

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 16166 / 2010

In the matter between:

OVERBERG DISTRICT MUNICIPALITY
EVE CATHERINE MARTHINUS
ISAK STEVENS
JAN CORNELIUS GELDERBLOM
FUNKA CORNELIUS KHOKLAKALA
CHRISTENE VUYELWA MAZEMBE
PATRICK THAMSANQA PONI
DEANNE CLAUDINE RUITERS
JODNA JANUARIE
DAVID JOHANNES ABRAHAMS
JOHN CHARLES OCTOBER
ELLEN ROSALINE JANSEN

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant
Eighth Applicant
Ninth Applicant
Tenth Applicant
Eleventh Applicant
Twelfth Applicant

versus

THE PREMIER OF THE WESTERN CAPE
THE MEMBER OF THE EXECUTIVE COUNCIL
FOR LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING,
WESTERN CAPE
THE EXECUTIVE COUNCIL OF THE
WESTERN CAPE PROVINCE
W.P. RABBETS N.O.

First Respondent

Second Respondent

Third Respondent
Fourth Respondent

JUDGMENT : 12 OCTOBER 2010

BOZALEK J:**INTRODUCTION**

- [1] This matter concerns the interpretation of s 139(4) of the Constitution¹ which provides for intervention by a provincial executive where a municipality has failed to timeously approve a budget or any revenue-raising measure necessary to give effect to the budget. It arises out of a decision taken by the Western Cape provincial cabinet on 14 July 2010 resolving that the Council of the Overberg District Municipality ("the council" and "the municipality" respectively) be dissolved with immediate effect in view of its failure to approve an annual budget before the start of the municipal financial year. The provincial cabinet further resolved to approve a temporary budget for the municipality and to appoint an interim administrator.
- [2] In response to the decision the municipality and eleven of the twenty councillors making up the council, as first and second to twelfth applicants respectively, launched an urgent application against the Premier of the Western Cape (the first respondent), the Provincial Minister of Local Government, Environmental Affairs and Development Planning (the second respondent), the

¹ Constitution of the Republic of South Africa, 1996.

Western Cape provincial cabinet (the third respondent) and the newly appointed administrator (the fourth respondent).

- [3] The main relief sought by the applicants was a declaration that the decision to dissolve the council was inconsistent with the Constitution and as such invalid. Further consequential declaratory and review relief was sought including the reinstatement the council and of the applicants as councillors. The application was opposed by the respondents, save for the fourth respondent who abides the court's decision. Answering and replying affidavits were filed and the matter came before me some two months after the disputed decision as one in which the applicants seek final relief on the papers. It follows that any factual disputes must be decided on the facts as presented by the respondents together with such facts presented by the applicants which the respondents do not place in dispute.²

BACKGROUND

- [4] Before proceeding to the issues it is necessary to set out a history of the developments which led to the disputed decision. At all material times the council comprised twenty councillors, eleven of whom are members of either the African National Congress or the National People's Party and comprise the ruling coalition. The

² *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.

remaining nine councillors were members of either the Democratic Alliance or the Independent Democrats. At a council meeting on 10 March 2010 the council resolved to remove the then Speaker from office following a motion of no confidence. Neither a Speaker nor an acting Speaker was elected in his place, however.

- [5] The council next met on 29 March 2010, a meeting called by Mr. D van den Heever, the municipal manager (to whom I shall refer as such), for the main purpose of electing a Speaker as required by the Local Government Municipal Structures Act³ ("the Structures Act"). At that meeting a permanent Speaker, councillor Dennis, was elected. (The respondents state that the new Speaker was elected at the council meeting held on 10 March 2010 but this is contradicted by the minutes to their answering papers.) When the council next met on 13 April 2010 the new Speaker had resigned with effect from that date. Another councillor was elected as Speaker but only for the duration of that meeting. At the same meeting the municipality's annual draft budget was tabled and approved for purposes of publication for comment.

³ Act 17 of 1998.

- [6] Despite the fact that the council was obliged to approve a budget by the expiry of the financial year on 30 June 2010 no further meetings of the council were held until July. This was not for lack of effort on the part of the ruling coalition. On 26 May 2010 the coalition's eleven councillors (second to twelfth applicants) each signed a joint written request addressed to the municipal manager requesting an urgent special council meeting the following day to deal *inter alia* with the election of a Speaker and approval of the budget. However, the municipal manager had now adopted the stance that he was precluded from convening meetings of the council since that function could only be fulfilled by a Speaker, whose office was vacant. He refused to convene the requested meeting and took disciplinary action against a municipal official who, in his absence, issued a notice advising councillors of the meeting via cell phone text messages. This was the method customarily used to deliver such notices to councillors.
- [7] The municipal manager considered that there was a *casus omissus* in the legislation and rules relating to the convening of meetings in such a situation and sought legal advice as to whether he had the power or obligation to convene a meeting in such circumstances. On 31 May 2010 he wrote to selected councillors inviting them to make "written representations" to him

regarding "the way forward" towards the convening of a council meeting and afforded them 14 working days for this purpose.

- [8] On 8 June the applicant councillors addressed a further written request to the municipal manager calling on him to convene an urgent council meeting for 11 June to deal with the consideration of the annual budget as required by the Local Government: Municipal Finance Management Act⁴ ("the MFMA"), the election of a Speaker and the election of a deputy mayor. The letter drew to the municipal manager's attention the urgent need for the council to consider the budget in the light of the various deadlines imposed by statute. This detailed and reasoned letter elicited no positive response from the municipal manager other than a letter from him advising the ANC's chief whip that he still awaited his written representations. In the event no meeting eventuated. On 23 June the same eleven councillors addressed yet a further written and jointly signed request to the municipal manager for an urgent special council meeting to be held on Friday 25 June to consider the annual budget and the election of a Speaker and a deputy mayor. No response appears to have been forthcoming and again no meeting was held.

⁴ Act 56 of 2003.

- [9] On 30 June 2010 the applicant councillors wrote to the second respondent advising him that the council had been unable to meet to approve the budget "*as a direct result of the vacancy of the Speaker and the consequent refusal by the Municipal Manager to convene the council meeting requested by a majority of council in writing on 27 March, 11 June and 25 June*". The letter concluded with a request to the second respondent to intervene by requiring the municipal manager to convene a council meeting. The letter was signed by all applicant councillors. The second respondent denies, however, that his office ever received this letter and questions its authenticity.
- [10] The applicants sought legal advice and, on 9 July, directed yet a further written request to the municipal manager, again signed by all applicant councillors, calling upon him to notify the balance of councillors of an *urgent special council meeting* to be held at 15h00 that afternoon to consider the budget and to elect a Speaker as well as an executive mayor, the incumbent of that position having also in the interim resigned. The applicant councillors warned that should the municipal manager fail to notify the other members of council, the meeting would go ahead regardless. The applicant councillors thereafter went ahead with the holding of a meeting that afternoon albeit in other premises since the municipal manager had locked the

council chambers. The municipal manager averred that he had refused to convene the meeting because, according to him, he did not have the power to do so. He maintained that the councillors needed to elect a Speaker to call further meetings of the council. At no stage did he explain how the council should resolve the apparent catch 22 situation and elect a Speaker when, as he insisted, only a Speaker could convene a meeting for this purpose.

- [11] As mentioned the meeting proceeded on 9 July and was presided over by the next most senior official of the municipality after the municipal manager. A Speaker was elected as well as an executive mayor and an executive deputy mayor. The meeting also purported to approve the 2010/2011 budget and resolved to place the municipal manager on compulsory leave with immediate effect pending the investigation of misconduct charges against him.
- [12] On 12 July a confrontation took place between the municipal manager and the newly elected mayor when she unsuccessfully attempted to serve the letter of suspension on the former. Mr. van den Heever refused to accept the letter and, somewhat surprisingly, there and then telephoned the second respondent who confirmed on the speaker phone that he had prepared

papers for the dissolution of the council which would be taken to the third respondent for adoption on 14 July. The second respondent also made it clear that no action should be taken against the municipal manager expressing the view that the mayor had no authority to act against him.

- [13] On that same day the second respondent addressed a letter to each councillor giving notice that he intended to request the third respondent on 14 July to dissolve the council in terms of s 139(4) of the Constitution by reason of its failure to approve an annual budget before 1 July and, further, that he would request the third respondent to approve a temporary budget and appoint an interim administrator. He invited comments on his intended action to be received by 16h00 on the following day.
- [14] The eleven applicant councillors furnished a lengthy written response the following day contending *inter alia* that such an extreme measure was inappropriate, particularly in the light of the fact that the council was willing and able to fulfil its obligations in terms of the Constitution to approve its budget and the revenue-raising measures necessary to give effect thereto. They expressed disappointment that the second respondent had not intervened in a more positive and constructive manner to enable the council to fulfil its obligations and referred to their

earlier letter dated 30 June 2010. The also advised the second respondent of the meeting which had been held on 9 July 2010 which had purported to elect a Speaker and approve the budget. The second respondent does not dispute receipt of this communication.

- [15] The third respondent duly met on 14 July and resolved to dissolve the council in terms of s 139(4) of the Constitution with effect from 16 July 2010 by reason of its failure to approve an annual budget before the start of the municipal financial year. It resolved further that the draft budget and revenue-raising measures placed before it in a submission be approved as a temporary budget for the municipality and that the fourth respondent be appointed as administrator to assume all of the powers and function of the council under the direction of the third respondent until such time as a newly elected council had been declared elected. The submission, prepared by the Director: Specialised Support in the second respondent's department, set out the background to the proposed intervention and furnished a motivation for the resolution.

- [16] The submission reads in part as follows:

"When intervening in terms of s 139(4) of the Constitution read with the applicable provisions of the MFMA, it should be noted that:

- *Where a municipality has not approved an annual budget by the commencement of the new financial year, there is as*

stated above, no statutory basis for the municipality to approve a budget;

- ...
- *Where an annual budget has not been approved by the due date, the applicable legislation indicates that the dissolution of council is compulsory and only after a new council has been elected, it regains its authority to approve a budget for the municipality."*

[17] The submission noted further that the municipal manager's views had been canvassed on the proposed intervention. These were reported to be that, given the resignation of the executive mayor, that the municipality had no deputy executive mayor or Speaker and "*given the political instability, no provable reasons*" existed as to why the council should not be dissolved and why the municipality should not be placed under administration.

[18] The submission makes no reference to the ruling coalition's repeated attempts to convene a special meeting to elect a Speaker and consider the budget. It did refer to the meeting held on 9 July 2010 but expressed the view that it was invalidly constituted. Regarding the purported approval of the budget at that meeting, the submission noted that the council was in any event no longer empowered to do so.

THE CASES FOR THE PARTIES

[19] The case for the applicants rested on two legs. In the first place it was contended that, regard being had to the requirement in s

139(4) that the provincial executive take "any appropriate steps" to ensure that the budget was approved, in the particular circumstances of this matter a decision to dissolve the council was completely inappropriate. More particularly, it was contended that the third respondent had misconstrued its powers when it approached the matter on the basis that it had no choice but to dissolve the council. Secondly, it was contended that, since the council had lawfully approved the budget at the special meeting held on 9 July, the jurisdictional fact necessary for the third respondent to decide to dissolve the council in terms of s 139(4) of the Constitution was absent and thus its decision to this effect was invalid.

[20] The respondents' case was that, in accordance with the submission referred to earlier, once the council had failed to pass the budget by 30 June the provisions of s 139(4) of the Constitution, read with the relevant provisions of the MFMA, left it with no alternative but to dissolve the council, approve a temporary budget and appoint an interim administrator. Similarly, as regards the meeting and its purported approval of the budget on 9 July 2010, as foreshadowed in the submission, the respondents' case was that once the deadline of 30 June had passed there was no legal basis upon which the council could approve the budget. In any event, it was contended, that

the meeting in question was not properly convened and that the resolution purporting to approve the budget had been insufficient for that purpose.

ISSUES AND ANALYSIS

[21] The primary issue for determination is whether s 139(4) of the Constitution obliged the third respondent to dissolve the municipal council where the budget of the municipality had not been approved by 1 July, the commencement date of the municipal financial year.

[22] The determination of this issue is a matter of constitutional interpretation and is therefore very much concerned with the determination and application of constitutional values and not simply with a search to find the literal meaning of statutes.⁵ As was put by Ngcobo J (as he then was) in *Matatiele Municipality and Others v President RSA and Others*⁶:

"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."

⁵ *Matiso v Commanding Officer Port Elizabeth Prison and Another* 1994 (4) SA 592 (SECLD) at 597H.

⁶ 2007 (1) BCLR 47 (CC) at paras [36] – [37].

Section 139 thus cannot be read in isolation but must be viewed against the background of the constitutional framework of which it forms part. That context includes the fact that the Constitution is the supreme law of the land and law or conduct inconsistent therewith is invalid. It is underpinned by founding values which includes the supremacy of the Constitution itself and the rule of law. Other relevant features are universal adult suffrage, regular elections and a multi-party system of democratic government.

- [23] Section 40 of the Constitution provides that government is constituted as national, provincial and local spheres of government which are "*distinctive, interdependent and interrelated*" and each sphere is obliged to conduct its activities within the parameters of Chapter 3 of the Constitution. This would include the duty of a provincial government to respect the status, powers and functions of local government, the duty not to assume any powers or functions except those conferred by the Constitution, the duty to exercise its functions in such a manner as not to encroach on the functional or institutional integrity of local government and the duty to cooperate with local government institutions in mutual trust and good faith.⁷ These duties are enforced by s 3 of the Local Government:

⁷ Ss 41(1), (e), (f), (g) and (h).

Municipal Systems Act⁸ which states that provincial government has to exercise its executive and legislative authority "in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority".

- [24] At a structural level, local government enjoys original legislative and executive powers which are recognised in the Constitution⁹.

As stated by the Constitutional Court:

*"The constitutional status of local government is ... materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates."*¹⁰

- [25] The Constitutional Court has recognised the very different nature of local government in the new constitutional order. As was stated in *City of Cape Town v Robertson*¹¹:

"The advent of the Constitution has enhanced, rather than diminished the autonomy and status of local government that obtained under the interim Constitution ... the Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character."

⁸ Act 32 of 2000.

⁹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 26.

¹⁰ *Id* para 38.

¹¹ 2005 (2) SA 323 at para 58 and 60.

[26] In an article dealing with s 139 in its previous form i.e. before s 139(4) was added, Murray commented generally that:

"The nature of the constitutional relationship between province and municipality and the drastic nature of a s 139(1)(b) take-over, suggests that the provisions should be used only after proper attempts have been made to resolve the problem by less invasive means."

and, furthermore, that:

"...once an intervention is formally justified by a municipal failure, the difficult question that arises is how to balance the constitutional imperative to respect the municipality's integrity as far as possible while ensuring effective government, which the Constitution also requires. The way such a balance is struck from case to case will depend on many practicalities – and especially what resources are available both in the municipality and the province – but it must be governed by normative considerations. Respect for municipal integrity presumably means that an intervention should intrude on municipal integrity as little as possible".¹²

[27] So much for the context in which s 139 must be considered. I turn now to the primary issue, namely, the correct interpretation of s 139(4) and more particularly whether a provincial executive is obliged to dissolve a municipal council and take the further attendant steps provided for where that municipality is unable or unwilling to timeously approve a budget or any revenue-raising measure necessary to give effect thereto.

[28] It is appropriate to note that s 139 as a whole makes provision for provincial intervention in local government affairs in two different situations. The first is where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or other

¹² See Murray "Municipal Integrity and Effective Government" (1999) 14 SAPR/PL 333 @ 349 and 355/356.

legislation. In such an event, in terms of s 139(1), the relevant provincial executive has a discretion to intervene by "*taking any appropriate steps to ensure fulfilment of that obligation ...*". Three species of such steps are provided for which are progressively more intrusive upon the authority and functioning of the municipality, namely, issuing a directive to the municipal council, assuming responsibility for the relevant obligation or, most drastically, dissolving the municipality and appointing an administrator until a new municipal council has been elected.

- [29] Section 139(2) provides that the provincial executive which is intervening by assuming responsibility for a municipality's obligation must give written notice thereof to the national cabinet member responsible for local government affairs and the National Council of Provinces whereupon these parties may terminate the intervention. Similarly s 139(3) provides for immediate notification to the same parties by the provincial executive of any dissolution of a municipal council which intervention may, within a limited period, in turn be set aside by the cabinet member or the National Council of Provinces.
- [30] These provisions as a whole indicate that the circumstances in which a provincial executive may intervene in the affairs of local government are quite strictly delineated. Furthermore, by

providing for progressively more intrusive steps and the establishment of notification and reversal procedures, the premium placed on the autonomy of local government is underlined.

- [31] Section 139(4) deals with what the Constitution clearly regards as a more serious situation than that contemplated in s 139(1), namely, the failure to fulfil an obligation to approve a budget or a related revenue-raising measure. This appears from the fact that the provincial executive is obliged in such circumstances to intervene as opposed to its discretionary power in the circumstances envisaged in s 139(1). This emphasis is reinforced by the terms of 139(7) which provides that if a provincial executive fails to adequately exercise its power (and obligation) to intervene, the national executive "*must intervene*" in its stead.
- [32] The only specific remedial step on the part of the provincial executive mentioned in this context is the dissolution of the council and the concomitant appointment of an administrator and approval of a temporary budget. Notwithstanding this, the open-ended language of s 139(4) – "by taking any appropriate steps... including dissolving the municipal council..." - strongly suggests that the dissolution of the defaulting municipal council is

not a mandatory step but rather the most far-reaching of a range of possible steps.¹³

[33] Both the language of s 139(4) and its broader context suggest that the provincial executive, although obliged to intervene, must exercise its discretion to take only such steps as are appropriate to achieve the end sought, namely, "*to ensure that the budget or revenue raising measures are approved*". Although not relevant to the present matter it also seems clear that once the provincial executive has decided that the form of its intervention will be a dissolution of the municipal council then it must at the same time appoint an interim administrator and approve a temporary budget.

[34] Mr. Heunis, who appeared together with Mr. Oliver, submitted on behalf of the respondents that section 139(4) must be read as obliging a provincial executive to enforce the full package of steps once a municipality had failed to approve its budget timeously. He suggested that the words "*by taking any appropriate steps*", apparently redundant on his interpretation, in fact referred to any preparatory steps necessary for the provincial executive to approve a temporary budget, such as obtaining relevant information from the municipal authority. This

¹³ My emphasis.

strikes me, however, as a strained interpretation, one which attributes a secondary meaning to words which otherwise appear clear. This is quite apart from the fact that it ignores the keyword "*including*" in s 139(4) which is completely at odds with the suggested meaning. Furthermore, the interpretation contended for on behalf of the respondents is also at odds with the general form and structure of the Constitution which establishes the three separate spheres of government and the requirement that each sphere should respect the autonomy of the other as far as possible. Seen in this light, an interpretation of s 139(4) which accords with the clear language of the section and which requires, if appropriate, the use of less intrusive means of intervention by one sphere of government in the affairs of another, is clearly to be preferred.

[35] Counsel were unable to refer the Court to any reported cases dealing with the provisions of s 139(4). However, in the unreported judgment in the matter of *Mnquma Local Municipality and Others v The Premier of the Eastern Cape and Others*¹⁴, Van Zyl J had occasion to consider the provisions of s 139(1) in circumstances where they had been invoked by the provincial executive to dissolve a municipality. The learned judge

¹⁴ Case no. 231/2009 dated 5 August 2009 (unreported Eastern Cape Division, Bisho) and to be found at <http://www.saflii.org.za/za/cases/ZAECBHC/2009/14.html>.

embarked upon a detailed analysis of the relevant provisions within the context of the Constitution as a whole. He identified a number of features relating to the structure of local government which stood out. Two of these were the enhanced status of local government and the provision of a governmental structure in which each sphere of government has its own distinctive status, powers and functions and a constitutional framework establishing a relationship between the different branches of government based on co-operation and aimed at the advancement of inter-governmental participation and support. Another important feature which the learned judge identified was that the structure of local government provides a forum for local community participation based on the principle of democracy.

- [36] Although the Court in *Mnquma* was dealing with a different issue to that in the present matter, the learned judge's analysis and interpretation of s 139 offers valuable assistance in the present matter. Faced with the question of whether the dissolution of a municipal council was an "appropriate" form of intervention in terms of s 139(1), Van Zyl J stated as follows:

"What is appropriate is not left to the discretion of the provincial executive. As stated by Harms JA in *Pharmaceutical Society of South Africa v Tshabalala Msimang* ...

- [74] The word '**appropriate**' means '**especially suitable**' or '**proper**'. In the *Second Certification judgment* the Constitutional Court

held that the reference to '**appropriate steps**' in section 100(1) had to be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power between the different levels of government...

[75] In *Pharmaceutical Society of South Africa v Tshabala-Msimang* case and in *Hoffman v South African Airways* the respective courts had to determine the meaning of the word '**appropriate**' in the context of '**appropriate dispensing fee**' and '**appropriate relief**'. It was held that appropriateness in the context of the Constitution imports the element of justice and fairness and that '**in determining what is appropriate one must consider the conflicting interests of all those involved and affected**' and that "**one is really dealing with a balancing act implicit in the right of access...**". In the present context I am of the view that '**appropriate steps**' are to be construed as steps that are such as would be suitable in the sense that it must fit the situation. The form of intervention must accordingly address the particular circumstances of the case. ... It requires a balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government. A further consideration is the purpose of the power to intervene. It is clearly designed as a corrective measure to ensure that such steps are taken that would resolve the problems that may be experienced in a particular municipality. This necessitates the question whether the form of intervention that is contemplated would be effective and commensurate with the nature and/or the extent of the failure to fulfil the obligation concerned."

Referring to the dissolution of a municipal council by a provincial executive in terms of s 139(1)(c), van Zyl J stated that such a step:

"[81] ... is only appropriate if the fulfilment of an executive obligation cannot be achieved otherwise than by the dissolution of the existing council and its replacement by an administrator until such time as a new council has been elected. There are three aspects that flow from this: the first is that it presupposes, at the very least, that consideration was given to other forms of intervention that are effective and less intrusive, secondly, that there exists a causal connection between the conduct of the Municipal Council and the continued failure to comply with an executive obligation, and lastly, as in the case of the other two forms of intervention, the question must be asked whether the Municipality would be able to fulfil its obligations after the intervention is over."

[37] I am in respectful agreement with the views expressed by the learned judge and consider that they are, *mutatis mutandis*,

equally applicable to an interpretation of the provisions of s 139(4).

- [38] Van Zyl J concluded that s 139(1) has both legal and political safeguards built into it. The legal safeguards are the objective determination of whether there has been a failure to fulfil an executive obligation, whether the intervention is appropriate and, in the case of paragraph (c), whether there exist "exceptional circumstances". These, the Court held, "...are matters which are not left to the discretion of the provincial executive. The existence of these prerequisites are to be determined objectively and the existence thereof may be tested in a court."
- [39] Again, I am in agreement with these views and consider that they can be applied, with appropriate adjustment to s 139(4). Where a provincial executive has exercised its powers in terms of s 139(4), the questions of whether the municipality has not fulfilled a statutory obligation to approve a budget or any revenue-raising measures and whether the form of intervention by the provincial executive is appropriate may be tested in a court. I would add in this regard however that, in accordance with established principles of review, it would not be open for a court to set aside the form of intervention chosen by the provincial

executive simply because, in its view, a different form of intervention would have been appropriate.

- [40] Mr. Heunis sought to rely on the MFMA as providing support for an interpretation of s 139(4) requiring the mandatory dissolution of a defaulting council and referred to the provisions of s 139(8) which provide that national legislation may regulate the implementation of s 139 as a whole. Chapter 13 of the MFMA deals with the resolution of financial problems with section 135 providing that the primary responsibility for the resolution of financial problems lies with the municipality itself. Sections 136-140 make provision for provincial interventions but, significantly, their key provisions mirror those of s 139(4) of the Constitution. Section 136(3) provides:

"If the municipality has failed to approve a budget or any revenue-raising measures necessary to give effect to the budget, as a result of which the conditions for an intervention in terms of s 139(4) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with s 26."

Section 26 provides for the consequences of a failure by a municipal council to approve a budget before the start of the budget year. It requires that the provincial executive 'must intervene' in such an instance in terms of s 139(4) of the Constitution and, in doing so, repeats the wording

"by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council..."

- [41] Thus the key provisions of the MFMA relating to a compulsory intervention by a provincial executive add little if anything to the provisions of s 139(4). Furthermore, one searches that Act in vain for any suggestion that a provincial executive is limited in those circumstances to only one form of intervention, namely, a dissolution of the defaulting municipal council.
- [42] Mr. Heunis further sought to rely on s 27 of the MFMA which provides that the MEC for Finance may extend any time limit relating to the non-compliance by a municipality with any statutory provisions pertaining to the approval of an annual budget, other than the time limit contained in s 16(1). That subsection establishes the deadline for the approval of a municipality's annual budget as being the start of that financial year. Counsel argued that this exception indicated that any intervention by the provincial executive in these circumstances could only be in the form of the dissolution of the council together with the concomitant appointment of an administrator and approval of a temporary budget.
- [43] It was further argued in this regard that it would not be feasible for both a municipality and the provincial executive, after the expiry of such a deadline, to have the power to approve the municipal budget or revenue-raising measures. This argument

takes the matter no further however, since, whilst the power to approve a budget cannot reside in two spheres of government simultaneously, until such time as the council is dissolved that power must logically remain in its hands. The fact that the MEC for finance cannot extend a deadline for the passing of a budget in terms of s 16(1) of the MFMA simply demarcates the limits of the MEC's authority. It underlines the serious nature of a municipality's default in failing to meet such a deadline and obliges the provincial executive to intervene in terms of s 139(4) if the default continues. As was pointed out by Mr. Potgieter, who appeared together with Mr. G Potgieter on behalf of the applicants, it does not follow from this however that the form of such intervention must be the dissolution of the municipal council and the accompanying steps provided for in s 139(4)(a) and (b).

- [44] Section 25 of the MFMA provides that a municipal council which has failed to approve an annual budget must reconsider the budget or an amended version thereof within seven days of the original meeting and this process must be repeated until the budget has been approved. Subsection (3) provides that if by the first day of the budget year, the budget has not been approved, the mayor must report this fact to the MEC for local government in terms of s 55 and may recommend "an appropriate provincial intervention to the MEC in terms of section

139 of the Constitution". These provisions would be nugatory if s 139(4) obliged a provincial executive to dissolve a municipal council which had failed to timeously approve a budget or revenue-raising measures.

- [45] Mr. Heunis sought to rely on the view of **Steytler & De Visser**, *Local Government Law of South Africa*, Lexis Nexis, Durban, 15-40 that, apart from dissolution, there are no other "appropriate steps" which can be taken by a provincial executive in terms of s 139(4). In this regard they reason that after the commencement of the new financial year there is no legal basis for a municipality to adopt the budget and thus any directive to that effect would be invalid. Furthermore, a provincial executive ordinarily cannot assume the responsibility of passing a municipal budget as this is a legislative function protected from provincial interference.
- [46] The authors cite no authority for their interpretation of s 139(4) and, as indicated earlier, neither the Constitution nor any relevant legislation directly or indirectly provides that a municipality is barred from approving a budget after the financial year deadline has passed; nor that it forfeits this power to the provincial executive simply by reason of failing to meet the deadline. Indeed, as mentioned, s 55 of the MFMA is an express pointer in the opposite direction.

[47] In conclusion, I find little support, either in the language of s 139(4) of the Constitution, its overall provisions relating to local government or in related legislation which supports the restrictive interpretation contended for on behalf of the respondents. In my view, s 139(4) places a duty upon a provincial executive to intervene in the envisaged circumstances; but through that form of intervention best suited to resolve the particular problem giving rise to the failure of the council to approve a budget or revenue-raising measures and with due regard to the provincial executive's duties in terms of the principles of intergovernmental relations in terms of s 41 of the Constitution.

THE CONSEQUENCES OF THE RESPONDENTS MISCONSTRUING THEIR POWERS

[48] It is not in dispute that at all material times the first, second and third respondents held the view that they had no alternative in law but to dissolve the council and take the associated statutory steps. This was the nature of the advice they received from an advisor in the second respondent's department as set out in the submission placed before the third respondent on 14 July 2010. In his answering affidavit the second respondent makes it plain that he accepted such advice.

[49] It is common cause that the third respondent's decision to dissolve the council did not constitute administrative action which can be challenged under the provisions of the Promotion of Administrative Justice Act ("PAJA")¹⁵ but was, rather, executive action which is expressly excluded from the definition of administrative action in PAJA. That, however, does not immunise the decision from legal challenge since it must nonetheless meet the test of legality. The principle of legality was formulated by Chaskalson P (as he then was); Goldstone J and O'Regan J (in *Fedsure Life*) as follows¹⁶:

"[56] These provisions imply that the local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – 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. This has been recognised in other jurisdictions..."

The Court went further and stated that:

[58] 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. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is the principle of legality."

[50] In *Pharmaceutical*¹⁷ Chaskalson P stated as follows:

"One of the constitutional controls referred to is that flowing from the doctrine of legality. Although Fedsure was decided under the interim Constitution, the decision is applicable to the exercise of public power

¹⁵ Act 3 of 2000.

¹⁶ See above note 9 at paras 56 & 58.

¹⁷ *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the RSA and Others* 2000 (2) SA 674 (CC) at para 17. *Id* at para 58.

under the 1996 Constitution, which in specific terms now declares that the rule of law is one of the foundational values of the Constitution."

Chaskalson P went on to say that the exercise of all public power has to comply with the Constitution, the supreme law of the land, and the doctrine of legality, which is part of that law¹⁸.

[51] The Constitutional Court has made it clear that the principle of legality requires *inter alia* that the exercise of public power should not be arbitrary or irrational and requires the holder of power to act in good faith and not to misconstrue his/her powers. In *Fedsure*, referring to the exercise by the State President of his powers under s 84(2) of the Constitution, the Court stated:

"The exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue his powers."

[52] It is clear that the respondents misdirected themselves in misconstruing the provisions of s 139(4) as requiring the mandatory dissolution of the council and, for that matter, in assuming that once the deadline had passed the council no longer had the power to approve the budget. The third respondent's decision to dissolve the council was squarely based upon its misconstruing these provisions and it thus failed to exercise its discretion in terms of s 139(4) at all. At the same time

¹⁸ *Id* at para 20.

the decision was, for the reasons more fully set out hereunder, inconsistent with the third respondent's obligations in terms of the principles of intergovernmental relations enshrined in s 41 of the Constitution. In their papers the respondents do not purport to make out any case at all justifying the dissolution of the council save on the sole premise that the municipality's budget was not adopted by 1 July 2010. It did not seriously advance any other ground in support of an argument that the dissolution of the council was an appropriate step in the circumstances.

[53] Indeed, on the face of it the decision to dissolve the council was ill-suited to the problem underlying its failure to approve the budget which was, of course, the absence of a Speaker and the municipal manager's view that, as a result, no further meetings of the council could be called, even for the purposes of electing a Speaker or approving the budget. The municipal manager resisted repeated attempts by the majority of councillors, both before and after the budget approval deadline passed, to hold a council meeting for the purposes of electing a Speaker and approving the budget. Instead he frittered away the remaining time seeking legal advice and calling upon members of the council to furnish him with written representations in regard to this relatively minor procedural matter.

- [54] The impasse called out for the third respondent to take appropriate steps falling well short of the dissolution of the council. Thus, for example, the second respondent could have merely have advised the municipal manager to take a common-sense view of the situation and call a meeting of the council on proper notice to all its members with a view to electing a Speaker and approving the budget. The inappropriateness of the decision to dissolve the council was highlighted by submissions of the respondents' own counsel concerning the so-called *casus omissus*. Mr. Heunis expressed the view that, regard being had to the provisions of s 51(3) and (4)(c) of the Western Cape Municipal Ordinance 20 of 1974, read together with Schedule 6 of the Constitution, the municipal manager was in fact obliged, upon the receipt of the various written and signed requests which he received from the applicant councillors, to have called a meeting on proper notice for the purpose of electing a Speaker and approving the budget. It is unnecessary for this Court to express a view on this issue, but these provisions do appear to dispel any question of there being a *casus omissus*.
- [55] Had the second respondent's mind (and that of his advisor) been directed to the immediate problem facing the council, namely, why its attempts to hold a meeting to elect a Speaker

and approve the budget were being frustrated, the relevant provisions of the Ordinance could have been drawn to the attention of the municipal manager. The problem of the budget not being timeously approved could then have been quickly resolved if not completely averted. The circumstances of this very case illustrate the good sense in s 139(4) requiring a provincial executive to consider appropriate steps falling short of dissolution of a council.

CONCLUSION AND RELIEF SOUGHT

[56] It follows from my conclusion regarding the scope and meaning of s 139(4) that the third respondent's decision to dissolve the Overberg District Municipal Council and take the ancillary steps was, for want of compliance with the principle of legality, inconsistent with the Constitution and as such, invalid. The applicants are therefore entitled to the main declaratory relief which they seek to this effect. The applicants also seek an order reviewing, correcting and setting aside the aforesaid decision of the third respondent. In my view such review relief is inappropriate in the case of executive action and, in the light of the declaratory relief already granted, is superfluous. The applicants also seek further orders reinstating the council and the second to the twelfth applicants as councillors. Again, the main declaratory relief having been granted, this relief is superfluous.

[57] An order was sought declaring that the appointment of the fourth respondent as administrator of the council was unlawful. This relief follows from the main declaratory relief and must be granted. Inasmuch as a further order was sought reviewing and setting aside the appointment of the fourth respondent as administrator of the council, as well as the decisions and actions taken by him in exercising the powers and functions of the council, the declaratory relief granted relating to his appointment renders the first part of this prayer superfluous for the reason furnished earlier in relation to other review relief sought. As far as the decisions and actions of the fourth respondent are concerned, these have not been stipulated by the applicants but are likely, it appears to me, to have been taken by the fourth respondent in good faith. They may well also have involved the incurring of obligations by and to third parties. In the circumstances, it would be inappropriate for the Court to make any declaration in respect thereof and they should rather be allowed to stand and have legal validity until such time as they may be specifically challenged.¹⁹

[58] Finally, the applicants seek a declaration that the 2010/2011 budget was duly approved by the council at the meeting held

¹⁹ See *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 paragraph [26] at 242 A-C.

on 9 July 2010. On the applicants' version of events this meeting was called on a few hours notice by way of cell phone text messages. Although attended by all eleven members of the ruling coalition, no other councillor was present. In the circumstances, I have considerable doubt as to whether the meeting complied with the procedural requirements for a lawful meeting. Although the remaining nine councillors were given notification of these proceedings they were not cited as parties. Furthermore, as Mr. Heunis pointed out, the resolution adopted by the council purporting to approve the budget appears to be insufficient for that purpose. It refers to the draft budget being approved "in principle" subject to ten items being submitted for "*approval/consideration by Council at the next urgent Special Council meeting to be convened within days*". Amongst these ten items are the budget votes; tariffs, and the capital budget for 2010/2011. The resolution is thus so qualified and provisional in nature as to fall short of a resolution approving the municipality's 2010/2011 budget. For these reasons, I decline to grant the declaratory relief sought in regard to the approval of the budget.

- [59] The applicants did not seek, as they would have been entitled to, a declaration that the third respondent's purported approval of a temporary budget and revenue raising measures was

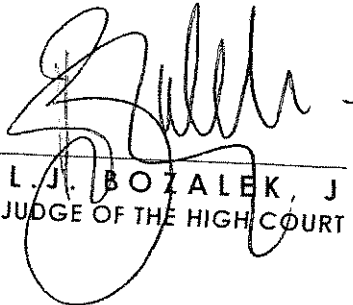
unlawful. However, if such relief were granted with immediate effect it would leave the municipality without an approved budget nearly three and a half months into the new financial year and with the prospect that it might take the council some time yet to approve a budget. This is obviously an undesirable situation for any municipality and, if possible, should be avoided through the relief granted by the Court.

[60] Section 172 (1)(b) of the Constitution empowers a court deciding a constitutional matter to make any order that is just and equitable including an order "*suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect*". In the present circumstances I consider that it would be appropriate to suspend the declaration of invalidity relating to the third respondent's approval of the temporary budget for the municipality for a limited period to afford the council an opportunity to formally approve a budget for the remainder of the municipality's 2010/2011 financial year.

[61] As far as costs are concerned there is no reason why the applicants should not be awarded their costs, including the costs of senior and junior counsel.

[62] In the result the following order is made:

- (a) It is declared that the decision taken by the Western Cape Provincial Cabinet on 14 July 2010:
- (i) to dissolve the Overberg District Municipal Council with effect from 16 July 2010 in terms of s 139(4) of the Constitution read with s 26 of the Local Government: Municipal Finance Management Act 2003;
 - (ii) to appoint the fourth respondent as administrator of the council with effect from 16 July 2010 until a newly elected council has been declared elected and;
 - (iii) to approve a draft budget and revenue raising measures as a temporary budget for the municipality;
- is inconsistent with the Constitution and, as such, invalid.
- (b) the declaration of invalidity in (a) (iii) above is suspended for a period of ten weeks from date hereof to allow the Overberg District Municipal Council to formally approve a budget for the remainder of the municipality's 2010/2011 financial year;
- (c) the first, second and third respondents shall pay the applicants' costs (including the costs of two counsel) jointly and severally, the one paying the others to be absolved.



L.J. BOZALEK, J
JUDGE OF THE HIGH COURT