accusing her of unbecoming conduct which had led to the collapse of the meeting. On 23 January 2020, the MEC suspended the speaker who challenged the decision in the High Court on the following day. The decision was later rescinded by the MEC. Frustration building up, the MEC directed the Council to hold disciplinary proceedings against the speaker. This was objected to by the chief whip in the Council on the basis that the MEC had no authority to issue such directive.

[149] On 30 January 2020, the Council held a meeting. Councillors demanded that the MEC's letter of 28 January 2020 be read out at the meeting. According to the DA, that meeting was chaired by the chief whip and not the speaker. When the chief whip declined the request to have the MEC's letter read out, councillors from the ANC and EFF withdrew from the meeting in protest.

[150] On 7 February 2020, the Municipality, according to the DA, provided a further comprehensive response to the MEC's directives of 14 January 2020. This response comprised a document of 188 pages. On 4 March 2020, the MEC enquired from the speaker if the directives had been placed before Council. The MEC afforded the speaker three days within which to respond to the query. But the Provincial Executive took a decision on 4 March 2020 to dissolve the Council and this decision was announced by the Premier on 5 March 2020. Notices were sent to the relevant Minister, the Provincial Legislature and the NCOP.

[151] Meanwhile, the Council had attempted to hold meetings without success on 19, 27 and 28 February 2020. All these attempted meetings were inquorate because members of the ANC and EFF failed to attend. The source of this was the unhappiness in how meetings scheduled to process motions of no confidence were conducted. The collapse of council meetings revealed a deep-rooted inability to address political issues within the Council. No decision of any kind could be taken by the Council, owing to the inquorate meetings. This inability seriously undermined the Council's ability to fulfil its executive obligations.

[152] Dissatisfied with the decision to dissolve the Council, the DA instituted a review application in the High Court. Three grounds of review were advanced. The first one was that the Provincial Executive had acted unfairly and irrationally in dissolving the Council. The second was that the dissolution was unlawful because it did not comply with the requirements of section 139(1) of the Constitution. The third ground was that the decision to dissolve was taken for an ulterior purpose.

[153] The review was opposed by the applicants who contended that the dissolution was effected in a manner that complied with section 139(1) of the Constitution. They argued that procedural fairness does not apply to a section 139(1) process. In any event, they submitted that on the facts on record, the Council was afforded an opportunity to make representations and that comprehensive representations were submitted by the speaker to the Gauteng Provincial Government. With regard to the third ground, they denied that the decision to dissolve was taken for an ulterior purpose.

[154] The High Court addressed the unlawfulness ground only and declined to decide the other grounds of review.<sup>87</sup> With regard to legality, the High Court held that the dissolution was not illegal. Instead, it concluded that "the dissolution decision was inappropriate" because there were less intrusive measures which the Provincial

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<sup>87</sup> High Court judgment above n 2 at para 104.



Executive could have taken “to address the root cause of the Council’s inability to fulfil its core responsibilities”.<sup>88</sup>

*The appeal*

[155] It cannot be gainsaid that the appeal lies against the decision of the High Court set out above. This Court is called upon to determine whether that decision was correct. The singular issue that needs to be determined is whether the taking of the decision to dissolve the Council was inappropriate for reasons advanced by the High Court.

[156] The lawfulness of that decision does not, strictly speaking, arise because the High Court did not, throughout its judgment, hold that the decision itself was unlawful. On the contrary, it held that it was the taking of the decision in light of present circumstances that rendered it inappropriate. For this conclusion, the High Court relied on sections 105 and 106 of the Systems Act. Section 105 empowers the MEC for local government to “establish mechanisms, processes and procedures” for monitoring the exercise of powers and performance of functions by municipalities in his or her province and assessing the support needed by those municipalities in order to strengthen their capacity.<sup>89</sup>

[157] Section 106 authorises the MEC to demand information relating to a failure to fulfil a statutory obligation or where there is maladministration or malpractice from a municipal council. The section also mandates the MEC to set up an investigation of the

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<sup>88</sup> Id at paras 94 and 104-5.

<sup>89</sup> Section 105 of the Systems Act provides:

- “(1) The MEC for local government in a province must establish mechanisms processes and procedures in terms of section 155(6) of the Constitution to—
- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
  - (b) monitor the development of local government capacity in the province; and
  - (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.”

matter, if he or she considers it necessary.<sup>90</sup> If there is no provincial legislation regulating such investigations, the provisions of the Commissions Act<sup>91</sup> would apply with the necessary changes.

[158] Since the impugned dissolution was effected in terms of section 139(1) of the Constitution, it is necessary to interpret this provision in order to determine if it requires that sections 105-6 of the Systems Act be followed before a dissolution mandated by the Constitution can be put into force. Section 139 of the Constitution provides:

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<sup>90</sup> Section 106 of the Systems Act provides:

- “(1) If an MEC 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 must—
- (a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
  - (b) if the MEC considers it necessary, designate a person or persons to investigate the matter.
- (2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act No. 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1)(b).
- (3) (a) An MEC issuing a notice in terms of subsection (1)(a) or designating a person to conduct an investigation in terms of subsection (1)(b), must within 14 days submit a written statement to the National Council of Provinces motivating the action.
- (b) A copy of the statement contemplated in paragraph (a) must simultaneously be forwarded to the Minister and to the Minister of Finance.
- (4) (a) The Minister may request the MEC to investigate maladministration, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.
- (b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National Council of Provinces.
- (5) (a) Where an MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of subsection (4)(a), the Minister may in terms of this section conduct such investigation.
- (b) The Minister must send a report detailing the outcome of the investigation referred to in paragraph (a) to the President.”

<sup>91</sup> 8 of 1947.

- “(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 elected, if exceptional circumstances warrant such a step.
- (2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b)—
- (a) it must submit a written notice of the intervention to—
    - (i) the Cabinet member responsible for local government affairs; and
    - (ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;
  - (b) the intervention must end if—
    - (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or
    - (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

- (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
- (3) If a Municipal Council is dissolved in terms of subsection (1)(c)—
- (a) the provincial executive must immediately submit a written notice of the dissolution to—
    - (i) the Cabinet member responsible for local government affairs; and
    - (ii) the relevant provincial legislature and the National Council of Provinces; and
  - (b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.”

[159] The context in which this section must be construed is that the Constitution creates a government with three spheres, namely national, provincial and local spheres. Each sphere is given powers and functions to perform within its own space, without interference from other spheres. However, the Constitution permits interference and intervention within the affairs of the provincial and local spheres in circumstances defined in sections 100 and 139. Outside these two sections, intervention or interference with the exercise of power or performance of functions by one sphere is prohibited.

[160] This means that the provincial and local spheres cannot intervene or interfere with the exercise of power granted to the national sphere, as this is not provided for in those sections. Nor can the local sphere interfere with the performance of provincial functions.

[161] Textually, section 139(1) begins by laying down the condition for a provincial executive to intervene in the affairs of a municipality. It tells us that there must be inability or a failure to fulfil an executive obligation by the municipality, where intervention is contemplated. In other words, the existence of the inability or failure to

fulfil that kind of obligation is a jurisdictional fact for the exercise of the power to intervene. Because the intervention may only be effected by a provincial executive, the inability or failure must relate to an obligation of the nature that can be fulfilled by an executive branch of government. It must be an executive obligation. And it must be sourced either from the Constitution or legislation.

[162] Once the jurisdictional part is established, the provincial executive in question is empowered to intervene by taking appropriate steps which would ensure the fulfilment of that obligation. The determination of steps to be taken is left to the discretion of the provincial executive concerned. In this regard, section 139(1) declares that the provincial executive “may intervene by taking any appropriate steps to ensure fulfilment of that obligation”. However, the provision goes further to list some of the steps that the provincial executive may take. Plainly, the text reveals that the listed steps are additional to any steps which are considered appropriate by the provincial executive.

[163] It is evident from the language of the text that the steps listed in section 139(1) are not exhaustive. The opening words state that the provincial executive may intervene by taking appropriate steps to ensure the fulfilment of the obligation, “including” the listed steps. The word “including” is used in a sense of enlarging the steps which the provincial executive may take.<sup>92</sup>

[164] The wide discretion conferred upon a provincial executive is qualified only by the requirement of appropriateness. The steps taken must be suitable in that they should be capable of fulfilling the obligations concerned. The appropriateness of the steps in a given case depends on the nature of the unfulfilled obligation and the circumstances that gave rise to the unfulfilment.

[165] If the provincial executive opts for steps listed in section 139(1), it must still determine their appropriateness. If the fulfilment can be achieved by a directive setting

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<sup>92</sup> *New Clicks* above n 1 at paras 454-6 and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 18.

out steps which the municipality may take, a directive may be issued. But where the cause for non-fulfilment is the municipality's inability, a directive would not be appropriate unless the provincial government first removes that inability. This is because the inability would prevent the municipality from taking the prescribed steps in order to fulfil the obligation.

[166] Depending on all the relevant circumstances, the provincial executive may decide to assume responsibility for that obligation itself if that would be appropriate. If this happens, the provincial executive would be entitled to perform whatever functions necessary to fulfil the obligation in question. But the fulfilment of an obligation by the provincial executive must be directed at one of the objectives listed in section 139(1)(b). These are maintaining essential national standards or meeting minimum standards for the rendering of service; preventing a municipality from taking unreasonable action that is prejudicial to another municipality or the entire province; and maintaining economic unity.

[167] The third step listed in section 139(1) is the dissolution of a municipal council if exceptional circumstances warrant such step. Dissolution too must be undertaken where it is appropriate to do so. In addition, exceptional circumstances justifying dissolution must be present. The latter requirement does not apply to the steps listed in (a) and (b) of the provision. As mentioned, (b) has its own requirements which do not apply to (a) or (c).

[168] If the provincial executive considers that dissolution is appropriate and warranted by the special circumstances, it may appoint an administrator to replace the dissolved municipal council and act in its place until a new Council is elected.

[169] A careful reading of section 139(1) indicates that the section does not oblige a provincial executive, where intervention is justified, to take any of the steps listed in it. It is left to the provincial executive concerned to determine the steps it needs to take to ensure fulfilment of the unfulfilled obligation. All that is required is that the steps taken

must be appropriate. But if the provincial executive is of the opinion that one of the listed steps is appropriate, it may take that step, provided requirements for taking such steps are satisfied.

[170] What is evident though from the text of section 139(1) is that the steps it lists do not have to be applied sequentially. There is nothing in the language of the section which suggests that the provincial executive must first take the step in (a) before it can proceed to (b) or that the provincial executive may not take the step in (c) even if all requirements are met, before taking the steps in (a) or (b) where the latter steps are not appropriate. By defining different requirements for the listed steps, the section suggests that the appropriateness of each does not depend on the inapplicability of the other steps but on the appropriateness of each, coupled with compliance with its requirements.

[171] Reading the section otherwise would lead to absurdity. It would mean that in respect of unlisted steps, a provincial executive has a free hand to choose an appropriate step. But when it comes to listed steps, there is no discretion. The provincial executive must first consider the step in (a) before it can have a look at (b) and (c), even if the special circumstances of a particular case show that (a) is not appropriate. For example, in a case of inability to fulfil an obligation, the step in (a) would be inappropriate for as long as that inability exists.

[172] Moreover, there is nothing in the language of section 139(1) which obliges a provincial executive to take the most appropriate step where a number of steps are appropriate. What the section forbids is an inappropriate step. The taking of an inappropriate step would fall outside the ambit of section 139(1). In a different context this Court stated:

“The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to

determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.”<sup>93</sup>

[173] The discretion conferred upon provincial executives by section 139(1) is wide. By parity of reasoning, provincial executives are permitted to select appropriate steps of their own choice and are not obliged to choose the more or most appropriate steps. For as long as the selected steps are appropriate, there would be compliance with section 139(1). This is because the section requires “any appropriate” steps to be taken. It does not qualify such steps with epithets like “more” or “most”.

[174] The language used in section 139(1) by the framers of the Constitution must not be ignored. It must be respected and should be construed properly within the reasonable bounds of its meaning. As this Court observed years ago:

“We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination.”<sup>94</sup>

[175] At the heart of our constitutional structure is the principle of separation of powers which reminds us that the Constitution allocates powers to three arms of the state, namely the Legislature, the Executive and the Judiciary. Under this principle, none of these arms should interfere with the exercise of power by other arms unless, and to the extent, permitted by the Constitution. Consequently, courts may not interfere with the provincial executive’s decision taken in terms of section 139(1) on the ground that, in the court’s opinion, there were more appropriate steps that could have been followed. The test is whether the steps taken were appropriate and not whether they were most appropriate.

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<sup>93</sup> *Albutt* above n 42 at para 51.

<sup>94</sup> *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 18.



[176] Courts must show deference to political choices made by the right political role-players.<sup>95</sup> The Constitution empowers the Judiciary to intervene in the exercise of power by the other arms only if there was no compliance with it. Courts are duty bound to uphold the Constitution. But this does not mean that where a discretionary power is conferred on the other arm and that arm has made its choice, courts may evaluate whether the choice made is a better choice and intervene if better choices exist but were not selected.

[177] In *Bato Star*, this Court affirmed the principle that just as the Judiciary is suited to exercise powers allocated to it, so are the Legislature and the Executive. Each arm is more suited to decide questions that fall within its competence and must accord due respect to decisions taken by the other arms. In that case, this Court formulated the principle in these terms:

“In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.”<sup>96</sup>

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<sup>95</sup> *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 46-7.

<sup>96</sup> *Id* at para 48.

[178] To complete the scheme created by section 139, a decision to dissolve a municipal council does not come into effect immediately. Section 139(3) obliges a provincial executive which has taken the decision, to immediately submit notices to the national Minister responsible for local government, the NCOP, and the relevant Provincial Legislature. But more importantly, the section empowers both the Minister and the NCOP to overturn the dissolution before it comes into force.

[179] Under section 139(3), there is a window period of 14 days before a dissolution may come into operation. This allows affected parties an opportunity to make representations to the Minister and the NCOP. This plainly illustrates that for the duration of that period, the dissolution is inchoate. But if the dissolution is not set aside until the expiry of the window period of 14 days from the date of receipt of the notice by the NCOP, the dissolution becomes effective.

[180] These are internal checks and balances created by section 139(3). The Constitution allocates the role of determining whether a dissolution was properly made to the Minister and the NCOP who are located at the national sphere of government. Of course, if they do not set aside a dissolution where there was a constitutional breach, courts must intervene to uphold the Constitution.

[181] This is the constitutional scheme against which the High Court's decision that the present dissolution was not appropriate must be assessed.

### *High Court decision*

[182] A good place at which this enquiry must begin is the question whether the dissolved Council had not fulfilled an executive obligation. The High Court accepted that the relevant Council had an executive obligation, flowing from section 27 of the Constitution and section 4(2) of the Systems Act, to supply water to the residents of Hammanskraal.<sup>97</sup>

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<sup>97</sup> High Court judgment above n 2 at para 64.

[183] However, having found that this executive obligation was not fulfilled, the High Court concluded that the non-fulfilment did not warrant a dissolution. That Court reasoned:

“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 [Executive Council], in the spirit of cooperative governance. Instead the Gauteng [Executive Council] 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 [Executive Council] with the latitude to dissolve the Municipal Council.”<sup>98</sup>

[184] It is evident from this statement that the High Court considered the failure to supply water in isolation. It overlooked the facts mentioned in the next paragraph of its judgment which should have been taken into account, together with other facts relevant to the inquiry. The existence of an unfulfilled obligation satisfied one of the jurisdictional facts for the exercise of the power to dissolve. It meant that it was competent for the Provincial Executive to exercise the power, provided other conditions for dissolution under the section were met.

[185] It will be recalled that, in addition to an unfulfilled obligation, section 139(1)(c) requires that there be exceptional circumstances warranting dissolution. The facts on which the Gauteng Executive Council relied as proof of exceptional circumstances were summarised thus:

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<sup>98</sup> Id at para 71.

“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.”<sup>99</sup>

[186] Evidently, these facts show that the entire Municipality and not the Municipal Council only, had serious difficulties. It had no mayor, no mayoral committee or municipal manager. To compound matters, the Municipal Council had become completely dysfunctional and as a result those vital vacancies could not be filled. The High Court described, rightly, the Municipal Council as paralysed. For a period of months, the Council could not take a single decision, including those necessary for the fulfilment of executive obligations.

[187] These stark facts moved the High Court to accept that “the Province acted rationally in looking into the deadlock in the Municipal Council”.<sup>100</sup> But that Court asked itself the question whether the Province had taken “the most appropriate action” by dissolving the Council. In the process of answering that question, the High Court held that there were better ways of addressing the dysfunctionality of the Council and held that the Systems Act mandated the MEC to resolve the problem.

[188] In this regard, the High Court reasoned:

“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

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<sup>99</sup> Id at para 72.

<sup>100</sup> Id at para 75.

missed an opportunity when 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 [unauthorised, irregular, fruitless and wasteful] expenditure”<sup>101</sup>

[189] Reliance on the Systems Act was misplaced. First, section 139(1) of the Constitution does not require compliance with the Act when a province exercises a constitutional power it confers. Second, section 106 of the Systems Act does not regulate the dissolution of municipal councils. Instead, it empowers the relevant MEC to intervene by seeking information or establishing an inquiry if he or she believes that there is maladministration, fraud, corruption or a serious malpractice. Whereas section 105 authorises the MEC to put in place mechanisms for monitoring performance of municipalities in his or her province. Both sections have nothing to do with the problems experienced by the dissolved Council.

[190] The High Court fell in error when it held that it needed to determine whether the impugned dissolution was the most appropriate action taken by the Gauteng Province. In doing so that Court applied the wrong standard. Section 139(1) does not lay down the test of the most appropriate steps but rather of any appropriate steps.

[191] Proceeding from the incorrect premise, the High Court further held:

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<sup>101</sup> Id at para 79.

“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.”<sup>102</sup>

[192] The High Court did not only apply the wrong test but it also held that a provincial executive must follow, sequentially, the steps listed in section 139(1), if it had decided to intervene.<sup>103</sup> This too was incorrect. It is not supported by the text of that provision which confers a wide discretionary power that goes beyond the listed steps. Even when the listed steps are considered, the syntax of section 139(1) does not underpin a sequential approach to taking those steps. This means that *Mogalakwena Local Municipality*<sup>104</sup> on which the High Court relied was erroneously decided.

[193] Furthermore, the High Court here held that a mandamus was an appropriate step to address the difficulty of inquorate meetings and would enable the Council to appoint a municipal manager and elect a mayor who would appoint a mayoral committee.<sup>105</sup> Having considered a number of alternative steps, the High Court concluded:

“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 not 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.”<sup>106</sup>

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<sup>102</sup> Id at para 81.

<sup>103</sup> Id at para 92.

<sup>104</sup> *Mogalakwena* above n 53.

<sup>105</sup> High Court judgment above n 2 at para 90.

<sup>106</sup> Id at para 94.

[194] The less intrusive measures which impelled the High Court to conclude that the decision to dissolve the relevant Council was inappropriate, are not a requirement of section 139(1). It bears emphasis that the section requires that a dissolution be an appropriate step that is likely to fulfil the executive obligation and that exceptional circumstances must warrant the dissolution. If these two conditions are met, a provincial executive may dissolve a municipal council. The fact that there may be other steps which are also appropriate and less intrusive has no bearing on the propriety of the dissolution. The same applies to other steps which are more appropriate.

[195] Having shown that the High Court has erred, it is now opportune to consider whether the impugned dissolution was appropriate and if it was warranted by exceptional circumstances. For these are requirements for the power to dissolve in addition to non-fulfilment of an executive obligation. Since we have already established that an executive obligation in relation to the supply of water to Hammanskraal was not fulfilled, it is not necessary to traverse the same ground again. Suffice it to say that over and above the non-fulfilment of that specific obligation, for a number of months, the impugned Council was unable to fulfil other obligations, as it could not take any decision.

### *Exceptional circumstances*

[196] Although these words are not defined in the Constitution, they are a common occurrence in our legislative landscape.<sup>107</sup> To begin with, as not defined, these words

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<sup>107</sup> Section 17(2)(f) of the Superior Courts Act 10 of 2013 provides:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may *in exceptional circumstances*, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

Section 60(4)(e) and 60(11)(a) of the Criminal Procedure Act 51 of 1977 provides:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

...

must be given their ordinary meaning unless the context in which they are used indicates otherwise.<sup>108</sup> Circumstances are exceptional if they are not usual or ordinary. Exceptional circumstances connote unusual or specially different circumstances.<sup>109</sup> They depict an uncommon occurrence. This is the sense in which the phrase was used in section 139(1)(c).

[197] The purpose was to make stricter conditions for the exercise of the power to dissolve a municipal council. It was to circumscribe the wide discretion of a provincial executive that enables it to choose whatever appropriate steps for intervening. In other words, the objective of “exceptional circumstances” is to protect municipal councils against provincial executives that are overzealous to dissolve a municipal council. It is a layer of protection additional to the appropriateness of the dissolution.

[198] The undisputed facts here show that the dissolved Council was dysfunctional. The dysfunctionality stemmed from the deep-rooted political differences among the political parties represented in the Council. There was a level of mistrust among them that ran so deep as to rupture the cooperation necessary for the normal and effective functioning of a municipal council.

[199] The ANC and EFF, as opposition parties in the Council, were frustrated by how the exercise of a political power to remove officials like the mayor and speaker from office was handled. In their view, the motions of no confidence were not properly

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(e) where in *exceptional circumstances* there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that *exceptional circumstances* exist which in the interests of justice permit his or her release.”

<sup>108</sup> *Johannesburg Metropolitan Municipality* above 34.

<sup>109</sup> *Seatrans Maritime* above n 67.



managed and as a result the two parties were denied the opportunity to put those motions to a vote. It will be recalled that legislation allows members of a municipal council to remove those officials from office by resolution.

[200] On the other hand, the DA as the ruling party in the Council was frustrated by the walkouts from council meetings by councillors from the ANC and EFF, as this disabled the Council from taking decisions necessary for fulfilling its obligations, executive or otherwise. This was a political problem that required a political solution by political parties represented in the Council.

[201] The impasse itself was extraordinary. Councillors withdrew from meetings in order to disable the Council from taking decisions because their demands to pass a resolution to remove certain officials from office, were not processed. It cannot be gainsaid that what happened here was exceptional. What remains for consideration is whether those unusual circumstances warranted a dissolution.

[202] Circumstances would warrant a dissolution if they justify the taking of such a step. It need not be the only step they justify, for section 139(1) does not say a provincial executive may dissolve a council if dissolution is the only step warranted.

[203] A determination of this issue requires consideration of the unusual circumstances themselves in their proper context. That context includes the fact that municipalities are autonomous creatures of the Constitution with original constitutional powers to exercise. The context also includes the reality of how municipal councils are composed. They are formed mainly by political parties that have contested elections and won seats in those councils. Ordinarily, those parties would have put forward to voters differing policies and election manifestos. Each party would want to promote those policies by supporting decisions of the Council which are consistent with its policies. Where, as here, the ruling party does not command a substantial majority, it can govern successfully only if it gets support of other parties.

[204] While it is permissible for political parties to pursue their interests in a municipal council, if the interests of various parties collide, the Council becomes a casualty. This is compounded where, as here, the governing party needs support of the other parties for governing effectively. When that support is withheld, the Council may be rendered dysfunctional. This reveals a serious weakness in the multi-party system of democratic government.

[205] Ordinarily, in a multi-party system, if the ruling party is no longer able to rule effectively, a fresh election is held. A fresh mandate to rule is sought from the voters. After all, it is their government which has lost the ability to rule.

[206] Under section 139(1), the only pathway that leads to fresh elections is dissolution. The framers of the Constitution were alive to the fact that a vacuum may be created by such dissolution. To avoid this, they have empowered the provincial executive to appoint an administrator whose job is to exercise all powers and perform all functions of the dissolved Council until a new Council is elected. A municipal council is elected to represent the people and to ensure government by them, the people. It is therefore evident that in the special circumstances of this case, the dissolution was warranted.

*Was dissolution appropriate?*

[207] The High Court and the first judgment hold that the dissolution was not appropriate because there were other steps which the Province could have taken to address the issue of non-fulfilment of executive obligations. There are serious difficulties against this approach. First, it assumes that section 139(1) requires that dissolution be done where it is the only step that can be taken. Objectively, there is no word in the language employed in section 139(1) which supports this interpretation. It must be remembered, as this Court cautioned in *Zuma* many years ago, that the Constitution does not mean whatever we may wish. Its language must be respected and courts must always maintain fidelity to that language.

[208] In *Zuma*, this Court stressed that ignoring the express language of the Constitution in favour of its values does not constitute interpretation but amounts to divination. As mentioned, section 139(1) expressly and unequivocally states that a provincial executive “may intervene by taking *any appropriate steps*”. This cannot reasonably be construed to mean more appropriate steps. To do so would be to subvert the framers’ deliberate choice of language. The word “any” qualifies the appropriate steps to be taken. To replace it with “more” does not constitute interpretation of that section.

[209] Second, as the first judgment rightly observed, the section lays down three conditions for the exercise of the power to dissolve. These are (a) non-fulfilment of an executive obligation; (b) the existence of exceptional circumstances warranting dissolution; and (c) the dissolution itself must be an appropriate step. There is no legal basis for reading additional conditions into the section. As the supreme law, the Constitution must be accorded respect and courts are obliged to uphold it in the manner it was framed by the founders. Once the three conditions are met, there can be no sound basis to hold that the exercise of the power to dissolve was unlawful or inappropriate.

[210] Once it is accepted, as the first judgment does, that the High Court was correct in holding that the dissolved Council was dysfunctional and that the Council was not able to fulfil any executive obligation, self-evidently the dissolution of that Council must be appropriate. A directive under section 139(1)(a) could not be appropriate. This is because a directive identifies an unfulfilled obligation and suggests steps to be taken by the Council itself to meet the obligation. The dysfunctional Council could not possibly do what a directive requires it to do.

[211] The step mentioned in section 139(1)(b) was also not appropriate. That step allows the provincial executive to take over and fulfil the relevant obligation. This is suitable to a situation where one or few obligations are unfulfilled but a Council is still competent to function. It is not designed for a situation like the present one, where no obligation can be fulfilled by the Council. This situation called for nothing short of

replacing the Council with another body. And that is catered for only under section 139(1)(c) and it must be preceded by a dissolution. The Constitution does not envisage a complete replacement of an existing Council.

[212] Third, the notion of using less drastic means has no bearing on the application of the section, for reasons already articulated. Notably, this is not part of the three requirements of the section. As a result, its genesis is not section 139(1) of the Constitution. Therefore, the approach adopted in the High Court and the first judgment which requires consideration of factors beyond the three requirements, for determining the lawfulness of the dissolution, is mistaken. It does not accord with section 139(1) itself.

*Remaining grounds of review*

[213] The High Court did not determine the remaining two grounds of review, namely that the dissolution was procedurally unfair and irrational, as well as that the Gauteng Province was actuated by an ulterior motive in taking the decision to dissolve.<sup>110</sup> Instead, that Court reasoned that “we do not find it necessary to address whether the process was procedurally fair and irrational” and “whether in taking the dissolution decision, the Gauteng EC was actuated by an ulterior motive”. This was said to be due to the finding that the dissolution was unlawful.

[214] Once the conclusion of the High Court on unlawfulness is overturned, there is nothing left to support its decision. That decision cannot be saved by the remaining grounds which that Court expressly and deliberately chose not to address. This is because an appeal by design involves a process of determining whether the decision of the court below was correct. And this exercise requires consideration of the reasons furnished by the lower court in support of the decision. Ordinarily, if those reasons are wrong the decision falls to be set aside.

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<sup>110</sup> High Court judgment above n 2 at paras 104-5.

[215] The question that arises on this aspect is whether the High Court's decision may be saved by this Court upholding one or both of the remaining grounds of review. I think not because there is no appeal in relation to those grounds in respect of which no decision exists. An appeal cannot lie against a non-existent decision. If this Court were to determine those grounds, it would be acting as a court of first and last instance.

[216] For this Court to do so, there must be a properly motivated request for direct access. Here there was none. Absent permission for direct access, there is no procedural basis for this Court to reach the other grounds.

[217] As a rule, our courts have declined to decide on appeal issues not determined by the court of first instance. Ordinarily, this Court does not adjudicate matters as a court of first and last instance. The underlying principle being that the losing party would be deprived of its constitutional right to appeal even where an appeal would have been allowed. In *M&G Media*,<sup>111</sup> the High Court had invoked incorrect legislation in deciding the issues raised by the parties. On appeal, this Court identified the correct provision but declined deciding the matter. The Court reasoned:

“I have concluded that the High Court should have invoked the provisions of section 80. However, the merits of the exemptions claimed, as well as the legality of the refusal to disclose the report, still need to be decided. These must now be decided in the light of the contents of the report sought. In addition, section 80(3) deals with procedural matters relevant to the application of section 80, including receiving representations, conducting the hearing, and potentially prohibiting the publication of information in relation to the proceedings. All these matters require further consideration and further issues may arise in the course of the hearing that may require further attention. These issues must be considered by the High Court in the first instance.

M & G has argued that remittal will necessarily entail wasted costs when ‘the matter will in all likelihood end up before this Court for final determination again’. It is not necessary to speculate on whether the matter will return to this Court, or even to the

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<sup>111</sup> *President of the Republic of SA v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC).

Supreme Court of Appeal for that matter. Suffice it to say, we have articulated the applicable legal principles and there is no reason to believe that these principles will not be properly applied by the High Court if the matter is remitted. Nor can we say, at this stage, whether the Supreme Court of Appeal or this Court will grant leave to appeal were the matter to appear before us again.

In all the circumstances, the just and equitable order to make is to remit the matter to the High Court to enable it to examine the report pursuant to the provisions of section 80 and thereafter to decide the merits of the exemptions claimed and the lawfulness of the refusal to disclose the record.”<sup>112</sup>

[218] The same approach was followed in *Chagi* where this Court held:

“The High Court and the Supreme Court of Appeal have considered this case on the hypothesis that the Second Unit had been cited. It was on this basis that the respondent’s special plea had been upheld by the High Court and the applicants’ appeal against that decision to the Supreme Court of Appeal had been dismissed. This premise has been held to be incorrect. The special plea should have been dismissed because the Second Unit had not been cited in the summons or the particulars of claim. In the circumstances, the appeal should succeed and the orders of the High Court and the Supreme Court of Appeal should be replaced by an appropriate order. That order requires the High Court to deal with this matter on the basis that the First Unit was at all times cited in the summons and particulars of claim.”<sup>113</sup>

[219] In a similar vein, the Supreme Court of Appeal too refused to determine issues which were not decided by the court of first instance in *Theron N.N.O.*<sup>114</sup> In that matter, the Court stated:

“The entire record of the proceedings did not serve before this court on appeal. The record came to be limited by agreement between the parties in the light of the solitary issue that had been decided by the high court and which, in turn, required determination

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<sup>112</sup> Id at paras 68-70.

<sup>113</sup> *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 48. See also *S v Qhinga* [2011] ZACC 18; 2011 (2) SACR 378 (CC); 2011 (9) BCLR 980 (CC).

<sup>114</sup> *Theron N.N.O. v Loubser N.O.* [2013] ZASCA 195; 2014 (3) SA 323 (SCA).

on appeal. But even if the full record had served before us, the high court had declined to enter into a consideration of any of the other issues in the application. This court has thus been deprived of the benefit of the high court's view on any of those issues. In the result this court will in effect be sitting both as a court of first instance, as also, a court of appeal insofar as those issues are concerned. It follows that the matter has to be remitted to the high court for a determination of each of the two applications which are the subject of this appeal.”<sup>115</sup>

[220] But the fault for this situation does not lie with the DA and its councillors. They raised all grounds which they believed would justify a rescission of the decision to dissolve. It was the High Court which, in its wisdom, decided not to address the remaining grounds. That Court erred and its error has turned out to be costly for the parties and the Judiciary, which has to expend scarce judicial resources more than once on the same matter. This could have been avoided if the High Court had decided all the issues placed before it, within the limited time it had. The matter was heard on an urgent basis on 24 March 2020 and judgment was delivered on 29 August 2020.

[221] The High Court was able to produce a comprehensive judgment of more than 100 paragraphs within that short span of time and which addressed various complex issues of the law. The High Court must be commended for this. The matter demanded an urgent resolution. The only shortcoming is that its judgment did not canvass all the issues.

[222] It would be unfair to the DA and its councillors if upholding the appeal were to include the rejection of the grounds which were not decided by the High Court. In these circumstances, I consider it fair to limit the reversal of the High Court's order to the extent of its decision, and remit the remainder of the matter to the High Court.

[223] The first judgment implicitly accepts that with regard to the supply of water to Hammanskraal, there was a failure to fulfil an executive obligation but the first

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<sup>115</sup> Id at para 21.

judgment concludes that that failure did not warrant the dissolution of the Municipal Council because the letter from the Speaker showed steps taken to resolve that matter.<sup>116</sup> While this may be true, it is beside the point. The point is there was a failure to fulfil an executive obligation and that satisfied one of the requirements of section 139(1) which permits a provincial executive to intervene when “a municipality cannot or does not fulfil an executive obligation.”

[224] While it is true that the kind of intervention flowing from that failure alone may not be dissolution, the failure would still have triggered and justified some form of intervention. That could assume the form of directives stating steps to be taken to fulfil the obligation or that the provincial executive itself discharge that obligation.

[225] But the difficulty here was that on the common cause facts, the Municipal Council was unable to do anything because it could not have quorate meetings. Therefore, if a directive was issued requiring the Council to take steps, it could not be carried out simply because the Council was dysfunctional and could not take even a single decision. While the discharge of that obligation by the provincial executive could have addressed the issue, it would not in present circumstances have resolved the bigger problem flowing from the dysfunctionality.

[226] In real terms the dysfunctionality meant that the Municipal Council was unable to fulfil all its obligations, regardless of whether they were executive or administrative in nature. The steps referred to in the Speaker’s letter in relation to Hammanskraal were taken before the collapse of cooperation among its councillors. On the facts the dysfunctionality commenced in November 2019. And therefore, when the decision to dissolve was taken in March 2020, there was literally no functional Council. The Speaker who was still in office could not act and take decisions in the place of Council, hence the Democratic Alliance sought an order obliging the ANC and EFF councillors to attend meetings.

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<sup>116</sup> See the first judgment at [110]-[112].



[227] It bears emphasis that as from November 2019, the Municipal Council was unable to take any decision and was incapable of fulfilling all of its executive obligations. This situation carried on for more than three months before the provincial executive of Gauteng intervened and dissolved that Council. Plainly no other form of intervention would have ensured the fulfilment of the Council's obligations apart from appointing an administrator who stepped into the collective shoes of the Council and was empowered to take decisions and fulfil obligations on its behalf. However, under section 139(1)(c), the appointment of an administrator must be preceded by a dissolution of the relevant Council.

### *Remedy*

[228] With regard to remedy, the first judgment replaces the order that was granted by the High Court with an order directing the MEC to establish a committee to investigate the cause for the dysfunctionality and for that committee to engage meaningfully with all councillors with the view to resolving issues. For a number of reasons, I have difficulty with the proposed order. First, it was not asked for by any of the parties. The Democratic Alliance had requested a *mandamus* obliging the ANC and the EFF councillors to attend and remain in attendance of council meetings, on pain of contempt of court if they failed to obey the order. This is the order which the High Court had granted.

[229] It is not permissible for a Court to refuse to grant the relief sought if a proper case for it has been made out and instead issue a remedy not pleaded for and not proved by evidence. The first judgment invoked item 14 of the Code without any pleaded case for that relief and any proof that the remedy was warranted.

[230] Moreover, the remedy was granted in disregard of the terms of item 14(4) of the Code which prescribes jurisdictional facts for the exercise of the power conferred upon the MEC. First, the item requires that the relevant Municipal Council must have failed to conduct the investigation itself. There is no evidence that the issue was ever referred

to the Council. We do not know whether the ANC and the EFF councillors would have participated in a meeting called to establish an inquiry. And therefore there is no proof of failure on the part of the Council to conduct an inquiry.

[231] In addition, the item requires the MEC to form an opinion on the need for an inquiry before establishing one. Item 14(4) of the Code reads:

“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 subitem (2) if a municipal council does not conduct an investigation contemplated in subitem (1) and the MEC for local government considers it necessary.”

[232] Under the item the MEC must be of the opinion that an inquiry is necessary. If this and the failure by the Council to conduct an investigation are not established, the power conferred by the item cannot be exercised. And no Court can competently order it to be exercised in the absence of proof that these conditions were met.

[233] Over and above the issue of legality, the remedy proposed is not suited to addressing the problem at hand. This is the inability to discharge obligations. The inquiry in question if established, will have no power to fulfil executive obligations of the Municipal Council. Unlike an administrator, the inquiry cannot take decisions and discharge municipal obligations. It can only investigate and recommend a sanction, among those listed in item 14(2) of the Code only<sup>117</sup>

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<sup>117</sup> Item 14(2) of the Code reads:

“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 councillor; and
- (e) request the MEC to remove the councillor from office.”

[234] Evidently the Code with its internal sanctions is not an appropriate step envisaged in section 139(1) of the Constitution. Instead, it was designed for disciplining wayward councillors. Consequently, the Code serves a purpose totally unrelated to the goals of section 139(1) of the Constitution.

#### *Costs*

[235] The *Biowatch* principle applies and protects the DA against the liability of costs awarded in favour of the state parties.<sup>118</sup> But that indemnity does not extend to liability to pay costs of the EFF to which the principle does not apply. However, with regard to costs incurred earlier in the High Court, those costs should be reserved in view of the fact that the matter is to be remitted for further consideration by that Court.

[236] In the result, I would have granted the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order granted by the High Court is set aside.
4. The matter is remitted to the High Court for determination of the other grounds of review.
5. The costs of the application in the High Court are reserved.
6. The Democratic Alliance is ordered to pay costs of the Economic Freedom Fighters in this Court, including costs of two counsel.

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<sup>118</sup> *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

MOGOENG CJ (Madlanga J concurring):

[237] I have had the pleasure of reading the judgment of my Brother Mathopo AJ. Barring jurisdiction, leave and the setting aside of the High Court order, I disagree with the reasoning and outcome. Similarly, it was a pleasurable exercise reading the judgment of my Brother Jafta J, with which I am in agreement but for the remittal and resultant reservation of the High Court costs. And this is how and why.

[238] Section 139(1) of the Constitution provides:

“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 elected, if exceptional circumstances warrant such a step.”

[239] A close examination of this section read with the all-essential imperative of cooperative governance,<sup>119</sup> suggests that a Provincial Executive is duty-bound to do

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<sup>119</sup> Section 41 of the Constitution.

everything reasonably practicable to help resolve challenges relating to a municipality's inability to either discharge any or all of its executive obligations at all or in an objectively satisfactory manner. What steps or measures would be appropriate should also depend on the existence of a functional or somewhat effective Municipal Council.

[240] Sight should never be lost of the fact that whatever measures the Provincial Executive proposes or takes, must be designed "to ensure fulfilment of that [executive] obligation" that the Municipality, whose failure to fulfil it, would have triggered and justified intervention by the Executive. And that could, in terms of section 139(1)(a), take the form of issuing directives highlighting the failures and proposing remedial steps. Directives intended "to ensure fulfilment of [an] obligation" may only be properly and meaningfully issued to a Municipal Council that is capable of acting on those directives. In other words, it must at least be able to do some work relating to its otherwise unfulfilled executive obligation(s). That measure cannot be taken in respect of a Municipal Council that is so paralysed by, say indifference, incompetence or dysfunctionality as to be incapable of responding to the directives in a way that would ensure fulfilment.

[241] Similarly, section 139(1)(b) does envisage a situation where a fully functional or somewhat functional Municipal Council is in place. The Provincial Executive may, more as an alternative to, but arguably even concomitantly with section 139(1)(a), itself assume the "responsibility for the relevant obligation . . . to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of a service". It may also assume those responsibilities to "prevent that Municipal Council from taking *unreasonable action* that is prejudicial" to certain specified interests. Finally, it may intervene to maintain economic unity. And that would be in circumstances where the capacities or other challenges reasonably capable of being addressed by the Municipal Council undermine its possibility to live up to set standards for delivering services and maintaining economic unity. These are measures for bridging the gap between what the Council is doing and what it should be doing. More importantly, a dysfunctional municipality cannot be prevented "from taking

unreasonable action” because it is incapable of taking any decision or action. This is also borne out by the fact that the focus of section 139(1)(b) is narrow. This, I believe, is so to enhance pre-existing performance or ongoing performance.

[242] Here, the all-important pre-condition or reasonably anticipated functionality is missing for the purpose of operationalising section 139(1)(a) and (b).

[243] While I agree that a failure to fulfil an executive obligation and the existence of exceptional circumstance are preconditions for a proper or appropriate dissolution in terms of section 139(1)(c), I disagree that section 139(1)(a) and/or (b) are indispensable preconditions to dissolution. There are circumstances where they would inevitably have to be explored first and section 139(1)(c) resorted to only after (a) and (b) would have failed to yield the desired result. And the correct approach to adopt is one that is guided by an answer to the question: which of the available section 139(1) options would realistically result in the executive obligation of delivering services being fulfilled?

[244] The main judgment incorrectly holds that the Provincial Executive’s decision to dissolve the Municipal Council in terms of section 139(1)(c) was unlawful because it failed to identify executive obligations that Council had failed to fulfil, it did not implement Mr Noko’s recommendations that investigations be conducted to unearth the reasons for Council’s inability to fulfil its executive obligations and to address the problem, or honour the deadlines it had set for the Municipal Council to respond to its Directives. And the fact that it knew that Council would, in any event, not be able to meet or quorate in order to consider its Directives was indicative of bad faith and the resultant unlawfulness.

[245] It must be borne in mind that Mr Noko, on behalf of the Provincial Executive as represented by the MEC, attended two meetings of the Municipal Council. On the second and last occasion, he formed a clear view that the Municipal Council had already degenerated into a state of dysfunctionality. It is difficult to understand why, this notwithstanding, he still thought that the MEC and by extension the Provincial

Executive, stood to derive some benefit from commissioning an investigation into this well-known fact – the Municipal Council could not quorate because the ANC and EFF Councillors had a proclivity to walk-out of Council meetings since 2017 and have thus rendered the Municipality dysfunctional.

[246] The question is, what other potentially fruit-bearing or consequential section 139(1) steps could have been taken by the Provincial Executive to remedy the situation? What reasonably practicable steps could it have taken to restore the governing coalition of the EFF and the DA or cause both the ANC and EFF Councillors to attend meetings and remain in attendance to help the Municipal Council stay quorate and take all the necessary decisions so that executive obligations could be fulfilled? In other words, what is it that could have been done to avert the dysfunctionality and ensure the fulfilment of the executive obligations? In view of the approach and decisions taken by the main judgment, it will be necessary to answer these critical questions, to determine whether the proposed solution empowers the Provincial Executive to have the unfulfilled executive obligations, fulfilled.

[247] For, extraordinary as the dissolution of the Municipal Council was, it was the only appropriate and effective remedial step to take under the circumstances. Besides, time simply does not permit the luxury of overly protracted litigation that could otherwise have been effectively ended by this Court's just and equitable order. The proposed solution by the main judgment, sourced from item 14(4) of Schedule 1 to the Systems Act, is not helpful at all. Even more concerning is that both the High Court order and that proposed by the main judgment in this connection constitute a constitutionally impermissible encroachment into the terrain exclusively reserved for the Executive. That said, item 14(4) reads thus:

“Breaches of Code

(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 subitem (2) if a municipal

council does not conduct an investigation contemplated in subitem (1) and the MEC for local government considers it necessary.”

And subitem (2) empowers the MEC at best to either issue a formal warning to a Councillor, reprimand the Councillor, suspend the Councillor for a period, impose a fine on the Councillor or remove the Councillor from office. Removal from office would, in this matter, be the most effective of all sanctions and would inevitably result in the dissolution of the Municipal Council, given the number of Councillors likely to be liable to that sanction – all ANC and EFF Councillors. It is after all, their absence from Council meetings that paralysed the Municipality.

[248] None of these measures or sanctions has the remotest possibility of ensuring that unfulfilled executive obligations are fulfilled. To be more specific, none of them would result in the ANC and EFF Councillors attending all meetings and staying on in meetings to enable the Municipal Council to discharge its executive obligations. Non-attendance of meetings by Councillors is regulated by item 3 of the Code whereas impossible sanctions are listed in item 4. Those sanctions may be imposed by a Municipal Council and none of them would enable any State functionary to enforce or ensure attendance of the meetings to the end. They are, as stated, either a fine or removal from office, depending on the circumstances.

[249] What then would the MEC or Provincial Executive, conceivably or in reality, achieve by investigating the well-known dysfunctionality of the Municipal Council occasioned by its inability to quorate as a result of the strategic walk outs by the ANC and EFF Councillors? What is it that the MEC or the Provincial Executive should deploy those energies and resources to uncover? I am satisfied that they would simply be seeking to ritualistically tick some inconsequential box were they to do so.

[250] Ordering the MEC to act in terms of item 14 of Schedule 1 or even sections 105 or 106 of the Systems Act will not help solve the problem. The “best” or “worst”, depending on how one views it, that the MEC could do or achieve is to have it



“revealed” to him that the EFF no longer wants to cooperate with the DA, hence the walk-outs, that the ANC and the EFF were determined to frustrate Council meetings, and fire them.

[251] Scarce judicial resources and the necessity to be more deliberate and intentional about addressing the burning service delivery related issues on the ground demand that courts be decisive. After that long wait by the public for much-needed service delivery, justice and equity require that all the issues central to the proper determination of this matter be disposed of once and for all rather than having to go through the motions proposed by the main judgment, or remitting aspects of this matter to the High Court as proposed by the second. And this Court can afford to be definitive here because all the issues, including those that the High Court chose not to address were fully ventilated before us. This, by the way, extends to rationality, legality or the procedural fairness aspect of this application. And this is what informs the dispositive character of my approach to this matter.

[252] It is now settled that the Municipal Council was not going to be quorate for the purpose of fulfilling any of its executive obligations. To what end would the Provincial Executive then be required to act in terms of section 139(1)(a) and (b) rather than merely for the purpose of putting form over substance? Again, one has to ask rhetorically, what could realistically have been achieved even if the Provincial Executive were to take its misguided process of issuing directives to its logical conclusion? Nothing! We should, in my view, adopt a reasonable and pragmatic approach to this highly disturbing and good-governance-undermining development in our constitutional democracy.

[253] And the dissolution of the Municipal Council in terms of section 139(1)(c) would result in having the currently unfulfillable executive obligations fulfilled. Not only is the dissolution lawful because the Municipal Council was self-evidently unable to fulfil its executive obligations, but dissolution is also rationally connected to its constitutional purpose, to have the unfulfilled executive obligations fulfilled by the Administrator. The Administrator would exercise the authority of the dysfunctional Municipal Council,

appoint all functionaries who need to be appointed and without whom the Municipality cannot function effectively and efficiently, and serve the public. Within the prescribed period, elections would then have to be held and the electorate will have the opportunity to deal with political parties appropriately for the good service rendered or the betrayal of the mandate they gave them, as the case may, in their view, be. Again I say, that it would then be for those who gave them the mandate to express their pleasure or displeasure through the ballot.

[254] It is in this context that the following remarks from the *First Certification* case quoted with approval and reflected upon in *United Democratic Movement*, must be understood:

“In the *Certification* case, this Court addressed the conflict that arises from some Members’ continued membership of the National Assembly, after their appointment to Cabinet:

‘An objection was taken to various provisions of the [New Text] that are said to violate [Chapter] VI. This [Chapter] reads:

“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”

The principal objection is directed at the provisions of the [New Text] which provide for members of executive government also to be members of legislature at all three levels of government. It was further submitted that this failure to effect full separation of powers enhances the power of executive government (particularly in the case of the President and provincial Premier), thereby undercutting the representative basis of the democratic order.

...

It was also contended that the requirements of accountability and responsiveness in [Chapter] VI were breached. The argument was that legislators would have to obey the instructions of the party leadership even if the party concerned had unequivocally abandoned its electoral manifesto and directed its [Members of Parliament] to vote, speak and

act against the policies expressed in that manifesto; or if the party imposed the whip in relation to a policy which legislators sincerely and reasonably believed to be wrong. The end result, so it was further submitted, would amount to a subversion of the accountability and responsiveness of legislators to the electorate. We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.’

The most effective extra-parliamentary mechanism for holding the people’s elected representatives accountable, is a general election. It is in this context that this Court said ‘it is parties that the electorate vote for and parties which must be accountable to the electorate’. Also, that a party’s unacceptable abandonment of its manifesto is likely to result in electoral defeat. A factor that is relevant to the Speaker’s decision-making in relation to a democratically-permissible voting procedure is that ‘an individual member remains free to follow the dictate of personal conscience’.<sup>120</sup>

[255] I also found the following remarks by Skweyiya J in *Merafong* to be particularly helpful:

“The Constitution makes clear that South Africa is a democratic State founded on the values of dignity, equality and freedom. As Van der Westhuizen J highlights, if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law, voters must deal with bad politics. The doctrine of separation of powers to which our constitutional democracy subscribes, does not allow this Court, or any other court, to interfere in the lawful exercise of powers by the legislature.”<sup>121</sup>

<sup>120</sup> *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at paras 77-8.

<sup>121</sup> *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 308.

I agree with the main judgment that no executive obligations could possibly be fulfilled as no decisions could be taken by the Municipal Council, for the reasons set out in this judgment. Courts must thus leave executive challenges, which could euphemistically be referred to as a political chess game, to the Executive or the politicians.

[256] And courts ought to caution themselves against importing into the Constitution requirements that the drafters, in their wisdom, chose not to factor into the provisions being interpreted. “Less restrictive means” or “less intrusive measure” is not part of section 139(1)(c) but only section 36 of the Constitution and for good reason. Here, unlike the situation to which section 36 applies, we are not dealing with a limitation of a fundamental human right in the Bill of Rights. We are dealing with a constitutionally-ordained encroachment by a Provincial Executive in the operational space of another sphere of the Executive Arm of the State – local government. And this is done to serve the public where they are being let down and not being served by a Municipal Council. That it is only permissible to dissolve a Municipal Council under “exceptional circumstances” is a sufficiently stringent and inbuilt requirement to obviate the importation of a section 36 requirement of “less restrictive means” to the section 139(1)(c) process. “Exceptional circumstances” is self-contained and has all we need to appreciate just how extraordinary or markedly high the test to be passed is for dissolution to be justifiable. Less restrictive means does not belong there. It is a needless addition.

[257] The Provincial Executive appears to have been half-hearted in its attempts to help. It was wrong of them to set a date for the Municipal Council or the Speaker to respond to their concerns only for them to act before a response was received and before the expiry of the date chosen by them. The criticism levelled against them in this connection is well-deserved although I am unable to say that they were actuated by bad faith to do what they did.

[258] As stated, the Premier and the Provincial Executive went through the motions apparently to tick all the boxes they thought needed to be ticked. But it should have been realised or objectively determinable in advance that this step could never bear any fruit or result in the fulfilment of the Municipality's hitherto unfulfilled executive obligations. Not only is it common cause that the Municipal Council was dysfunctional for at least a year, its inability to fulfil any executive obligation is also undisputed. That the Provincial Executive may have identified wrong executive obligations and fudged its ill-advised attempt at compliance with section 139(1)(a) cannot detract from the fact that the Municipal Council was or is dysfunctional. It also cannot be meaningfully assisted by the section 139(1)(a) and (b) measures or the item 14 process and that dissolution was the only reasonably practicable option under the circumstances.

[259] That the Provincial Executive was already aware that the Municipal Council was dysfunctional by the time they sent the Directives or purported to act in terms of section 139(1)(a), could not have debarred them from relying on the undeniable dysfunctionality as the basis for dissolution. This is so because all the requirements for the dissolution had been met as at the time of dissolution. They were therefore entitled to dissolve the Municipal Council.

[260] It is for these reasons that I disagree with the reasoning and order of the main judgment. I would therefore grant leave, uphold the appeal and set aside the order of the High Court with no order as to costs, but order the DA to pay the EFF's costs, including costs occasioned by the employment of two counsel.

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