

SOUTH AFRICA / JUDGMENT

Abaqulusi Local Municipality and Others v Premier of the Province of KwaZulu-Natal and Others (3357/2020P) [2020] ZAKZPHC 30 (30 July 2020)

[2020] ZAKZPHC 30

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen

CASE / FILE NUMBER

3357/2020P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Reportable

Case

no: 3357/2020P

In

the matter between:

ABAQULUSI
LOCAL MUNICIPALITY
FIRST
APPLICANT
MICHAEL
BHEKISIPHO KHUMALO
SECOND APPLICANT
MNCEDISI
CYRIL MAPHISA
THIRD
APPLICANT
and
THE
PREMIER OF THE PROVINCE OF
KWAZULU-NATAL
FIRST RESPONDENT
THE
MEMBER OF THE EXECUTIVE

COMMITTEE
FOR COOPERATIVE
GOVERNANCE
AND TRADITIONAL
AFFAIRS
OF KWAZULU-NATAL
SECOND
RESPONDENT
THE
PROVINCIAL EXECUTIVE
COMMITTEE
FOR THE PROVINCE
OF
KWAZULU-NATAL
THIRD
RESPONDENT
SIBUSISO
WYCLIFF MKHIZE
FOURTH
RESPONDENT
BONGINKOSI
EVERT NTANZI
FIFTH RESPONDENT

Coram: KOEN J
Heard: 1 JULY 2020
Delivered: 30 JULY 2020
ORDER
The
application is dismissed with costs.

JUDGMENT

Koen J

Introduction

- [1] This application is the third in a trilogy involving the Abaqulusi Local Municipality,[1] a municipality as contemplated in chapter 7 of the Constitution. It concerns whether the ministerial representative (the representative),[2] who was appointed by the Member of the Executive Committee for Co-operative Governance and Traditional Affairs (the MEC),[3] pursuant to a decision of the Provincial Executive Committee for KwaZulu-Natal (the PEC)[4] to intervene in the administration of the municipality, is authorised by a decision of the PEC taken on 8 April 2020 (the impugned

decision), to pursue disciplinary proceedings against its municipal manager, Mr Ntanzi.[5] The impugned decision amended the initial resolution for intervention, by stipulating additional functions which the representative had to assume. The impugned decision was communicated to the municipality by the MEC on 17 April 2020. The municipality, the speaker of the municipality, [6] and the acting mayor/deputy mayor (the mayor)[7] seek a review[8] of the impugned decision and the notification thereof to the municipality by the MEC. This judgment is concerned solely with interim relief sought pending the finalisation of that review.[9]

[2] The interim relief sought is claimed[10] in the following terms:

‘(a) That pending the outcome of the relief sought in terms of Part B of this Notice of Motion:

(i) the decision of the Third[11] Respondent taken on 8 April 2020 to extend the powers of the Fourth Respondent[12] in terms of section 139 (1) (b) of the Constitution, be and is hereby suspended;

(ii) the Notice given by the Second Respondent[13] to the First Applicant[14] dated 17 April 2020, advising of the purported extension of the Fourth Respondent’s powers, be and is hereby suspended;

(iii) the First,[15] Second, Third and Fourth Respondents be and are hereby interdicted and restrained from taking any steps pursuant to the decision of the Third Respondent referred to in paragraph 2 (a) (i) above;

(iv) the suspension of the Fifth Respondent[16] by the Fourth Respondent[17] be and is hereby suspended;

(b) That the costs occasioned by the granting of the relief set out in Part A of this Notice of Motion, be and are hereby reserved for the Court hearing Part B, save only if any Respondent opposes the granting of relief in terms of Part A, it be ordered to pay the cost thereof;’

[3] This court does not have the power to suspend decisions of the executive arm of government, but only has the power to interdict the operation of a decision pending a review thereof.[18] This was conceded by Mr Pammenter SC, for the applicants, who accordingly persisted only with the relief claimed in paragraph (a)(iii), and for an interdict against the representative’s continued suspension of Mr Ntanzi.

Background

[4] On 21 February 2019, following a meeting of the PEC, the MEC issued an intervention notice, in terms of s 139(1)(b) of the Constitution,

against the municipality in respect of various obligations it failed to fulfil. The reasons for the intervention included inter alia: the implementation of legal decisions exposing it to financial and governance obligations;^[19] the failure to exercise oversight and management with particular reference to revenue collection and management of grants; the

provision of security services to certain members of the council and the administration, without threat and risk assessment reports; the failure to take reasonable steps to prevent unauthorised expenditure of R108.46 million and irregular expenditure of R41,86 million; the failure to investigate unauthorised, irregular and fruitless and wasteful expenditure; the failure by the council to investigate the appointment of the director of community services into logical complaint; and the failure to investigate nepotism allegations against the Speaker. The notice advised that the PEC had resolved to intervene to assume ‘the functions specified in s 51,^[20] 66^[21] and 67^[22] of the Local Government: Municipal Systems Act.^[23] It is not in dispute that the functions intended to be referred to, were those in s 51, 54(A)^[24] and 56,^[25] and that the reference to s 66 and s 67 was incorrect. Nothing turns on this error.

[5] The notice required the representative, who would be based at the municipality, to assume responsibility for those obligations, with various powers, which included inter alia to:

‘(e) implement governance systems and procedures including oversight over the administration including ratification of decisions taken by the Municipal Council, the Executive Committee, Committees, Municipal Manager and Section 56 Managers in terms of delegated or original authority;

(f) ensuring the implementation of findings arising from any investigations into fraud or maladministration or corruption . . .’

[6] The representative, upon his appointment, took control of various obligations of the municipality as authorised by the intervention. He made certain discoveries as a result of his investigations.

[7] On 7 March 2019 the municipality launched the first application in the trilogy of applications against the Premier, the MEC and the then representative,^[26] in which it challenged the validity of the PEC’s decision to intervene in its affairs. That application, under case number 1648/19P was opposed and affidavits were subsequently exchanged.

[8] Following on his investigations, the representative^[27] invited Mr Ntanzi to advance reasons why he should not be suspended pending a disciplinary enquiry into his conduct. On 4 July 2019 he placed Mr Ntanzi on precautionary suspension. A list of charges was prepared, comprising 11 separate counts (with alternatives), in respect of conduct and various alleged failures attributed to Mr Ntanzi to ensure financial stability, proper governance and

accountability at the municipality. It is not clear when this list of charges was prepared. The document containing the charges also served as notice to Mr Ntanzi that the disciplinary hearing against him would proceed on 21 February 2020. It advised that the evidence leader would be Mr Seethal, an attorney from Port Shepstone.

[9] Argument in the first application was heard by Chetty J on 16 August 2019 and judgment was reserved.

[10] Mr Ntanzi disregarded the suspension[28] imposed by the representative. He returned to his office on 13 September 2019 on the instructions of the mayor. That led to the

Premier of KZN,[29] the MEC and the PEC (hereinafter referred to collectively as the ‘respondents’) launching the second application in the trilogy on 16 September 2019, in which they sought an order that Mr Ntanzi, the mayor, the municipality and its executive be interdicted and restrained from disobeying and acting contrary to the s 139 intervention, ordered on 21 February 2019, and specifically,

interdicting and restraining Mr Ntanzi inter alia: from attending on and entering the offices of the municipality; carrying out any functions as municipal manager; taking any steps to resume office as municipal manager; attending the municipal offices with body guards; and threatening or intimidating the representative. The second application was opposed. Argument was heard by Seegobin J on 6 February 2020 and judgment was reserved.

[11] The written judgment of Chetty J was handed down on 28 February 2020. He found that the municipality is a severely ailing municipality in urgent need of attention. He also commented on the political fault-lines drawn on the basis of party affiliation in the council,

with the IFP having 22 remaining councillors after one resigned, and the ANC having 21. At least one walk out from a council meeting had occurred, in an attempt to thwart council business. Chetty J viewed the crucial issue, going to the heart of whether the municipality was able to fulfil its obligations to its community, to be whether it was able to manage its financial affairs. He held that this enquiry had to be answered with ‘a resounding “NO”’. The judgment concluded that the intervention was rational and warranted. No appeal has been noted against that judgment.

[12] On 11 March 2020 Seegobin J delivered a written judgment dismissing the second application with costs. In brief, Seegobin J found that ‘by placing Mr Ntanzi on precautionary suspension without the council’s involvement and approval . . . (the representative) . . . acted ultra vires the powers conferred upon him in terms of the notice of intervention.’ He remarked that there was no provision in the MEC’s initial notice which permitted the representative to suspend officials of the municipality. He held that:

‘Given the nature of the intervention in terms of section 139(1)(b) I hold that the entire municipality structure remained intact and was required to continue its day to day functions subject of course to the provincial executive keeping a close watch over its activities. Any material decision taken by the (representative) would in any event have required the approval of the full council.’

He held further, that even assuming that the representative did have the power to suspend and/or institute disciplinary proceedings against Mr Ntanzi, such power would have had to be exercised in terms of the Local Government Disciplinary Regulations for Senior Managers, 2010 (the regulations) - these required that the allegations of misconduct had to be brought to the attention of the municipal council in terms of regulation 5(1), that it is the council that is entitled to place a senior manager, like Mr Ntanzi, on precautionary suspension, and that having suspended him, a disciplinary hearing had to be commenced within three (3) months (which period may not be extended by the council) after the date of suspension, failing which the suspension would automatically lapse. As none of these procedures had occurred and more than three months had elapsed since the suspension of Mr Ntanzi, the judgment concluded that the suspension had run its course and that Mr Ntanzi had become entitled to return to work a long time ago. An application for leave to appeal against that order was dismissed with costs, but a petition for leave to appeal against the judgment to the Supreme Court of Appeal is apparently being pursued.

[13] Following the impugned decision by the PEC on 8 April 2020, the MEC on 17 April 2020 issued a notice, in accordance with its tenor, advising the municipality that the initial resolution had been amended by requiring that the following additional functions be assumed at the municipality:

‘(i) disciplinary processes contemplated in the Disciplinary Regulations for Senior Managers, 2010 and other disciplinary functions in respect of staff below senior managers contemplated in section 67 of the Municipal Systems Act 32 of 2000.

(ii) powers to implement and enforce forensic investigation findings and recommendations arising from provincial government or own investigations,

(iii) powers to implement investigation findings and recommendations in respect of unauthorised, irregular and fruitless expenditure as contemplated in section 32 of the Municipal Finance Management act 2003.

Accordingly, the municipal councillors are called upon to continue to cooperate with the Ministerial Representative in order to address the outstanding issues at the municipality as planned. The Speaker is requested to table this letter at the next Council meeting.’

The basis for the interim relief claimed

- [14] The applicants contend that the PEC and MEC, when purporting to extend the powers of the representative as they did, acted ultra vires their powers in s 139 of the Constitution, acted in a procedurally unfair manner, and contrary to the provisions of the regulations. Further; and in any event, that the powers in question relate to an attempt to discipline Mr Ntanzu which matter is the subject matter of an application for leave to appeal.
- [15] The founding affidavit raised only the above grounds. It did not suggest that the impugned decision was motivated by mala fides or some ulterior purpose or conspiracy. Suggestions to the latter effect were only introduced in the 'answering affidavit' of Mr Ntanzu, as the fifth respondent. They were denied by the remaining respondents in a supplementary affidavit, and will not be considered further in this judgment. Mr Ntanzu did not appear to advance any argument, but instead filed a notice that he 'abides by the decision of this . . . Court and will consent to an order along the terms of paragraph 9 of the Applicants' supplementary

affidavit.[30] This judgment accordingly only deals with the argument foreshadowed in the applicants' founding affidavit.

- [16] As regards the contention that the powers in question relate to an attempt to discipline Mr Ntanzu, which is the subject matter of the application for leave to appeal the judgment of Seegobin J, what forms the subject of the application for leave to appeal, is the correctness of Seegobin J's interpretation of the terms of the initial intervention before the amendment of the terms thereof by the impugned decision. This judgment does not concern the findings of Seegobin J, but deals with the additional unfulfilled obligations identified in, and the powers conferred by, the impugned decision only. Seegobin J did, in addition, find that Mr Ntanzu could not be suspended any further, but that decision was based on what powers of suspension the representative had in the initial intervention, and would not affect any suspension arising from the exercise of powers conferred by the impugned decision, an aspect to which I shall return below after dealing with the ultra vires argument.

The nature of the relief claimed

- [17] The applicants claim an interim interdict.[31] In *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*[32] it was held that the 'Setlogelo test' for interim interdict's continues to be a handy guide for the grant of interim interdict's against organs of state, save that a court when applying the test, must be cognisant of the democratic principles that underlie the Constitution and that:

'The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of government.'

The correct approach is that if an interim interdict has a restraining effect on the constitutional and statutory powers of an organ of state or state functionary and intrudes into the exclusive terrain of the executive, then it should only be granted in the 'clearest

of cases’[33] and in ‘exceptional circumstances and when a strong case is made out for relief’.[34] This test was also applied by the Constitutional Court in *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan*. [35] *Khampepe ADCJ* held at para 48 (footnotes omitted):

‘We were cautioned by this Court in *OUTA* that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out.’

The ultra vires argument – section 139 does not find application

[18] The applicants’ primary argument is that the municipality has not failed to fulfil the obligation of pursuing disciplinary proceedings against Mr Ntanzu; that a decision to take disciplinary steps and implement them amounts to administrative action; that the executive action contemplated in s 139(1) does not include such administrative action; accordingly that s 139(1)(b) does not apply and could not be invoked; and hence that the additional powers conferred by the impugned decision, are ultra vires the powers of the PEC and the MEC.

[19] Section 139 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 interest 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 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 intervention; and
- (c) the Council must, while the intervention continues, review the intervention regularly and may make appropriate recommendations to the provincial executive.’

Did the municipality fail to fulfil an obligation?

[20] As a jurisdictional pre-requisite, for s 139(1) to apply, there must be a failure by the municipality to fulfil an obligation; and the obligation must be an executive obligation. It is not a prerequisite of s 139(1) that there must be a culpable failure by the

municipality, persisted with despite demand, to fulfil a particular obligation. Section 139(1) simply requires that the municipality

‘cannot or has not’ performed a particular obligation.

[21] The learned authors Steytler and De Visser[36] correctly summarise the legal position in this regard as follows:

‘The provincial executive may use the intervention powers granted to it in terms of section 139 (1) of the Constitution, subject to the existence of the fact that the municipality “cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.” In *Mnquma*[37] the Court held that this is a “statutory precondition or jurisdictional fact . . . not left to the discretion of the provincial executive but . . . an objective fact which is independently triable by a Court. . . The duty is on the provincial executive to gather sufficient information, using its monitoring powers, to satisfy that the precondition exists. . .

The identification of the executive obligation is an essential element in the intervention process. The executive obligation determines the scope of a possible assumption of responsibility by the provincial executive. It is submitted that a provincial executive can only assume responsibility for the specific functional area that is linked to the obligation that was identified. Powers that fall outside the scope of the executive obligation that was identified remained the prerogative of the municipal council in the event of an assumption of responsibility.'

[22] The facts on which this application is to be determined[38] reveal that Mr Ntanzi is alleged to have been a party, *ex facie* the charges in the charge sheet, to conduct which required investigation,

and possibly action, since, *inter alia*, March 2017 (count 1 - fraud), October 2017 (count 2 - financial misconduct and the failure to comply with duties imposed by the provisions of the SCM Policy and Municipal Finance Management Act), 3 May 2019 (count 5 -

authorising payments in respect of a contract after he had been advised by the engineers to cancel the contract due to non-performance), 1 September 2017 (appointing persons to posts which did not exist and were not on the staff establishment), October 2017 (count 9 - failed to advise the council that Mr Khumalo had been appointed as Director: Community Services although he had failed

to provide a verified matric qualification) and 1 August 2018 (counts 10 and 11 - failing to obtain prior approval before increasing the salary packages of MB Sibiyi and Ms N G Khumalo).

[23] The municipality failed to take any steps in respect of such conduct against Mr Ntanzi; and instead apparently directed, or at least

tacitly approved, that he return to the municipal offices on 13 September 2019 despite his precautionary suspension by the representative. It took no decision or action to pursue disciplinary steps against Mr Ntanzi, from then until the second application was launched, or thereafter and to date, notwithstanding having become privy to the list of charges since at least the filing of the answering affidavit. It has not tendered unconditionally to allow disciplinary proceedings being taken against Mr Ntanzi.[39]

[24] The applicants maintain that it could not have been expected of the municipality to take disciplinary steps against Mr Ntanzi when the respondents maintain that the authority to take such steps vested in the representative subsequent to the intervention (whether in accordance with the terms of the original intervention, which Seegobin J held it did not, or the subsequent amendment thereof, now sought to be reviewed). Accordingly, they argue that the municipality still had to consider whether such proceedings were justified, and if so, that it then would institute the disciplinary proceedings. The respondents were dismissive of this line of argument. Mr Dickson SC, for the respondents, submitted that if the applicants were indeed intent on pursuing such disciplinary proceedings, they could have advised the respondents that they intended to do so, notwithstanding the respondents' view of the legal position, within a set time.

[25] There is merit in the respondents' submission. To date, having regard to the terms of the open tender in the supplementary replying affidavit, and having regard to the fact that the proceedings will be presented by an independent evidence leader who practices hundreds of kilometres from the municipal area of the municipality and would seem to be independent, the proceedings have still not commenced. The municipality had been alerted to certain allegations the MEC required to be investigated since November

2018. If the municipality was serious about its obligation to ensure an accountable administration, it could at any stage have advised the respondents that it disputes the respondents' claims to be the repository of that power, to acknowledge the charges as formulated in the charge sheet, and to have indicated that it was desirous that the disciplinary proceedings commence.

[26] Prima facie the charges that have been formulated and appear in an annexure to the answering affidavit, arise from various obligations which were identified as not having been fulfilled. The failure to have fulfilled those obligations justified the initial intervention by the PEC, as Chetty J had found. They were investigated and the inference is that the cause of them not being fulfilled, was ascribed to failures by Mr Ntanzu, as municipal manager, to fulfil various of his statutory and other obligations required for the proper administration of the business, financial and otherwise, of the municipality. The failure to implement proper financial

administration could not be corrected, assuming the charges to have substance, by Mr Ntanzu remaining in office. The regulations provide that:

'3(4) Except in exceptional circumstances, a disciplinary action may not be taken against a senior manager until a full investigation has been carried out.

Policy

4

(1) If a senior manager is alleged to have committed misconduct, the municipal council must institute

disciplinary proceedings in accordance with this Disciplinary Code.

(2) The maintenance of discipline is the responsibility of the municipality ...

Disciplinary procedures

5

(1) Any allegation of misconduct against the senior manager must be brought to the attention of the municipal council.

(2) An allegation referred to in sub-regulation (1) must be tabled by the Mayor or the municipal manager, as the case may be, before the municipal council not later than seven (7) days after receipt thereof ...'

[27] The municipality failed to fulfil an obligation, as contemplated in s 139, of commencing and pursuing the disciplinary action against Mr Ntanzu. The representative has now stepped into the shoes of the council, as the impugned decision entrusts the failure by the council to have acted against Mr Ntanzu, to the representative. The representative has to fulfil the council's obligations. The jurisdictional point that there was no obligation which the municipality had not performed, is accordingly without substance.

The nature of a decision to institute and set up disciplinary proceedings

[28] A distinction must be drawn between a decision to initiate disciplinary proceedings, and the subsequent disciplinary proceedings themselves.

[29] The applicants submit that the disciplinary proceedings against Mr Ntanzu constitutes administrative action. They rely on *President of the Republic of South Africa & Others v The South African Rugby Football Union & Others*[40] where it was held that whether conduct constitutes administrative action does not depend on who carries out the action, but rather on the nature of the action. In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & Others*[41] it was held that:

'The taking of disciplinary steps is classically administrative rather than executive action. Nothing in section 139 (1) (b) gives a province the right to divest the municipality or its council of its powers to take administrative action.'

The decision in *Mogalakwena* is distinguishable as it was concerned with an interim interdict and a threat to suspend the municipal manager, Mr Kekana, where there were suggestions that the power was being excised for an improper purpose by a representative who was not impartial. Whether the taking of disciplinary steps would be ultra vires s 139 did therefore not strictly arise for consideration. The taking of 'disciplinary

steps' as part of a disciplinary enquiry must furthermore be distinguished from the decision to institute disciplinary proceedings, an aspect I deal with further below.[42]

[30] On the other hand, it has been held that the formulation of a recruitment policy by municipal council may constitute executive action but the implementation thereof constitutes administrative action.[43]

[31] The decision to initiate disciplinary proceedings, is not administrative action, but executive action. Considerations of administrative

justness and fairness, both substantially and procedurally, will plainly attach to the disciplinary process itself, once it has

commenced. But the decision to instigate the process is not subject to these considerations. In *The Master v Deedat*[44] the court stated:

‘I shall deal first with the question referred to in (a) above, namely whether in launching the application under s 20(1) of the Act the Master was acting in the exercise of an administrative discretion. I have formulated the issue referred to in (a) above in these terms because, in my view, the applicant could only have subjected the respondents to an unjust administrative action if he were acting in the exercise of an administrative discretion. No specific argument was advanced on behalf of the first and second respondents on this point, save for the bald submission in the heads of argument that the respondents have a right to fair, just and lawful administrative action. The first and second respondents contend further that in bringing the application under s 20(1) the Master was performing an administrative function. In my view, the argument is without substance. Section 20(1) merely confers on the Master locus standi to bring before the Court an application for the removal of a trustee and does not prescribe how he should do it. A trustee sought to be removed will have full procedural rights accorded to him in the conduct of his case. The section envisaged that it is a Court that is vested with the power to remove a trustee. The Master has no discretion in the matter.

It appears that the function of the Master acting in terms of s 20(1) of the Act is similar to a decision by him to commence an insolvency hearing in terms of s 152 of the Insolvency Act 24 of 1936; the power of the Law Society to make an application to have an attorney removed from the roll of attorneys in terms of s 22 of the Attorneys Act 53 of 1979; the power of a Society of Advocates or the General Council of the Bar to make an application to have an advocate removed from the roll of advocates in terms of s 7(2) of the Admission of Advocates Act 74 of 1964, and the power of the Attorney-General or prosecuting authority to charge an accused with a crime in the criminal courts in terms of the Criminal Procedure Act 51 of 1977 (chap 1).

In the aforesaid cases the decision of the prosecutor or applicant is not a determinant of the guilt of the respondent but merely sets in motion the administrative, judicial and criminal process which will, after a hearing in due course, make a decision on the conduct of the respondent.

Mr Dickson, counsel for the applicant, referred me to the case of *Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T) (1994 (3) BCLR 137), where it was held that the *audi alteram partem* principle applies when a statute empowers a public official to make a decision prejudicially affecting an individual in his liberty, property or existing rights. In the *Podlas* case *supra* the Court found that a decision to issue notices in terms of s 152 of the Insolvency Act 24 of 1936, summoning witnesses to be interrogated, did not affect any such interests of witnesses. Mr Poswa, for the first respondent, submitted that this case was not in point. I disagree. The reasoning in the *Podlas* case *supra* is in point and I consider it to be of assistance in determining the issues raised in this matter.

I was also referred to the case of *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A) at 205B - C, in which it was said that the *audi alteram partem* principle is a rule of natural justice that comes into play whenever a statute empowers a public

official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary. See also *R v Ngwevela* 1954 (1) SA 123 (A).

In the instant case it is clear that the applicant in deciding to bring the application did not make a decision in the administrative justice sense. Even if he did, such decision was not likely to have any adverse or prejudicial effect on the first and second respondents and the other trustees because they would in any event have every opportunity to put their case before the Court as to why they should not be removed as trustees.'

[32] A peace officer who desires to secure the attendance of a suspect before a court, does not execute administrative action, which would require him giving the suspect the opportunity first to advance reasons why he should not be dealt with in the particular manner contemplated. I was not referred to any authority which would suggest otherwise. The decision to suspend will require that an opportunity to be heard first be given, but that forms part of the process of implementing the disciplinary process, and would constitute administrative action. Obviously, Mr Ntanzu would be entitled to be heard before he was suspended and the disciplinary proceedings, when they commence, must be administratively just.

[33] But even if I was wrong in drawing that distinction and in concluding that the decision to institute disciplinary proceedings was not administrative action, the question remains whether an 'executive obligation' in s 139(1) includes what is otherwise generally referred to as administrative action, that is whether the term 'executive obligation' is used in strict contradistinction to, and to the exclusion of, 'administrative action'.

Does the 'executive obligation' in s 139(1) include administrative action?

[34] The learned authors Steytler and De Visser[45] state that:

'The identification of the executive obligation is an essential element in the intervention process. . . .

The municipal council exercises both legislative and executive functions. In principle, the provincial executive may not intervene in the legislative functioning of the municipal council. The distinction between the two functions is therefore important. In the context of the right to fair administrative action, a distinction is usually made between legislative, executive and administrative action. In *Mnquma*, however, the Court warned against applying that distinction to section 139(1) of the Constitution. The Court pointed out that said distinction is applied to the question as to whether a particular action triggers the right to fair administrative action as

contemplated by section 33 of the Constitution. The purpose of the distinction in section 139(1) of the Constitution is, so the Court reasoned,

‘[t]o determine whether a jurisdictional fact necessary for the exercise of the constitutional power has been shown to exist, as opposed to whether a decision or action taken by a public body constitutes the exercise of public power which are subject to the supervisory powers of review of the Court.’

The Court thus rejected the argument, based on the distinction between administrative and executive action within the context of section 33 of the Constitution, that “executive obligation” as contemplated in section 139(1) is confined to the obligations of the municipal council to develop policy and to initiate by-laws. It is suggested that this approach is correct. To distinguish

administrative acts is important because administrative acts are reviewable and executive acts are not. However, section 139 is not at all concerned with courts reviewing municipal decisions. The term “executive” appears in section 139(1) in order to immunise a municipality’s legislative power from provincial interference. It does not appear there in order to immunise a municipality’s administrative or statutory obligations from provincial interference.

The Court held 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.

It is suggested that, rather than attempting to carefully define the term “executive obligation”, it is more useful to define the legislative function and concluded that anything that does not fall within the definition is executive in nature and therefore falls within the ambit of section 139. The Mquma Court adopted a similar approach, albeit in more general terms, by characterising the executive functions as “the residue of functions of government after legislative and judicial functions have been taken away”. . .’

[35] I agree with the distinction drawn and referred to by Steytler and De Visser that the power in s 139 relates to executive action, as opposed to legislative power, in the wide sense, and hence would include administrative action. The purpose of s 139 is to deal with errant municipalities that fail to comply with their ‘obligations’, amongst other to maintain essential national standards for the rendering of services, preventing the municipal council from taking unreasonable steps prejudicial to the province as a whole, or maintaining economic unity. It would be absurd that where such failure is due to an errant municipal manager, and the municipality fails to take steps to dismiss such manager (whether due to not being able to command the required majority decision, voting along party political lines thus thwarting the passing of the required resolution, or otherwise) that the manager could simply remain secure in his or her position. The personal interests of a municipal manager, or the interests of a party responsible for his appointment, cannot compete with the community’s interest in proper service delivery and good governance.[46]

Did the impugned decision include the power to institute disciplinary proceedings?

[36] Regardless of the findings by Seegobin J that the power to institute disciplinary proceedings was not expressly conferred by the original intervention notice (and presumably, was also not implied), the impugned decision specifically and expressly entrusted the failure by the municipality to fulfil the obligation of commencing disciplinary proceedings against Mr Ntanzi, to the representative. On a proper reading of s 139 (1)(b) there is nothing to suggest that in assuming responsibility for the failure by the municipality to perform that obligation, to the 'extent necessary to . . . maintain essential national standards or meet established minimum standards for the rendering of a service, to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of . . . the province as a whole . . . or . . . maintain economic unity,' the representative would act *ultra vires* if, objectively justified, he decided to pursue disciplinary proceedings against the municipal manager. There is nothing to suggest that the representative should not be so objectively justified.

Could the impugned decision authorise the representative to take disciplinary proceedings?

[37] The suggestion by the applicants that s 139(1)(b) did not authorise a decision of the nature of the impugned decision permitting

disciplinary proceedings against Mr Ntanzi, and that the remedy in circumstances of an errant municipal manager lay in s 139(1)(c), can, be rejected. It would be absurd to require that an entire municipality would have to be dissolved, depriving elected councillors in the democratic process also of their powers, especially where they are not to blame but simply are unable to muster the required majority, and the problem only lies with an errant municipal manager. But considerations of possible absurdity aside, the requirement of 'executive action' is a jurisdictional prerequisite not only for the application of s 139(1)(a) and (b), but also subsection (c). If the respondents' contention in respect of the distinction between executive and administrative action is incorrect, then s 139(1)(c) could also not provide a remedy to dealing with a possibly errant municipal manager.

[38] An alternative remedy suggested was to invoke s 106 of the Local Government: Municipal Systems Act[47] which provides for 'Non-performance and maladministration' in the following terms:

'(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) . . .

(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 . . .’

The respondents submitted that the s 106 process is a lengthy and cumbersome process. It clearly does not lend itself to instances

where urgent intervention and action is required. The answering affidavit confirmed that a s 106 investigation was instituted by the MEC and is in the process of being finalised.

[39] A municipal manager fulfils an important function as the head of the administration of a municipality. Section 51(i) of the Local

Government: Municipal Systems Act provides:

‘A municipality must within administrative and financial capacity establish and organise its administration in a manner that would

enable the municipality to- . . .

- (i) hold the municipal manager accountable for the overall performance of the administration; . . .’

Section 54A regulates the appointment of municipal managers. In the event of a vacancy, pending a suitable person being identified, subsection 6 provides:

- (a) The municipal council may request the MEC . . . to second a suitable person, in such conditions as described, to act in the advertised

position until such time as a suitable candidate has been appointed.

- (b) If the MEC . . . has not seconded a suitable person within a period of 60 days after receipt of the request referred to in paragraph (a), the minutes of the council may request the Minister to 2nd suitable person . . .’

Section 55 deals with the responsibilities and accountability of municipal managers. In terms of subsection 2:

‘As accounting officer of the municipality the municipal manager is responsible and accountable for –

- (a) all income and expenditure of the municipality;
- (b) all assets and the discharge of all liabilities of the municipality; and
- (c) proper and diligent compliance with the Municipal Finance Management Act.’

[40] The PEC had the power (if such authority was not included in the terms of the initial intervention, on which Seegobin J ruled, but in view of the pending petition for leave to appeal I do not express any view) to take the impugned decision, and to authorise the representative to decide, as part of performing the obligations which the municipality failed to perform in regard to the proper administration of its affairs, to initiate disciplinary proceedings against Mr Ntanzi for what the representative considered to be improper or unlawful conduct.

Procedural fairness - Audi alteram partem

[41] The applicants submit further that, on a proper construction of s 139(1)(b), the municipality and/or Mr Ntanzi had to be afforded an opportunity to be heard prior to the additional functions of instituting disciplinary proceedings against him, provided for in the impugned decision, were issued. Reliance was placed on Mnquma[48] as indicative that the 'weight of judicial authority is clearly in favour of there being an obligation on the PEC to apply the audi principle'. I was advised that the Mnquma judgment was the only judgment that counsel could find dealing with the issue. It was also submitted that such an approach would be in accordance with the provisions of s 41 of the Constitution which requires all spheres of government to co-operate with one another and consult one another on matters of common interest.

[42] The respondents argued that Chetty J in the first application, had not required such consultation process before the intervention was issued, and submitted that such notice was not required, particularly as the exigencies of what might confront the PEC, might not always allow for a hearing before an intervention should follow.

[43] Whether effect had to be given to the audi alteram partem principle before a decision is taken to intervene, was not considered specifically by Chetty J. It might be that the issue simply did not arise for consideration, as the applicants submitted, because the initial decision to intervene had been preceded by various

interactions between the provincial authorities and the municipality.

[44] In Mnquma, D Van Zyl J held that:

'That the application of the principle of legality in the context of the provisions of section 139(1) may also demand procedural fairness is in my view not without merit. As I shall attempt to indicate when I deal with the constitutional context of subsection (1), the power to dissolve a municipal council encroaches on the autonomy of the sphere of local government. Its effect is also prejudicial to the individual members of the council as they are in most instances removed from their positions against their will with adverse financial implications. In addition, section 139, as I will show when I deal with the interpretation of subsection (1), requires the objective determination of certain precautions before it may be invoked. Accordingly, it may be argued that the relevant authority cannot do so without also receiving evidence from the council itself. However, as the matter can be disposed of on other grounds I shall refrain from making any

finding in this regard.’

These observations in *Mnquma* are accordingly obiter, as the last sentence in this quote indicates.

[45] I incline to the view that the decision to intervene in the administration of a municipality in terms of s 139 is executive action, and not reviewable save on strict grounds of legality and irrationality. On a proper construction of s 139 an obligation of prior notice and having to hear the other side should not be inferred. It seems that the purpose of s 139(1) could in many instances be thwarted if notice and a consultative process had to precede a decision to intervene (or decide on additional functions). During that time evidence could be destroyed or unlawful agreements irrevocably approved and implemented with third parties. The respondents correctly pointed to the notice provisions in s 139(2) acting as a check and balance on the exercise of powers in s 139(1). The decision to intervene (and any amendment thereof) can also always be reviewed, or its implementation can be interdicted, if appropriate.

[46] The question of Mr Ntanzzi’s suspension and disciplinary proceedings against him, received comprehensive attention in the second

application. Even assuming in favour of the applicants that they were entitled to be heard, before the impugned decision was taken, it is apparent from the affidavits in the second application that the views and opposition of the applicants to the fact of a suspension and disciplinary proceedings, were articulated comprehensively. There would have been no purpose in inviting further representations. The applicants were heard.

Can Mr Ntanzzi be suspended again?

[47] The applicants seek an order interdicting any further suspension of Mr Ntanzzi. They maintain, with reference to the provisions of the regulations, that any further suspension of Mr Ntanzzi, would be unlawful. I consider this relief in that context.

[48] A municipal manager is a senior manager for the purposes of the regulations.[49] The applicable regulations provide:[50]

‘Precautionary suspension

6

(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct . . .

(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended within seven [7] days of being notified of the council’s decision to suspend him or her....

(6)

- (a) If a senior manager is suspended, a disciplinary hearing must commence within 3 months after the date of suspension, failing which the suspension will automatically lapse.
- (b) The period of 3 months referred to in paragraph (a) may not be extended by council.'
- [49] Mr Ntanzi was previously suspended by the representative[51] on 4 July 2019. Administrative action of that nature, absent a collateral challenge, stands until set aside.[52] It could not simply be ignored and effect had to be given thereto. Although suspended, Mr Ntanzi disregarded the suspension and returned to the offices of the municipality on 13 September 2019. On 16 September 2019 the MEC, the Premier and the PEC launched the second in the trilogy of applications inter alia interdicting Mr Ntanzi from returning to the office and carrying out the functions of the municipal manager. On 17 September 2019 Mr Ntanzi gave an undertaking not to return to the office or carry out the functions of the municipal manager pending the final determination of the second application. It thus appears that he vacated the offices, at least after 17 September 2019 pursuant to an undertaking to do so, rather than strictly pursuant to his suspension. No disciplinary proceedings were instituted against him within three months for the date of his suspension.
- [50] Seegobin J found that Mr Ntanzi's suspension was ultra vires the powers of the ministerial representative in the intervention. The suspension of 4 July 2019 was therefore, as a matter of law, invalid. That finding was made on the powers as conferred before they were amplified by the impugned decision. It is so, as held in *Oudekraal*, that even where administrative action is subsequently challenged successfully, not all action following on such unlawful administrative action is necessarily without consequences. The applicants submit that Mr Ntanzi had been under suspension for a period in excess of three (3) months, or that the practical effect is the same as if he had been suspended for a period in excess of three months.
- [51] The suspension contemplated in regulation 6, with the three month limitation within which disciplinary proceedings are to be instituted, exists to protect Mr Ntanzi, the municipality and its taxpayer constituents. But the disciplinary proceedings could hardly have commenced when the validity of the intervention was challenged, and while that issue remained to be decided by Chetty J. If the

disciplinary proceedings were proceeded with during the interim period, it would undoubtedly have been met by an application for an interdict to restrain the continuation thereof. There was no relief claimed at that stage, whether on an interim basis, or otherwise, to review and set aside the suspension specifically. It seems that the municipality was content to leave the validity of the suspension to follow the fate of the validity of the intervention application. Instead, Mr Ntanzi and/or the acting mayor chose to ignore the suspension, which necessitated the application which Seegobin J decided. Mr Ntanzi suffered no financial prejudice, as he has been on full pay throughout.

- [52] Regulation 6 appears to contemplate a position where there is a suspension, duly implemented and adhered to, without any intervening legal challenges to the validity of the intervention or any suspension, in which event, the disciplinary enquiry has to commence within 3 months. That is not what occurred in this matter. At the time of the second application, the validity of the intervention was being challenged in the first application, which was pending. Mr Ntanzi seems to have associated himself with that challenge, which would impact on the validity of his suspension and any disciplinary proceedings pursued against him by the representative (the first application had not been decided at the time the second application was argued, but was only decided some 11 calendar days before the judgment of Seegobin J. was handed down)
- [53] The limitation of the three months' suspension could only apply in respect of a valid power to suspend Mr Ntanzi, which Seegobin J found, although still the subject of an appeal, not to be the case. Accordingly, there was no proper valid suspension, as contemplated by regulation 6. Any further disciplinary proceedings (and any precautionary suspension, as a prelude thereto) arising in respect of the impugned decision, are in terms of new additional functions/powers not previously authorised, which did not arise for adjudication before Seegobin J. Accordingly, any future disciplinary proceedings (and any precautionary suspension thereto) will, for the purposes of this application, be pursuant to the additional powers and functions provided for in the impugned decision. Regulation 6(6)(a) would not, in those circumstances, preclude disciplinary proceedings being taken against Mr Ntanzi pursuant to the impugned decision.

Order

- [54] For the reasons afore-stated, the application falls to be dismissed with costs.

KOEN J

Appearances

For the applicants: Mr C.J. Pammenter SC

Instructed by:

Garlicke and Bousfield Inc

c/o Diedricks Attorney

Pietermaritzburg

For the first,

second, third and

fourth respondents: Mr A.J Dickson SC

Instructed by:

Siva Chetty and Company

Pietermaritzburg.

For the fifth respondent: No appearance.

- [1] The first applicant
- [2] The fourth respondent. Mr Mkhize, the current representative, is the third incumbent of that office, having been preceded by Mr Dladla (until 1 October 2019) and thereafter Mr Duma.
- [3] The second respondent.
- [4] The third respondent.
- [5] The fifth respondent.
- [6] The second applicant.
- [7] The third applicant.
- [8] Being the relief claimed in Part B of the Notice of Motion.
- [9] Being the relief claimed in Part A of the Notice of Motion.
- [10] Although originally couched in the form of a rule nisi, the applicants asked, as full affidavits have been exchanged, that if I was to find in their favour, that an order in terms of paragraph (a) and (b) should be granted.
- [11] The PEC.
- [12] The representative.
- [13] The MEC.
- [14] The municipality.
- [15] The Premier.
- [16] Mr Ntanzi.
- [17] The latter was amended to refer to fifth (not fourth) and fourth (not fifth) respondents respectively.
- [18] National Treasury & Others v Opposition to Urban Tolling Alliance & Others [2012] ZACC 18; 2012 (6) SA 223 (CC) paras 44 – 47; Economic Freedom Fighters v Gordhan & Others; Public Protector & Another v Gordhan & Others

- [2020] ZACC 10 paras 19 – 20. See generally C Okpaluba & M Mhango ‘Between separation of powers and justiciability: Rationalising the Constitutional Court’s judgment in the Gauteng E-tolling litigation in South Africa’ (2017) 21 Law, Democracy & Development 1 – 24.
- [19] More correctly the failure not to expose the municipality to financial and governance obligations,
- [20] Section 51 deals with the ‘Organisation of administration’.
- [21] Section 66 deals with ‘Staff establishment’.
- [22] Section 67 deals with ‘Human resource development’.
- [23] Local Government: Municipal Systems Act 32 of 2000.
- [24] Section 54A deals with the ‘Appointment of municipal managers and acting municipal managers’.
- [25] Section 56 deals with the ‘Appointment of managers directly accountable to municipal managers’.
- [26] Mr Nkosi was the representative who was cited.
- [27] Mr Dladla was the representative at that time.
- [28] A legal challenge by Mr Ntanzu in the Labour Court was struck off the roll for a lack of urgency and was apparently not pursued further.
- [29] The first respondent in this application.
- [30] Paragraph 9 of the applicants’ supplementary replying affidavit provides: ‘With this in mind, therefore, the Applicants make the following formal tender: (a) The allegations against (Mr Ntanzu) as set out in the charge sheets next to the First to Fourth Respondents Replying Affidavit, can be examined and investigated by a completely independent person; (b) If that person finds that there is substance to any of the allegations, then the (municipality) will bring disciplinary proceedings against (Mr Ntanzu) in accordance with the regulations; (c) Such proceedings can be chaired by a completely independent Chairperson; (d) The independent person’s referred to above will be persons with no known affiliations to any political party; (e) The (municipality) will consult with the MEC in identifying such independent persons.’ Section 39 of the Intergovernmental Relations Framework Act 13 of 2005 provides that the provisions of s 45 of that Act relating to avoiding litigation between organs of state, do not apply to disputes involving s 139 of the Constitution.
- [30] Paragraph 9 of the applicants’ supplementary replying affidavit provides:
‘With this in mind, therefore, the Applicants make the following formal tender:

- (a) The allegations against (Mr Ntanzi) as set out in the charge sheets next to the First to Fourth Respondents Replying Affidavit, can be examined and investigated by a completely independent person;
- (b) If that person finds that there is substance to any of the allegations, then the (municipality) will bring disciplinary proceedings against (Mr Ntanzi) in accordance with the regulations;
- (c) Such proceedings can be chaired by a completely independent Chairperson;
- (d) The independent person's referred to above will be persons with no known affiliations to any political party;
- (e) The (municipality) will consult with the MEC in identifying such independent persons.'

Section 39 of the Intergovernmental Relations Framework Act 13 of 2005 provides that the provisions of s 45 of that Act relating to avoiding litigation between organs of state, do not apply to disputes involving s 139 of the Constitution.

[31] The issue must be dealt with in terms of the method of adjudication set out in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd & Others* 2001

(3) SA 344 (N) at 353D – 354D.

[32] *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 45.

[33] *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* para 47.

[34] *Gool v Minister of Justice & Another* 1955 (2) SA 682 (C) at 689B-C referred to in *OUTA* para 43.

[35] *Economic Freedom Fighters v Gordhan & Others; Public Protector & Another v Gordhan & Others*

[2020] ZACC 10 paras 34 – 42.

[36] N Steytler & J De Visser *Local Government Law of South Africa* (November 2019 – Issue 12) Chapter 15, para 5.2.2ff (footnotes omitted).

[37] *Mnquma Local Municipality & Another v Premier of the Eastern Cape & Others*

[2012] JOL 28311 (ECB).

[38] *Webster v Mitchell* 1948

(1) SA 1186 (W) at 1189.

[39] See the terms of the tender contained in the last supplementary replying affidavit, quoted in footnote 24 above.

- [40] President of the Republic of South Africa & Others v The South African Rugby Football Union & Others 2000 (1) SA 1 (CC) para 141.
- [41] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & Others 2016 (4) SA 99 (GP) para 49.
- [42] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & Others 2016 (4) SA 99 (GP) para 49.
- [43] Mlokoti v Amathole District Municipality
- [2009] 2 BLLR 168 (E) para 187 confirmed in Moerane v Buffalo City Municipality
- [2019] JOL 41148 (ECG) para 23 to 24.
- [44] The Master v Deedat 2000 (3) SA 1076 (N) at 1082-1084.
- [45] N Steytler & J De Visser Local Government Law of South Africa (November 2019 – Issue 12) Chapter 15 para 5.2.2ff (footnotes omitted).
- [46] Ngaka Modiri Molema District Municipality v Chairperson NW Province Executive 2015 (1) BCLR 72 (CC) paras 13 – 23.
- [47] Act 32 of 2000.
- [48] Mnquma Local Municipality & Another v Premier of the Eastern Cape & Others
- [2012] JOL 28311 (ECB) para 34.
- [49] S 1 of the regulations provides that ‘a senior manager’ means – ‘(j) a municipal manager referred to in section 82 (1) of the Local Government Municipal Structures Act, 1998 (Act No 117 of 1998).’
- [49] S 1 of the regulations provides that ‘a senior manager’ means –
- ‘(j) a municipal manager referred to in section 82 (1) of the Local Government Municipal Structures Act, 1998 (Act No 117 of 1998).’
- [50] Local Government: Disciplinary Regulations for Senior Managers, 2010, GN 344. GG 34213, 21 April 2011.
- [51] Mr Dladla.
- [52] Oudekraal Estates (Pty) Ltd v City of Cape Town 2004
- (6) SA 222 (SCA) paras 26 and 38; C Hoexter Administrative Law in South Africa 2 ed (2012) at 546 – 550.

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Prepared on 11 October 2026 · Esheria