

SOUTH AFRICA / JUDGMENT

Kamiesberg Local Municipality and Another v Koingnaas Belastingbetalersvereniging and Another (2609/2021) [2024] ZANCHC 14 (16 February 2024)

[2024] ZANCHC 14

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

2609/2021

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personal/private details of parties or witnesses have been
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Policy

FLYNOTES:

CIVIL LAW – Negotiorum gestio – Municipal functions –
Alleges
municipality failed to maintain roads infrastructure and render
water and sanitation services – Respondent undertook
repairs
without formal procurement processes – Billed costs to
municipality – Conflict with provisions of Constitution
–
Conduct amounts to self-help – Services not sanctioned by
municipal council – Conduct impermissible –
Applicant
established breaches of rights sufficient to interdict respondent.
IN THE HIGH COURT OF
SOUTH AFRICA
NORTHERN CAPE
DIVISION, KIMBERLEY

Case No:

2609/2021
Heard: 13 &
14/09/2023

Date available:	16/02/2024 Reportable: YES / NO Circulate to Judges: YES / NO
Circulate to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO In
the matter between:	KAMIESBERG LOCAL MUNICIPALITY 1st Applicant THE MUNICIPAL MANAGER OF KAMIESBERG LOCAL MUNICIPALITY 2nd Applicant and KOINGNAAS BELASTINGBETALERSVERENIGING 1st Respondent JOHAN G GRÄBE 2nd Respondent And
in the counter application of:	KOINGNAAS BELASTINGBETALERSVERENIGING Applicant KAMIESBERG LOCAL MUNICIPALITY 1st Respondent RUFUS CORMARCO BEUKES 2nd Respondent NAMAKWA DISTRICT MUNICIPALITY 3rd Respondent MEC FOR ENVIRONMENTAL AFFAIRS

NORTHERN
CAPE
4th
Respondent
MINISTER
OF HUMAN SETTLEMENT, WATER
AND
SANITATION
5th
Respondent
MINISTER
OF ENVIRONMENTAL AFFAIRS
6th
Respondent
MEC
FOR LOCAL GOVERNMENT NORTHERN CAPE
7th
Respondent
MINISTER
OF
COGHSTA
8th
Respondent
MINISTER
OF JUSTICE AND
CONSTITUTIONAL
DEVELOPMENT
9th
Respondent

JUDGMENT

Mamosebo J

[1] On 31 December 2021 I granted a rule nisi in favour of the first and second applicants (Kamiesberg Local Municipality or KLM) and Rufus Cormarco Beukes (the Municipal Manager) which was extended from time to time. This application was opposed by the first and second respondents, the Koingnaas Belastingbetalersvereniging

(KBBV) and Johan G Gräbe and was finally argued on the return dates of 13 and 14 September 2023. The relief sought by the applicants is the confirmation of the rule.

[2] The order granted on 31 December 2021 interdicting and prohibiting KBBV and Gräbe from:

2.1 Interfering with the rights of access of any member of the public to the municipal and public roads situated within the town of Koingnaas;

2.2 conducting any road works, maintenance and/or repairs to any municipal and public roads situated within the municipal district of the Kamiesberg Municipality;

2.3 Entering the Kamiesberg Municipality's sewerage plant, water plant and rubbish dump for purposes of conducting work in the town of Koingnaas;

2.4 Interfering with any of the Kamiesberg Municipality's infrastructure including water and sewerage systems within the municipal district of Koingnaas;

2.5 Conducting any works, construction, maintenance and/or repairs to any of the Kamiesberg Municipality's infrastructure, including water and sewerage systems,

buildings, assets or property situated within the town of Koingnaas;

2.6 Interfering with the Municipal Manager and/or any of the employees and staff of Kamiesberg Municipality;

2.7 Interfering with the administration and/or day to day running of Kamiesberg Municipality's functions at:

2.7.1 the Kamiesberg municipal service point at Koingnaas.

2.7.2 the Koingnaas sewerage plant and sewerage systems.

2.7.3 the Koingnaas water system.

2.7.4 the Koingnaas municipal rubbish dump.

2.7.5 the Kamiesberg municipal offices situated at 2[...]

M[...] Road, Garies.

2.8 Threatening the Municipal Manager and/or any of the Municipality's employees and staff members.

[3] KBBV launched a counter-application against KLM seeking this order as reflected in the Notice of Motion:

1.1 to repair and restore the water supply and sewage systems of Koingnaas to full functionality within 2 (two) weeks of the granting of this order;

1.2 to repair and restore the reverse osmosis water purification system of Koingnaas to full functionality within 2 (two) weeks of the granting of this order;

1.3 to immediately stop the pollution of ground water in Koingnaas, and to perform regular water tests, to the satisfaction of the 9th respondent [Minister of Justice and Constitutional Development, Dr Ronald Lamola]

1.4 repair all potholes in the streets in Koingnaas not yet repaired by KLM within 4 (four) weeks of the granting of this order;

1.5 to restore the landfill operations at the Koingnaas municipal rubbish dump within 4 (four) weeks of the granting of this order;

1.6 to repair and maintain municipal infrastructure in Koingnaas to a reasonably acceptable standard of functionality.

2. In the event of failure by KLM to comply with 1.1 – 1.6 above

within the specified periods of two and four weeks of the granting of the order, the ratepayers association sought authorisation to take over control and the repairs of all the infrastructure and municipal services of Koingnaas until such time as KLM was able to show its ability to fulfil and resume its duties in that regard.

3. Should prayer 2 become operative KLM is to be ordered to pay all the costs occasioned by such services within 7 (seven) days of invoice.

4. KLM and the Municipal Manager are within 30 (thirty) days of this

order to provide proof to the ratepayers' association's legal representative of how an amount of R21,000,000.00 (Twenty-One

Million Rand) donated by De Beers Diamonds in 2016 was utilised to the exclusive benefit of the town of Koingnaas.

5. That a declarator be issued

5.1 that the conduct of the ratepayers' association was not unlawful and amounted to a sui generis form of necessity.

5.2 that in future the conduct of the residents of Koingnaas will not be regarded as unlawful should they proceed to act in restoring their Constitutional rights if:

(i) the rights infringed upon, amount to the infringement of a fundamental human right enshrined in Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996, and the conduct of proceeding to restore those human rights can be lawfully seen as acting in necessity, such as the right to life, human dignity or access to drinking water;

(ii) the municipality in question [KLM] has been given at least 7 (seven) days written notice, served on the offices of the Municipal Manager personally, to restore those fundamental human rights, and KLM and/or the Municipal Manager have failed to take any action, whatsoever in restoring those rights;

(iii) in which instance it is declared that conduct of the ratepayers' association and its members shall be regarded as lawful, as far as it meets the requirements set out above.

6. An order discharging the rule nisi granted on 31 December 2021 with

an order that KLM and the Municipal Manager pay costs of the main and counter-application jointly and severally, which costs shall include costs consequent upon the employment of three advocates, including senior counsel and two junior counsel”.

Only KLM opposed the counter-application. Minister Lamola filed a Notice to Abide the decision of the Court.

- [4] It is the counter-application that resulted in KLM raising a point in limine challenging the ratepayers’ association’s lack of standing to bring this application and contended that it may be dispositive of the counter-application. KLM was represented by Adv AG Van Tonder and KBBV by Adv MD Du Preez SC assisted by Adv ZF Kriel.
- [5] It is convenient to approach this matter in the following fashion. First, consider the point in limine raised by KLM, namely, lack of locus standi in judicio (lack of legal standing) by KBBV and whether or not this point is dispositive of the counter-application. Secondly, should the finding not support this challenge, to proceed to deal with the merits to determine whether or not the rule must be confirmed or discharged and dismiss the counter-application.

Point in limine

- [6] KLM, as argued by Mr Van Tonder, relied on the following to substantiate the contention of lack of standing in the counter-application:

First, that KBBV is a voluntary association founded on its own constitution. It can litigate in its own name. Secondly, Clause 2.3 of its constitution empowers a management committee with legal capacity to act on behalf of the association. Further, that in terms of Clause 7 the management committee must comprise not less than 5 members and not more than 11 members. More importantly, and in terms of Clause 10.1, such members are to be elected at KBBV’s Annual General Meeting where members quorate.

- [7] KBBV has failed to comply with the constitution in that when they launched the counter-application there were only 4 (four) committee members (Gräbe, Roxzaan Visser, Leon van den Berg and Jana Johnson) and the remainder of the positions were vacant. Mr Van Tonder, invoked Hyde Construction CC[1]; Parker[2] and Lupacchini[3] maintaining that KBBV had no legal standing to bring the counter-application and its action could not be ratified. These were the insightful remarks by Rogers J, then, in Hyde Construction CC[4]

“[33] Parker and Lupacchini do not bring this analysis of general agency principles into question. Those cases address the position which arises where the trust deed requires that there should be no fewer than a specified number of trustees and where, at the time the act which is sought to be attributed to the trust was performed, fewer than that number existed. Where that is the case the trust lacks the capacity to act; it is not a problem of authority but capacity.

- [36] Nevertheless, one can understand that, where a party does not have the capacity to act, a purported act in its name is a nullity and cannot be ratified. That this is so appears to me to have been confirmed in Lupacchini, to which I now turn.

[37] Lupacchini was again a case where fewer than the specified number of trustees existed at the relevant time. Although this is not specifically mentioned in the judgment of the Supreme Court of Appeal, it appears clearly from para 8 of the judgment of the trial court ([2008] ZAFSHC 7) and para 2 of the judgment of the full bench ([2009] ZAFSHC 82) that the trust deed required there to be not fewer than two trustees. Nugent JA commenced his judgment in Lupacchini by quoting from paras 10 and 11 of Parker, where the point was made that the existence of the specified minimum number of trustees is a capacity-defining condition. In para 13 he said that the true question in the case was 'not whether the trustees had a sufficient interest, but instead whether they were capable of suing or being sued at all'. And in para 23 he said that Parker made it clear that 'legal proceedings commenced by persons who lack capacity to act for the trust are a nullity.'" (Own emphasis added)

KLM, on this basis alone, seeks the dismissal of the counter-application since KBBV has not established and proved its legal standing

pertaining to its capacity in its founding papers.

[8] It appears from Gräbe's replying affidavit that in an effort to rectify the shortcoming of the required number of members for purposes of litigation, the additional members were added during

a telephonic meeting held on 07 May 2022. This, so the argument went, does not comply with its constitution and the counter-application falls to be dismissed for lack of standing.

[9] In as far as opposition by KBBV to the main application is concerned, it was also not compliant with its constitution on the same basis. However, Gräbe in his personal capacity has the required

locus standi to oppose the main application. Of significance is that Gräbe is not a party to the counter-application.

[10] In countering the lack of standing attack, Mr du Preez, for KBBV and Gräbe, made the following submissions:

First, that KBBV and Gräbe accepted their citation as the respondents in the main application. Invoking *Van Staden N.O. & Others v Pro-Wiz Group (Pty) Ltd*[5] where Wallis JA said:

"[13] Furthermore, as a matter of principle, when a party is cited in legal proceedings it is entitled without more to participate in those proceedings. The fact that it was cited as a party gives it that right. Here the liquidators were cited and decided to resist the application. They were entitled to do so by the mere fact of their joinder as parties. It is not open to an applicant who has joined a respondent to contend thereafter that this was a misjoinder and on that footing to resist an adverse order for costs. Were that the case a party who took the point that it had been wrongly joined would not be entitled to recover its costs, when that argument succeeded. On this simple ground the liquidators were entitled to oppose the application and, as a matter of general principle, were entitled to their costs when it was withdrawn." (Emphasis added)

- [11] KBBV also relied on s 38(e) of the Constitution of the Republic of South Africa (the Constitution)[6] contending that it was entitled to approach any competent court for appropriate relief, acting in the interests of its members.
- [12] It was further argued on behalf of KBBV that it followed the process prescribed in Rule 7(1) of the Uniform Rules of Court on 11 May 2022 and has rectified the flaw of not meeting its constitutional requirements relating to the purported lack of locus standi by adding the requisite number of members to the committee. A further contention was that KLM is raising an opportunistic defensive point in an endeavour to block KBBV and its members from dealing with the merits of the case.
- [13] After argument, but before judgment was handed down, KBBV's counsel filed supplementary heads, drawing attention to a recent Supreme Court of Appeal's (SCA's) judgment handed down on 15 November 2023 in *Forestry South Africa v Minister of Human Settlements, Water and Sanitation and Others* (777/2022) and *Minister of Human Settlements, Water and Sanitation and Others v Forestry South Africa*[7] addressing locus standi. It is submitted that following the Forestry SA judgment, the point in limine should be dismissed. In it the pronouncements by Unterhalter AJA, writing for the majority on the issue of standing are salutary:

"[19] Forestry SA represents timber growers in South Africa. Its application was not only brought in its own interests, but on behalf

of its members. Section 38 of the Constitution has considerably extended the common law's recognition of standing. Section

38(e) of the Constitution permits an association, acting in the interests of its members, to approach a competent court to seek

appropriate relief, including a declaration of rights, on the basis that members' rights in the Bill of Rights are threatened.

Forestry SA and the Statutory Authorities have opposed interpretations of provisions of the Act that bear upon the rights of members, including their existing use rights to water. These rights fall within the ambit of property rights protected by s 25 of the Constitution. In my view, Forestry SA has standing, on behalf of its members, to approach a court to seek an authoritative declaration as to the correct interpretation of the Act, and thereby determine the scope of the property rights of its members. That is precisely what s 38(e) recognises. There is no constitutional challenge to the Act. But I can see no reason why, in a case of this kind, which seeks an authoritative interpretation of legislation that affects important rights, an association such as Forestry SA should not enjoy standing on behalf of its members. It is a warranted extension of the standing recognised in s 38(e) of the Constitution."

- [14] The challenge to standing, in my view, is not levelled at KBBV not enjoying the extension of the standing recognised in s 38(e) of the Constitution but to its failure to meet its own constitution's requirements to form a quorum to enable it to litigate on its behalf as well as

those members having been appropriately appointed following an Annual General Meeting. The association attempted to correct the flaw by conducting a telephonic meeting to add the number of members. This, in my view, does not comply with its constitutional requirement because not all members of the association

were present at the AGM.

[15] I am neither persuaded that the shortcoming was rectified nor rectifiable. Had this constitutional impediment not presented, nothing would have stopped KBBV from enjoying the standing on behalf of its members based on s 38(e) of the Constitution.

It is on this basis that I find that KBBV has no standing to bring the counter-application or even to oppose the main application. In as far as Gräbe is concerned, he is not a party to the counter-application. Therefore, the counter-application stands to be dismissed. In the event that I am wrong in this finding, I now proceed to consider the main application and the counter-application.

The historical

background.

[16] Koinaas was a mining town established, owned and controlled by De Beers Consolidated Mines (Pty) Ltd and provided services to its residents. In 2010 De Beers partially transferred municipal services of Koinaas to the Kamiesberg Local Municipality (KLM) in terms of an agreement relating to the transfer of Municipal Services. In 2016 De Beers transferred the remainder of the services to KLM. KLM is responsible for delivering services to 16 towns including Koinaas with their main municipal offices situated at Garies, about 108 kilometres southeast of Koinaas. In his founding affidavit the Municipal Manager explained that Koinaas is not treated as a separate entity with its separate income, budget, and expenses but all 16 towns are administered and managed as a cohesive unit. According to KBBV, between 2010 and 2016 they

noticed a service delivery decline. Since 2016 their small town has degenerated to the point of the community receiving little or no municipal services. The residents consequently established a ratepayers association with Gräbe as its chairperson.

[17] KBBV maintains that De Beers donated an amount of R21 million in 2016 solely for the upgrading of the infrastructure of Koinaas. KBBV also established that among themselves, as property owners, they contribute an amount of R166,000.00 monthly and they demand an account of where and how their money is utilised. The ratepayers maintain that their services have deteriorated since the transfer from De Beers to the Municipality, hence they took over some of the services which constrained them to bring this litigation. KBBV appended photographs to the founding affidavit to substantiate their allegations. It claims that KLM is failing to maintain the roads infrastructure and to render water and sanitation services. It alleges that test results revealed that the quality of water supplied is not fit for

human consumption. The residents were, so the complaint went, left without running water for up to 35 consecutive days.

- [18] On 01 December 2021 KBBV members approached Mr Cyril Cook, a general worker ostensibly managing the technical services in Koingnaas, and informed him that KBBV has skilled artisans with more than four decades of experience who could fix the water problem within a few days, but the offer was rebuffed. Gräbe says the following in the replying affidavit:

“77.2 Many of the former employees of De Beers still live in Koingnaas, for instance, Rudi Raath, the former mine manager, with extensive experience in managing sewerage works and also Jan Liebenberg, and then Gielie Botha, the former electrician for the town, who was also employed by De Beers.

77.3 These former employees of De Beers have all the necessary skill set to carry on performing the management tasks they attended to for many years, under the ownership and management of De Beers.”

- [19] In the circumstances, and from 06 December 2021, KBBV and its members started repairing the potholes. This led to confrontation with members of the South African Police Service set upon them by KLM.

- [20] In an email dated 08 December 2021 addressed to the Municipal Manager, KBBV wrote:

“Verder stel die KBBS die Kamiesberg Munisipaliteit in kennis dat sodra die KBBV klaar is met die paaie einde van Desember 2021 gaan ons ook beheer vat oor die water, riool, geboue en vullis werke van Koingnaas onder die regsbeginsel “negotiorum gestio”.(loosely

translated: (Furthermore, the KBBV notifies the Kamiesberg Municipality that as soon as the KBBV has completed the road repairs

at the end of December 2021, we will also take control of the water, sewerage, buildings and refuse works of Koingnaas under the legal principle "negotiorum gestio".)

KBBV also indicated in the same email that the cost of the repairs to the road amounted to R120,000.00 for which the Municipality will be billed or invoiced for payment.

- [21] The doctrine of negotiorum gestio is described or defined in these terms: If X commits an act which infringes the interests of another (Y), and X's act thereby accords with the definitional elements of a crime, her conduct is justified if she acts in defence of, or in the furthering of, Y's interests, in circumstances in which Y's consent to the act is not obtainable but there are, nevertheless, at the time of X's conduct reasonable grounds for assuming that Y would indeed have consented to X's conduct had she been in a position to make a decision about it.[8]

[22] If, for instance, Y loses consciousness in a motor accident. X1, an ambulance driver and paramedic summoned to the scene of the accident, transports Y to a hospital where X2 performs an operation on her in order to save her life. Although X1's conduct conforms to the definitional elements of kidnapping (deprivation of a person's freedom of movement), her conduct is justified by the present ground of justification and she can accordingly not be found guilty of this

crime. As far as X2 is concerned, although her conduct conforms to the definitional elements of assault, she is not guilty of this crime because her conduct is justified by the present ground of justification.

[23] These are the requirements for successfully relying on this ground of justification:[9]

- (a) It must not be possible for X to obtain Y's consent in advance. If it is possible, X must obtain Y's consent, in which case X may rely on consent as justification.
- (b) There must be reasonable grounds for assuming that, had Y been aware of the material facts, she would not have objected to X's conduct. The test to ascertain the existence of reasonable grounds is objective.
- (c) The reasonable grounds for assuming that Y would not have objected to X's conduct must exist at the time that X performs her act.
- (d) At the time of performing her act X must know that there are reasonable grounds for assuming that Y would not object to her (X's) acts.
- (e) X must intend to protect or further Y's interests.
- (f) X's intrusion into Y's interests must not go beyond conduct to which Y would presumably have given consent.
- (g) It is not required that X's act should indeed have succeeded in protecting or furthering Y's interests.

[24] This defence will be available only where X could not have obtained Y's consent beforehand hence the name 'presumed consent'. *Negotiorum gestio* is one of those cases where the motive of the person who intervenes is an important determinant of the lawfulness or unlawfulness of his or her conduct.

[25] The fact that KBBV is effecting repairs to the roads and was in the process of rendering an invoice or has already rendered an invoice of R120,000.00 to the Municipality, without any formal procurement processes, renders them in conflict with the provisions of section 217 of the Constitution of our country[10] which stipulates:

- (1) When an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

[26] When I granted the interim order I pronounced that allowing KBBV to continue with the works would, in my view, result in wasteful and irregular expenditure. The conduct of KBBV amounts to “self-help” contrary to the spirit and purport of the Constitution. KBBV has therefore arbitrarily arrogated to itself a monopoly as sole service provider. The services have not been sanctioned by the municipal council and have closed the door to fairness, equity, transparency and competition.

[27] In the counter-application KBBV relied on the unreported judgment of *Mafube Business Forum and Another v Mafube Local Municipality and Others*[11] in an endeavour to persuade me to endorse its aforesaid conduct. In *Mafube* the main issue before the Court was the interpretation of s 139(7)[12] of the Constitution and the question whether the jurisdictional facts for mandatory national intervention as provided for in s 139(7), are present. Section 139(7) stipulates:

“If a provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or

(5) in the stead of the relevant provincial executive.”

[28] Unlike in *Mahube* where intervention by the Ministers of four national departments was sought in terms of s 139(7), as well as a supervisory/structural interdict with the participation of the *Mafube Business Forum*, in *casu*, the relief sought by KBBV is for it to perform the tasks on its own and for KLM to account directly to it with no municipal council,

provincial or national government’s involvement. This will be an unprecedented and an unconstitutional route to follow

particularly bearing in mind that in terms of s 139 of the Constitution[13] provision is made for a hierarchical step of intervention should local government (municipalities) fail to carry out their mandate.

[29] Evidently, pre 2010 the town of Koinaas was 100% controlled by De Beers mining. In 2010 Koinaas and its services were partially transferred to the Municipality and during 2016 there was a final handing over of the town and its services. Clearly, the operational services changed post 2016 because the systems were no longer private-sector orientated but were governed by the Constitution of the country and all other legal framework relating to the governance of municipalities. There was bound to be a change in the administration. In terms of s 151(2) of the Constitution the executive and legislative authority of a municipality is vested in its Municipal Council.

[30] Moseneke J, then, in *City of Cape Town and Another v Robertson and Another*[14] remarked:

“[57] The Court restated the principle of legality and, in particular, the rule that an entity can only act within the powers that are lawfully conferred upon it. In the context of local government, the Court stated that the powers of local government are conferred upon it either in terms of the Constitution or the laws of a competent authority.

[58] The advent of the Constitution has enhanced, rather than diminished, the autonomy and status of local government that obtained under the interim Constitution. In the First Certification Judgment, this Court stated:

'[Local Government] structures are given more autonomy in the [New Text] than they have in the [interim Constitution] and this autonomy is sourced in the [New Text] and not derived from anything given to [Local Government] structures by the provinces.'

[59] Subsection 40(1) of the Constitution entrenches the institutions of local government as a sphere of government and pronounces all spheres of government to be distinctive, interdependent and interrelated. Subsections 41(e) and (g) articulate and preserve the geographical, functional and institutional integrity of local government. In turn, ss 43(c) and 151(2) confer original legislative and executive authority on municipal councils. The Constitution expressly precludes the national or a provincial government from impeding the proper exercise of powers and functions

of municipalities. Thus a municipality has the right to govern the local government affairs of its area and community.

However, the duties, powers and rights of municipalities have to be exercised subject to national or provincial legislation as provided for in the Constitution.” (own emphasis added)

[31] Sections 105 and 106 of the Local Government: Municipal Systems Act[15] (the Systems Act) provides:

“105. Provincial monitoring of municipalities

(1) The MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155 (6) of the Constitution to-

- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
 - (b) monitor the development of local government capacity in the province; and
 - (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.
- (2) The MEC for local government in a province may by notice in the Provincial Gazette require municipalities of any category or type specified in the notice or of any other kind described in the notice, to submit to a specified provincial organ of state such information as may be required in the notice, either at regular intervals or within a period as may be specified.
- (3) When exercising their powers in terms of subsection (1) MECs for local government-
- (a) must rely as far as is possible on annual reports in terms of section 46 and information submitted by municipalities in terms of subsection (2); and
 - (b) may make reasonable requests to municipalities for additional information after taking into account-
 - (i) the administrative burden on municipalities to furnish the information;
 - (ii) the cost involved; and
 - (iii) existing performance monitoring mechanisms, systems and processes in the municipality.

106. Non-performance and maladministration

- (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.

(1A) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the MEC designated a person or persons to investigate the matter and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National

Council of Provinces.

(2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1) (b).

(3)(a) An MEC issuing a notice in terms of subsection (1) (a) or designating

a person to conduct an investigation in terms of subsection (1) (b), must within 14 days submit a written statement to the National

Council of Provinces motivating the action.

(b) A copy of the statement contemplated in paragraph (a) must simultaneously be forwarded to the Minister and to the Minister of Finance.

(4)(a) The Minister may request the MEC to investigate maladministration, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.

(b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National Council of Provinces.

(5)(a) Where an MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of subsection

(4) (a), the Minister may in terms of this section conduct such investigation.

(b) The Minister must send a report detailing the outcome of the investigation referred to in paragraph (a) to the President.

(6) If an investigation warrants such a step, the municipality must institute disciplinary proceedings against the person or persons implicated in the report in accordance with the systems and

procedures referred to in section 67, read with Schedule 2, and report the outcome to the MEC or the Minister, as the case may be, within 14 days of finalisation.”

[32] KBBV’s case is not based on s 139 of the Constitution which would have been the appropriate instrument for intervening in the local government sphere. The association, which in my view does not differ from any disgruntled citizen or any competing company for providing services to the municipality, is presupposing that the municipal council or the provincial or national government will inevitably fail to intervene, hence its request to this court to grant the order as formulated in its draft order attached to its heads of argument. There is nothing in the papers that says that there is failure by other spheres of government to intervene against the Kamiesberg Local Municipality which would entitle KBBV to approach Court for declaratory orders sought.

[33] Predicated on the Robertson judgment by Moseneke J the court cannot order the Municipality to step back and let KBBV take over all its duties and responsibilities. One of the reliefs sought is to authorise KBBV to take control of and repair and maintain the municipal service infrastructure of Koingnaas until such time as the Municipality is able to show its ability to fulfil and resume its duties in this regard. KBBV will be assuming a supervisory role and imposing itself to perform such functions without having followed any due process or itself being assessed for its competencies or capabilities. It is unclear how it will be shown that KLM has reached a stage of resuming its duties and responsibilities and who KBBV will be accountable to. This, in my view, is a recipe for disaster.

[34] KLM pleads an impossibility of performance in respect of repairing and restoring the water supply and sewage systems within the two to four weeks' timeframe set by KBBV. KLM explains that it is categorised under long-term projects which are already underway. It further maintains that the reverse osmosis water purification system is fully functional and denies the submission by the ratepayers' association that it is not functional. While KLM admits that from time to time it faces problems with pollution of ground water which it tackles as and when it arises, it denies that it is a permanent problem. KLM added that it conducts regular water tests. Potholes are, in KLM's response, not

prioritised because of financial constraints as funds are directed at the rectification of the water supply and sewage systems at Koingnaas. KLM refutes the allegation that there are problems with the landfill operations and maintains that they are fully functional. Clearly, there are disputes of fact in respect of the contentions by the parties pertaining to the infrastructure which are not soluble on paper. Following the Plascon-Evans rule,[16] the ratepayers' association would be entitled to the relief it is seeking if the facts, as set out by the ratepayers'

association in its founding affidavit as admitted by KLM and the municipal manager, together with the facts as set out by KLM entitles

the ratepayers' association to the relief it is seeking. This is not the case.

[35] There are appropriate measures that aggrieved parties can embark upon but usurping the powers and functions of a Municipality is definitely not one of them. As pointed out by Brand JA, writing for a unanimous court in *Premier, Western Cape and Others v Overberg District Municipality and Others*[17]:

"....Broadly stated for present purposes, however, s 139 of the Constitution permits and requires provincial governments to supervise the affairs of local governments and to intervene when things go awry."

I therefore cannot support the contention that the conduct of KBBV and its members was not unlawful or that it amounted to a sui generis form of necessity.

It therefore follows that the counter-application stands to fail.

[36] I now proceed to establish whether Kamiesberg Local Municipality has met the requirements for a final interdict as espoused in *Setlogelo v Setlogelo*.^[18] It is trite that an applicant that claims a final interdict must establish (a) a clear right; (b) an injury actually committed or reasonably apprehended, and (c) the absence of an alternative remedy. Once these three requisite elements are established, the scope, if any, for refusing the relief, is limited. There is no general discretion to refuse relief, as succinctly pronounced by Wallis JA in *Hotz and Others v University of Cape Town*.^[19]

[37] Legislatively, the responsibility to render municipal services lies with the Municipalities. They not only carry the mandate from the Constitution but also from the subsidiary legislation. That being said, KLM and the Municipal Manager bear the right to carry out their obligations as the accounting office and officer. Whether there stands to be apprehension of harm suffered by the applicants is irrefutable. The intentions of KBBV may be well and good but

without following proper processes and ensuring that they are fair, equitable, transparent, competitive and cost-effective, it is impermissible.

[38] KBBV acknowledges that its members took over the repairs of the road and intended to take over all the infrastructure and buildings and effect repairs or perform whatever function necessary, particularly to the sewage plant, the water treatment plant and rubbish dump. I am satisfied that KLM and the Municipal Manager have established

breaches of the rights sufficient to interdict KBBV and its members from taking control of the municipal infrastructure.

[39] KBBV's communication with the Municipal Manager is telling. They did not mince their words. Gräbe wrote an email dated 08 December 2021 the wording of which is unambiguous and already quoted in full above. This signifies that KBBV intended to continue with the said repairs and taking over of the infrastructure of KLM until it (KBBV) was satisfied that KLM was in a position to take over its responsibilities. The threat or injury is ever present and will be persisted with by KBBV.

[40] Resorting to the SAPS for intervention has proved futile and cannot be argued as an alternative remedy. This is what Wallis JA said in *Hotz*^[20]

"[36] Firstly, the purpose of an interdict is to put an end to conduct in breach of the applicant's rights. The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. That is why in many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There

may also be instances where, in the case of a statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy, but there are likely to be few instances where that will be the case. Thirdly, the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.”

[41] I am satisfied that KLM has established the three requisite elements for the grant of a final interdict and there is neither a scope for refusing such relief nor a general discretion to refuse the relief. I therefore find that KLM and the Municipal Manager have made out a proper case for the grant of a final interdict.

Costs

[42] On a conspectus of the evidence it is evident that service delivery is an intractable malaise in Koinaas and that KBBV resolved to do something about it for the benefit of the community. Whereas their negotiorum gestio justification that they invoked has not succeeded, however, they meant well and it is apparent that KBBV has dug deep into its own pockets to fix the potholes and/or do some road repairs. This is a cost that, it turns out, it is unlikely to recoup. To mulct it further with legal costs would be to add insult to injury and amount to an injustice.

[43] In the exercise of my discretion I am of the considered view that KBBV’s conduct does resort within the ambit of the pronouncement by the Constitutional Court in *Biowatch Trust v Registrar, Generic Resources and Others*[21]. It would accordingly be fair and equitable that each party should bear their own costs.

[44] The following order is made:

1. The rule nisi that was granted on 31 December 2021 is confirmed.
2. The counter-application is dismissed with no order as to costs.

M.C. MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Applicants: Adv. A.G. van Tonder Instructed by: Van de Wall Inc For the Respondents: Adv. MD du Preez SC assisted by Adv. Z.F. Kriel Instructed by: JC Kidson Attorneys. c/o Haarhoffs Inc

[1] *Hyde Construction CC v Deuschar Family Trust and Another* 2015 (5) SA 388 (WCC);

[2] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); [2004] 4 All SA 261 (SCA)

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- [3] Lupacchini NO and Another v Minister of Safety and Security (16/2010) [2010] ZASCA 108; 2010 (6) SA 457 (SCA) ; [2011] 2 All SA 138 (SCA) (17 September 2010)
- [4] Ibid at paras 33, 36 and 37
- [5] 2019
- (4) SA 532 (SCA) at para 13
- [6] The Constitution of the Republic of South Africa, 108 of 1996
- [7] (824/2022)
- [2023] ZASCA 153 (15 November 2023)
- [8] Snyman 1996 THRHR 106 107. CR Snyman, Snyman's Criminal Law, 7th Edition, Updated by SV Hoorntje (LexisNexis, 2020) at 107
- [9] See Snyman 1996 THRHR 106 for a more detailed discussion of these requirements
- [10] Act 108 of 1996
- [11] 2022 JDR 1236 (FB)
- [12] Section 139(7) stipulates: If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.
- [13] 139 Provincial intervention in local government
- (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
- (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or (iii) maintain economic unity; or (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

- (2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)- (a) it must submit a written notice of the intervention to- (i) the Cabinet member responsible for local government affairs; and (ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began; (b) the intervention must end if- (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
- (3) If a Municipal Council is dissolved in terms of subsection (1) (c)- (a) the provincial executive must immediately submit a written notice of the dissolution to- (i) the Cabinet member responsible for local government affairs; and (ii) the relevant provincial legislature and the National Council of Provinces; and (b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.
- (4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and- (a) appointing an administrator until a newly elected Municipal Council has been declared elected; and (b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.
- (5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must- (a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which- (i) is to be prepared in accordance with national legislation; and (ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and (b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and- (i) appoint an administrator until a newly elected Municipal Council has been declared elected; and (ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or (c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

- (6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to- (a) the Cabinet member responsible for local government affairs; and (b) the relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.
- (7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection
- (4) or (5) in the stead of the relevant provincial executive.
- (8) National legislation may regulate the implementation of this section, including the processes established by this section.

[13] 139 Provincial intervention in local government

- (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
 - (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
 - (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - (iii) maintain economic unity; or
 - (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.
- (2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)-
 - (a) it must submit a written notice of the intervention to-
 - (i) the Cabinet member responsible for local government affairs; and
 - (ii) the relevant provincial legislature and the National Council of Provinces,within 14 days after the intervention began;
 - (b) the intervention must end if-

- (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or
- (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
- (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
- (3) If a Municipal Council is dissolved in terms of subsection (1) (c)-
 - (a) the provincial executive must immediately submit a written notice of the dissolution to-
 - (ii) the relevant provincial legislature and the National Council of Provinces; and
 - (b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.
- (4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and-
 - (a) appointing an administrator until a newly elected Municipal Council has been declared elected; and
 - (b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.
- (5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-
 - (a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-
 - (i) is to be prepared in accordance with national legislation; and
 - (ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and
 - (b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-

- (i) appoint an administrator until a newly elected Municipal Council has been declared elected; and
- (ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or
- (c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.
- (6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to-
 - (a) the Cabinet member responsible for local government affairs; and
 - (b) the relevant provincial legislature and the National Council of Provinces,within seven days after the intervention began.
- (7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection
- (4) or (5) in the stead of the relevant provincial executive.
- (8) National legislation may regulate the implementation of this section, including the processes established by this section.

[14]

[2004] ZACC 21; 2005

(2) SA 323 (CC) at paras 57, 58 and 59

[15] 32 of 2000

[16] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[17] 2011

(4) SA 441 (SCA) para 1

[18] 1914 AD 221 at 227

[19] 2017

(2) SA 485 (SCA) para 29

[20] Ibid footnote 19 at para 36

[21] 2009

(6) SA 232 (CC)

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Prepared on 14 October 2026 · Esheria