

SOUTH AFRICA / JUDGMENT

Plaaslike Besorgde Inwoners (PBI) and Others v George Municipality and Others (7529/2020) [2020] ZAWCHC 102 (24 August 2020)

[2020] ZAWCHC 102

COURT

Western Cape High Court, Cape Town

BEFORE

Hockey AJ

CASE / FILE NUMBER

7529/2020

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IN

THE HIGH court of South Africa
(WESTERN
CAPE DIVISION, CAPE TOWN)

CASE NO:

7529/2020
In

the matter between:

PLAASLIKE
BESORGDE INWONERS
(PBI)
1st
Applicant
AFRICAN
NATIONAL CONGRESS
(ANC)
2nd
Applicant
ECONOMIC
FREEDOM FIGHTERS
(EFF)
3rd
Applicant
SOUTH
AFRICAN CIVICS
(SAC)
4th
Applicant
AFRICAN
INDEPENDENT CONGRESS

(AIC)
5th
Applicant
VIRGIL
GERICKE N.O
(PBI)
6th
Applicant
NOMAWETHU
GUSHMAN N.O
(ANC)
7th
Applicant
MBULELO
MAGWALA N.O
(EFF)
8th
Applicant
MERCIA
DRAGHOENDER N.O
(SAC)
9th
Applicant
KHUMBULELE
MKHONDO N.O
(AIC)
10th
Applicant
and
GEORGE
MUNICIPALITY
1st
Respondent
MUNICIPALITY
MANAGER OF
GEORGE
2nd
Respondent
SPEAKER
OF GEORGE MUNICIPAL
COUNCIL
3rd
Respondent
MAYOR
OF GEORGE
MUNICIPALITY
4th
Respondent
DEMOCRATIC
ALLIANCE
(DA)

5th
Respondent
Date
of hearing: 07 August 2020
Date
of Judgment: 24 August 2020 (delivered via email to the parties'
legal representatives)

JUDGMENT

INTRODUCTION

- [1] This application was brought on an urgent basis wherein the applicants seek an order “[r]evueing, declaring null and void and setting aside the mayoral election of 22 May 2020 for the position of mayor of the George Municipality”. During argument, the applicants abandoned relief sought in prayers three and four of their notice of motion which for purpose of this judgment became superfluous.
- [2] By the time that the applicants filed their replying papers, the fourth applicant had withdrawn its mandate and did not participate in the proceedings when the matter was argued. When I refer to the applicants, it is to the exclusion of the fourth applicant.
- [3] The first to fourth respondents (“the respondents”) opposed the granting of the relief sought, and the fifth respondent,
- namely the Democratic Alliance, (“the DA”) did not participate in the proceedings.
- [4] The first to fifth applicants are political parties registered to participate in political activities and elections in the national,
- provincial and local spheres of government. The sixth, seventh, ninth and tenth applicants are whips of the first, second, fourth and fifth applicants respectively, whereas the eight applicant is the regional secretary of the third applicant.
- [5] The first respondent is a Municipality (“the Municipality”) as referred to in Chapter seven of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and regulated in terms of, amongst other legislation, the Local Government: Municipal Structures Act 117 of 1998 (“the Structures Act”). The second respondent is the municipal manager of the Municipality, the third respondent, its speaker and the fourth respondent is its newly elected executive mayor.
- [6] At the times relevant to this matter, the DA was in control of the Municipality. On 22 May 2020, a council meeting and an election for its executive mayor for the Municipality took place, resulting in the election of the fourth respondent who is a member of the DA. It is this election which the applicants seek to have set aside. In doing so, the applicants raised two main issues for this court to decide, namely first, whether the speaker, who is also a member

of the DA, deliberately manipulated the timing of scheduled council meetings by cancelling or postponing them until he was sure of the successful election of the fourth respondent, and second whether the meeting of 22 May 2020 and the election process was marred by irregularities.

- [7] I am indebted to both counsel who appeared in this matter before me. Mr Fisher appeared for the applicants and despite having accepted his brief on short notice, argued with compassion and professionalism. Mr Breitenbach acted for those respondents who opposed the relief sought. I am indebted for his detailed heads of argument setting out all relevant legislative provisions.

THE LEGISLATIVE FRAMEWORK

- [8] Since this matter concerns the election of the executive mayor of the Municipality, it is apposite to consider, to the extent necessary, the applicable legislative framework.

The Constitution

- [9] Chapter 7 of the Constitution provides the framework for the establishment of local government, which no doubt occupy an important

role in our constitutional democracy. The chapter makes provision, in section 152, for the establishment of municipalities for the whole of the territory of the Republic. It sets out the objects of local government, which are -

“a) to provide democratic and accountable government for the local communities;

- b) to ensure the provision of services to communities in a sustainable manner;
- c) to promote social and economic development;
- d) to promote safe and healthy environment; and
- e) to encourage the involvement of communities and community organisations in the matters of local government.”

The above clearly demonstrates that local government, as a third sphere of government, plays a critical role in our democracy, with an objective to involve communities within the whole democratic process on which our constitutional democracy is built. The election of not only those representative to municipal councils, but also those who hold important positions on those council are of vital importance.

The Structures Act

- [10] The Structures Act, as well as the Local Government: Municipal Systems Act 32 of 2000 are the main pieces of legislation giving effect to the provisions of Chapter 7 of the Constitution. For present purposes, it is only necessary to consider the provisions of the Structures Act.

- [11] The Structures Act makes provisions for various different types of executive systems in local government, but it suffices to state for present purposes that an executive mayoral system has been adopted in respect of the Municipality. In accordance with this system the municipal council elects an executive mayor to whom certain executive functions are delegated, as set out in section 56 of the Structures Act. The executive mayor plays an important role within the municipality, such role including identifying and evaluating the needs of the community, recommending strategies to the municipal council, etc. In addition, the executive mayor is required to perform duties and functions delegated by the council and to oversee the provisions of services to the community.
- [12] Section 55(1) of the Structures Act requires that a municipal council must elect an executive mayor (where the council has chosen to have an executive mayor in terms of section 54(2)) within 14 days of the council's election. In terms of section 55(2), a vacancy in the office of the executive mayor must be filled when necessary. Section 55(3) provides that the procedure set out in Schedule 3 of the Structures Act applies whenever a municipal council meets to elect an executive mayor.
- [13] Schedule 3 to the Structures Act provides for the procedure whenever a municipal council meets to elect, amongst other, an executive mayor. The procedure includes for the person presiding at a meeting to call for nominations of the candidates for the position to be filled, for a form to be completed and signed by two members of the council, for the person being nominated to indicate acceptance by his/her signature, and for the announcement by the presiding officer of the names of the person/s nominated. No debate is allowed. Furthermore, the Schedule provides for the election procedure to be followed. Voting must take place by secret ballot.
- [14] The speaker too, fulfils an important function within the municipal council. Chapter 2 of the Structures Act provides for the election and functions of the speaker. Duties of the speaker, amongst other, include to decide when and where the council meets, to preside at meetings, to maintain order during meetings and to ensure that council meetings are conducted in accordance with the rules and orders as adopted by the council.

The Rules of Order

- [15] Section 160(6) of the Constitution permits municipal councils to make by-laws which prescribes rules and orders for its internal arrangements, its business and procedures and for the establishments, composition, procedures, powers and functions of its committees.
- [16] The Municipality has adopted "Rules of Order for Council and its Committees" ("the Rules") regulating the conduct of meetings of its municipal council.
- [17] Item 3 of the Rules deals with the conduct at meetings and provides for the duties of the speaker to amongst other, maintain order during meetings, ensure compliance with the Code of Conduct for Councillors at meetings, ensure that meetings are conducted in

accordance with the rules of order (except if otherwise ruled by the speaker) and ensure that members conduct themselves in a dignified and orderly manner. In terms of Rule 4, the ruling of the speaker “in regards to the application or interpretation of these Rules and the other procedural matters not dealt with in the Rules of Order is, once he/she has given his/her reasons, final and binding.”

- [18] Further responsibilities of the speaker include, to determine the date, time and venue of municipal council meetings, and to ensure that such meetings take place at least quarterly (Rule 6.1); and to determine whether Municipal Council meetings are urgent or not (Rule 6.7).
- [19] Rule 6.3 provide that the Municipal Manager must give at least 72 hours’ notice of Municipal Council meetings to enable members to prepare adequately. In the case of urgent meetings, Rule 6.7 provides that the notice period must be at least 24 hours.
- [20] The Rules further provides that “[e]very member of the Municipal Council must specify in writing an electronic mail address and/or physical address within the municipal area of George where he/she can receive or electronically notice of meetings and other official correspondence. Delivery to this address will constitute proper notice of meetings of the Municipal Council.” (Rule 6.10).
- [21] Rule 6.5 provides that where members have not received proper notices of meetings, this will not affect the validity of such meetings.

THE COVID-19 PANDEMIC AND THE REGULATIONS PROMULGATED UNDER THE DISASTER MANGEMENT ACT

- [22] The key events which gave rise to the present application occurred during a time that our country (and the world) faced a global

pandemic (COVID-19) caused by a novel coronavirus which was first identified in Wuhan, China during December 2019 and which spread

globally during the early part of 2020. This resulted in our national government declaring a national state of disaster in terms of section 27 (1) of the Disaster Management Act 57 of 2002 (“the DMA”) on 15 March 2020.

- [23] On 23 March 2020 our President announced a nation-wide “lockdown” beginning at midnight 26 March 2020 and ending 16 April 2020 (this initial 21 day period was eventually extended until the end of April 2020).
- [24] On 25 March 2020, the Minister of Cooperative Governance and Traditional Affairs (“the Minister”) issued regulations

in terms of section 27(2) of the DMA which regulated the lockdown period. On the same day the Minister also issued directives under

those regulations in response to COVID-19 pertaining to the cooperative governance and traditional affairs sectors (“the 25 March directions”). The purpose of these directions is to direct municipalities and provinces in respect of various matters in response to COVID-19, including municipal public spaces, facilities and offices, isolation and quarantine, municipal operations and governance, institutional arrangements and development of COVID-19 response plans and precautionary measures to mitigate employee health and safety risks.

[25] Paragraph 6.5 of the 25 March directions, provides that control measures must be put in place in relation to public spaces,

facilities and offices to ensure social distancing to prevent the risk of transmission. “Social distancing” is defined in paragraph 5 as “limiting personal contact as a measure to reduce the probability of contact between persons carrying an infection, and others who are not infected, so as to minimize disease transmission, morbidity and ultimately, mortality”

[26] Paragraph 6.7 dealing with municipal operations and governance provides in paragraph 6.7.2 thereunder that no municipal council

meetings outside the District Command Centre Meetings may be undertaken during the initial 21 day lockdown period, or any extended

period that may be declared. All ordinary council meetings were suspended in terms of paragraph 6.7.2 (e).

[27] On 30 March 2020, the Minister issued further directions (“the 30 March directions”) replacing paragraph 6.7 of the 25 March directions. The 30 March directions required municipalities during the initial lockdown period or any extended period that may be declared to:

1. undertake only meetings of the Metropolitan and District Command Centres (para 6.7.2);
2. to suspend all municipal council meetings (para 6.7.3(a)); and
3. not convene any meetings (para 6.7.3(b)).

[28] On 23 April 2020, the President announced that after 30 April 2020 (ie the end of the initial period of lockdown), a risk adjusted

strategy to gradually ease lockdown restrictions. Five alert levels were announced, Alert level 5 being with high virus spread and/or low health system readiness, during which drastic measures are required to contain the spread of the virus to save lives, and Alert level 4 with moderate to high virus spread with low to moderate health system readiness during which period some activity can be allowed to resume subject to extreme precautions required to limit community transmissions and outbreaks. Alert level 4 was applicable from 1 May 2020 until after 22 May 2020 when the impugned election of the executive mayor took place, and it is therefore not necessary for present purposes to consider other Alert levels.

[29] On 7 May 2020, the Minister issued further directions pertaining to municipal operations and governance (“the 7 May directions”),

replacing paragraph 6.7 of the 30 March directions. The 7 May directions provided, amongst other, that;

1. all meetings of councils must be done using media platforms such as teleconferencing and videoconferencing (para 6.7.3); and
2. municipalities and municipal entities are directed to convene meetings to consider any council-related business.

THE CHRONOLGY OF EVENTS

[30] Most, but not all of the chronology of factual events which gave rise to this application are common cause. I am mindful that in motion proceedings such as the present matter, where there are disputes of fact, and there are no referral of such disputed issues to oral evidence, a final order can only be granted if the facts averred by the applicants and admitted by the respondents, together with facts averred by the latter, justify such order. This is so unless the respondents’ version consists of bald or uncreditworthy denials, raises fictitious dispute of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers - See Plascon Evans principle (see Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A). In National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2 SA 277 the rationale for the Plascon-Evans principle was well elucidated as follows (at p 290, para 26);

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on affidavit, a final order can be granted only if the facts averred by the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[31] A rejection of the respondent’s version on the basis of the Plascon-Evans rule “occurs infrequently as a court are alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence” as held by Wallis AJ in Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017

(2) SA 1 at p18A.

[32] According to the applicants, the series of events which gave rise to this application stems from certain political instability within the DA during 2019 and 2020, which caused a loss of DA councillors within the municipality which resulted in the shifting in the balance of power within the council. In his founding affidavit deposed to on behalf of the applicants,

Mr Virgil Gericke (“Gericke”), the sixth applicant and a member of the first applicant, referring to the state of affairs in the DA at the time, states that “[t]his unhealthy position for the DA inspired Speaker, a member of the DA, to adopt certain strategies, which in my humble view were biased and unlawful, during Council Meetings to avoid the DA’s loss of control over the George Municipal Administration.”

- [33] It is common cause that on 20 February 2020, a vacancy in the office for the executive mayor of the Municipality arose when the incumbent, Mr Melvin Naik ceased to be a member of the municipal council because his membership of the political party he represented, namely the DA, was terminated.
- [34] As for the rest of the relevant events, the first event in the chronology mentioned by Gericke is the cancellation at 6am on 27 February, of a meeting which was scheduled for 10am that day. On the agenda for that meeting was a motion of no confidence tabled against the speaker as well as the deputy mayor. The councillors were locked-out from the meeting. In doing so, the speaker cited safety reasons without elaborating thereon.
- [35] The speaker deposed to the answering affidavit on behalf of the first to fourth respondents. The first event of importance, according to the speaker, was on 28 November 2019 when he had to cancel a meeting of the municipal council shortly before it was due to start because of a rowdy crowd of persons who refused to take their protest outside the chamber and building so as to allow the meeting to proceed.
- [36] The mention of the meeting scheduled for 28 November 2019 was important as the meeting scheduled for 27 February 2020 was cancelled, according to the speaker, because he was informed from a reliable source that the 27 February meeting was going to be

disrupted (as did happen with the 28 November meeting) by a large number of members of the public. Nothing on record indicates that there were any complaints about the cancellation at the time and the reason for the cancellation proffered by the speaker seem to have been accepted. The applicants’ case can only be that this cancellation appeared only at a later stage to have been part of a pattern of manipulation to cancel and re-schedule meetings to ensure that the DA carries a majority for any important decisions to be taken.

- [37] The next important event, which is mentioned by both the applicants and the respondents is the meeting scheduled for 26 March 2020 where, amongst other, the motions of no confidence against the deputy mayor and the speaker were to be tabled. As a result of the declaration of a state of national disaster and the resultant initial period of lockdown during which all municipal meetings had to be suspended in terms of paragraph 6.7 of the Minister’s directions, this meeting was cancelled. In my view, this cancellation was legitimate and cannot be said to form part of any pattern of manipulation as alleged by the applicants. It was also not possible to bring the meeting forward as advocated by Gericke in his replying affidavit as the directions were issued on 25 March 2020, the day before the scheduled meeting, leaving no time for the rescheduling of the meeting to an earlier date. The speaker correctly states that he was obliged to cancel the meeting by paragraph 6.7 of

the 25 March directions. No further attention is warranted in respect of the cancellation of this meeting.

[38] Another meeting scheduled for 31 March 2020, for which a motion of no-confidence was tabled in the chief whip of the municipality, had to be cancelled for the same reasons as the cancellation of the 26 March meeting.

[39] Following the 7 May directions, notices were sent out to councillors on 15 May 2020 for a special e-council meeting to be held on Microsoft Teams, one of the standard media platforms in use by municipalities following the Minister's direction for the

holding of such meetings. The meeting was to be held at the George Municipality, Main Building (also referred to as the civic centre) on 18 May 2020 at 14:00. Councillors were requested to arrive 30 minutes early to be showed to a particular venue.

[40] Also on 15 May 2020, an email was sent to councillors with, amongst other things, links to access the agenda for the scheduled meeting and a further email with the Microsoft Teams link for the meeting. The only item on the agenda was the election of the executive mayor. The voting for the executive mayor was planned to take place in the civic centre, ie the main building as referred to in the notice for the meeting. Arrangements were made for votes to be casted in four separate places within the complex, namely the banquet hall, the main hall, the conference room and the council chamber.

[41] Councillors from certain of the applicant political parties experienced some IT issues, but nothing turns on this as the scheduled meeting was cancelled.

[42] On 17 May 2020, the speaker received news that a municipal staff member working in the civic centre tested positive for the

coronavirus which necessitated the closure of the civic centre for sanitising, and he accordingly decided to postpone the meeting until further notice. Gericke confirmed that the speaker cancelled the meeting scheduled for 18 May 2020 by sms and WhatsApp to councillors only citing coronavirus health risks. The email that was sent out to councillors notifying them of the cancellation of the meeting, however stated that the postponement (not cancellation) was "due to Covid-19 circumstances beyond our control, which demands deep sanitising of the main building again."

[43] In my view, the closure of the civic centre after an employee was infected with the coronavirus and the resultant postponement of the council meeting cannot be faulted. The decision to close the building under the circumstances for deep sanitising is exactly what was expected in terms of the directions of the Minister, especially in relation to precautionary measures to mitigate employee (as well as public) health risks.

- [44] On 18 May 2020 at 14: 01, the speaker sent an email to all councillors informing them that the postponed meeting for the election of the executive mayor would be held on 19 May 2020 at 14:00, again using the Microsoft Teams platform at various venues to be communicated shortly. The only item on the agenda for this meeting again was the election of the executive mayor.
- [45] On the same day, at a meeting of the whips of the various parties and the speaker, it was agreed, amongst other, that the venues for the meeting, and more specifically where the voting would take place would be venues in Blanco, Conville, Pacaltsdorp, Rosemore and Thembaletu. Each of the councillors would be allocated to one of the five venues. The meeting would be held virtually, but physical voting at the five venues would take place.
- [46] On 19 May 2020, news was received that another municipal staff member whose work entail the entering of the main administrative building and all adjacent municipal buildings had tested positive for the coronavirus which, according to the speaker, necessitated the closure of the buildings for sanitising. The speaker accordingly decided to cancel the scheduled meeting until further notice. An email was sent to councillors informing them of the cancellation until further notice.
- [47] For the same reasons relating to the cancellation of the meeting that was scheduled for 18 May 2020, I cannot find fault the cancellation of the meeting scheduled for 19 May 2020. Health and safety under these circumstances should no doubt be paramount.
- [48] On 21 May 2020 at 13:55, an email was sent to councillors informing them that the meeting for the election of the executive mayor would take place on 22 May 2020 at 14:00. The meeting was to take place on Microsoft Teams and the email contained the necessary link.
- [49] On the same day, 21 May 2020, the Whips of the various political parties and speaker agreed that the venue of the meeting,
- specifically where voting would take place would be venues in Blanco, Conville and Thembaletu. A further email was sent out to councillors informing them of the venues and their allocations to the voting venues.
- [50] Since the procedure of the meeting and the voting is impugned, it is required to deal with what transpired in some detail. First, it is necessary to set out the full text of an email which was sent out to all councillors at 09:56 on 22 May 2020 informing them of the procedure to be followed at the meeting and for the election of the mayor. It reads as follows:

“THIS IS THE FINAL AND CORRECT NOTIFICATION:

Issued Friday 22 MAY 2020

ISSUED BY OFFICE OF MUNICIPAL MANAGER

Good day Councillors

You will have received notification of the Special Council e- Meeting called for Friday 22 May at 14h00.

The election process for the election of an Executive Mayor as prescribed in Schedule 3 to the Municipal Structures Act, 117 of 1998, will be followed. The process is as follows:

1. The Speaker will call for nominations for the position of Executive Mayor, Nomination forms in this regard will be available at the three venues identified.
2. Once nominations are closed, the duly completed and signed form(s) must be handed to the official of Corporate Services present at the venue who will check the form to ensure it is signed by two Councillors and accepted by the person(s) nominated. The official will then communicate the name(s) of the persons who have been nominated to the Speaker who will announce the names live on MS Teams.
3. No debate will be permitted.
4. If only one candidate is nominated, the Speaker will declare the candidate elected.
5. If more than one candidate is nominated, voting will take place by secret ballot.
6. Councillors will be afforded the opportunity to vote at the venue allocated to specific Councillors as per the list circulated. Ballot papers will be made available at the venues.
7. Safety must be observed at all venues, such as the wearing of face masks, social distancing and hand sanitising.
8. Councillors who do not have transport to go to a venue for voting purposes, will be provided with transport.
9. Ballot papers must be placed in a ballot box provided for this purpose. Voting will only take place once the whips of the parties have inspected the open boxes, where after it will be sealed.
10. For safety reasons, Councillors will enter the venue one by one to cast their votes in booths provided. Ballot papers must be placed in the sealed ballot boxes.
11. Officials will provide assistance inside the halls.
12. Once all Councillors have voted, the sealed ballot boxes from Thembaletu and Blanco will be transported to the Conville Civic by a vehicle provided by Fidelity Guards, escorted by the South African Police Services. Once the ballot boxes are delivered, all ballot boxes will be emptied simultaneously and then counted by the Director: Corporate Services in the presence of the Party Whips. The Director: Corporate Services will communicate the number of votes received by each candidate to the Speaker who will declare elected the candidate who received the majority of the votes.

All of the necessary checks and balances will be in place at all times.

We thank you for participating in the historic events, a first for George Municipality and given our current scenario, the way forward for many months to come. I trust the combined efforts of the Councillors and municipal officials will contribute to the success of tomorrow proceedings.

Trevor Botha

Municipal Manager”

[51] It is important to note that the meeting was to take place (and did take place) on the virtual platform, but the actual voting, took place physically and by secret ballot at the three venues. Councillors could take part in the virtual meeting at any of the

three venues, from their homes or any place of their choosing. The whole process entailed the following;

51.1 the call by the speaker for the nominations of candidates for election as the executive mayor via the virtual platform;

51.2 the physical presence of the persons nominating candidates at one of the three venues in order to complete and sign the nomination form;

51.3 the physical presence of the persons nominated for the positions at the venue where he/she was nominated in order to sign acceptance of his/her nomination form;

51.4 the announcement by the speaker of the names of the persons nominated via the virtual platform;

51.5 the announcement by the speaker via the virtual platform of the start of the voting process;

51.6 the inspection of the ballot boxes by the party whips at each of the venues if they so wished;

51.7 the physical presence of the councillors at the venues allocated to them in order to cast their votes;

51.8 the sealing of the ballot boxes and the transportation thereof from two of the venues to the Conville venue where counting took place;

51.9 the presence of the party whips at the Conville venue where counting took place; and

51.10 the declaration by the speaker via the virtual platform that the candidate who received the most votes had been elected as the executive mayor.

[52] Three officials of the Municipality was put in charge in each of the three voting venues as electoral officials.

[53] Those councillors who elected to attend the meeting from any of the three venues were allowed to enter the venue at the start of the meeting or when they arrived during the meeting instead of one by one as notified. Nothing turns on this.

- [54] After the speaker started the meeting from the Conville venue, there were some heated debate on two issues which I shall deal with here. First, after the speaker announced that there were three members (who happened to be DA members) who were particularly vulnerable to the infection to the coronavirus. He did not mention any names. The opposition councillors objected to the participation of the three unnamed members in the election process. Gericke in his founding affidavit states that the speaker informed the meeting that three members were “exposed” to the virus, as opposed to the account of the speaker in his answering affidavit that the three were “particularly vulnerable” to infection.
- [55] The speaker explains in the answering affidavit that he ignored the objection from the opposition councillors for four reasons.

First, the meeting, apart for the voting stage, was to be held virtually and he knew that the three councillors concerned were going to attend at their allocating voting venues only when they had to vote.

Second, two of the three councillors had not been “exposed” to the virus, instead they and/or their families were particularly

vulnerable to the virus. One of the two in question was over the age of 65 and his wife was receiving treatment for cancer. The daughter of the second was pregnant.

Third, one of the three he referred to, was Councillor Kritzinger whose son, a municipal employee, had tested positive for the virus – she showed no signs of infection and her temperature was going to be tested before she entered her allocated voting venue. Her period of contact with others inside the voting station could be limited by ensuring that she voted last, that she entered the voting venue only when the time came for her to vote and that she left immediately thereafter. This is in line with 6.5 of the 25 March directions (which did not change and was still applicable) relating to social distancing.

Fourth, he regarded the objection “as a transparent and baseless attempt to reduce the number of DA councillors who could participate in the election of the new Executive Mayor”.

- [56] The second issue which caused heated debate was the objection raised by the opposition councillors because of the absence from his assigned venue by Councillor Raybin Figland (“Figland”), who indicated that he wanted to nominate Councillor Leon Van Wyk (“Van Wyk”). The objection, according to the speaker, was not upheld as Figland was not required to be at the venue at that stage when nominations were called for. After he indicated that he wanted to nominate Van Wyk, he travelled to the Conville venue to complete the nomination form. This, in my view was in line with the due process adopted.
- [57] After the speaker called for nominations, Councillor Virgil Gericke, a member of the first applicant and Van Wyk of the DA were duly nominated for election as the executive mayor. Both accepted their nominations at the venues where they were present and the nomination forms were taken by officials to the Conville venue where it was received by the speaker.

- [58] The speaker then adjourned the meeting in order for 50 anonymous ballot papers to be prepared at the Conville venue with the names of the two nominees and for the ballot papers to be transported to the other two venues.
- [59] What transpired during and before the actual voting process caused the opposition councillors to lodge certain complaints which have become issues for consideration in this application. To put these issues in context, it is necessary to repeat two provisions of the Rules, namely Rule 7.1 which provides that the “quorum for a meeting of the Municipal Council or Committee is a majority of its members”, and Rule 15.2 which provides that “[b]efore any vote is taken on any matter before the Council no Councillor or any other person shall be allowed to enter or leave the Council Chamber, while voting is in process.”
- [60] When the official, Mr James arrived at the Thembaletu voting venue with the ballot papers after they had been prepared at the Conville venue, he found two councillors, Councillors Snyman and Stimela, who were meant to vote there and who had earlier been inside the venue, locked out. Another councillor, Councillor Louw who was also meant to vote there also arrived. Mr James had a discussion with the councillors inside, during which it became apparent some of them were of the view that since Snyman and Stimela had left the voting venue after the meeting had started, they should not be allowed back. Mr James explained that they had not left the venue whilst the voting process was ongoing and should be allowed back. The persons inside then allowed those inside to enter the venue. In any event, the meeting was adjourned after the nominations process, and had not yet re-commenced at this juncture.
- [61] After the ballot boxes were inspected and locked, voting at the three venues commenced at the same time. The councillors were called forward to vote one by one by the officials in charge at each of the three venues. Each signed a register, collected a ballot paper and used it to cast their votes in secret. All the councillors who were allocated to the three venues voted, except for Councillor Muller who was absent from the Thembaletu venue and did not vote at all. The speaker, who was stationed at the Conville venue permitted Councillor Kritzinger to enter the venue after all the other councillors had voted to enter the venue to cast her vote so as to minimise potential risks to others at the venue, as her son had tested positive for the coronavirus. When it came time for her to vote, the speaker fetched her from her car, her temperature was taken (which was normal) and she was allowed to vote, whereafter she left the venue. Kritzinger showed no signs of infection on the day that she voted, nor did she show signs thereafter or tested positive for the virus since then. The extent of her exposure to her son is unclear. There is no indication on the papers whether her son lives with her, when and for how long they were in contact, whether such contact was before or after (and for what period before or after) his showing of symptoms or his positive test. The measures put in place to allow her to cast her vote, was reasonable in my view. I will deal with this and her right to vote again below.

[62] After voting was completed, the ballot boxes were sealed and taken by a security company from Thembaletu and Blanco to the Conville venue where the votes were counted. There were 49 ballots in total, which contained 26 votes in favour of Van Wyk and 23 votes in favour of Gericke. Using the virtual platform the speaker then announced the result of the election and that Van Wyk had been elected as the new executive mayor of the municipality.

EVALUATION

[63] When the coronavirus hit the world, it posed a problem to all and sundry to change the way we were used to doing things. There has been no universal response on how to adapt behaviours in dealing with the virus, maybe apart for measures relating to social distancing, wearing of face masks and improved hygiene. Governments - all spheres of it, as well as business had to adopt to new rules and procedure of best coping with the virus. The resultant lockdown experienced in our country had a pertinacious effect on what we considered normal and routine in our daily lives.

[64] In order for life to continue under lockdown, various measures were implemented to do what is necessary to safeguard the economy.

Similarly, in order for government (and businesses to) to carry on with its duties, it had to adapt to new measures and ways of doing things. At the initial stage of lockdown, there was a phase concentrating on health readiness. Gradually more activities were allowed after that initial phase in terms of the government's risk adjusted strategy. On local government level, meetings were initially disallowed, but later directions were promulgated to allow meetings on media platforms. Meetings were allowed to take place to consider any council related business in terms of the 7 May directions.

[65] The Municipality had to cancel two council meetings during March 2020 as a result of the prohibition in terms of the 25 March directives. Health risks also caused two meetings to be either postponed or cancelled during May 2020. These risks emanated from the infection of two employees shortly before the meetings were due to take place, and in both cases it required deep sanitising of the venues where the meetings, or at least the voting parts thereof were due to take place.

[66] The applicants allege that the cancellation of these meetings were sinister in order to afford the DA an unfair advantage during motions and mayoral elections. The applicants, however, cites no objective facts on which this court can rely on in order to conclude that the inference relied on is reasonable.

[67] In his heads of argument, Mr Breitenbach refers to a quote by Lord Wright in *Caswell v Powel Duffryn Associated Colliers Ltd*

[1939] 3 All ER 722 (HL) at 733, as quoted in *Bates & Lloyd Aviation V Aviation Insurance Co* 1985 (3) 916 at 939, as follows;

“There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation and conjecture.”

Besides the Bates matter, this approach has also been followed in *Moraitis Investments v Montic Diary* 2017 (5) SA 508 at 523 and in *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) (see footnote 115).

- [68] On the contrary to what the applicants wants the court to infer, namely that the cancellations or postponements of various meetings were for sinister reasons, it is clear that good reasons exist for the postponement or cancellation of each of the meetings so postponed or cancelled. I have dealt with these reasons above.
- [69] A further complaint raised by the applicants is that the speaker did not announce, at the commencement of the meeting on 22 May, that one of the DA councillors were absent – it turned out that this councillor did not participate in the meeting at all and also did not in the voting process. Had this been announced, it is alleged, the opposition may have walked out of the meeting thereby compromising the quorum requirement for the meeting to proceed. Besides the fact that I find no obligation of the speaker to have made such announcement, the possible walking out of the opposition, too, is conjecture and speculation and should be ignored.
- [70] It is apposite to mention that the council at the time consisted of 50 elected members, 25 of whom were members of the DA. Gericke informed in his answering papers that the DA had an agreement with two political parties, namely the African Christian Democratic Party and the Freedom Front, who each had one member on the council, in terms of which these parties would support the DA in matters like motions of no-confidence and the election of the new mayor. This was not denied in the replying affidavit.
- [71] As for the contention that three of the DA members should not have been allowed into their allocated voting venues in order to cast their votes as they were “exposed” to the virus, I cannot agree. In fact, only one of the three DA councillors may have had potential exposure as her son had contracted the virus. The extent of the exposure is not known. The other two members were vulnerable, or at least members of their families were. In my view the contention that these three members should have been denied their democratic vote is opportunistic and cannot pass muster.

[72] Mr Breitenbach acknowledged that the only possible transgression of the Rules may have been the decision to allow Kritzinger to vote. This may have been contrary to Rule 15.2 which forbids any councillor to leave or enter the council chamber while voting is in progress. If this is so, the speaker too would have transgressed the Rule as he left the voting venue to fetch Kritzinger from her vehicle after all the other councillors had voted, so that she could vote last.

[73] Enfranchisement is an important foundation on which our democracy is built. This entails the right of not only the electorate to cast their votes, but also those who have been democratically elected by the electorate to represent them. A founding provision in section 1 of the Constitution provides:

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

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” (my underlining)

[74] After referencing the above founding provision in the Constitution O’Regan J opined in *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 CC at para [23] p 316:

“These foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes, to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion.”

Further on, at paragraph [25] of the judgement, it was held;

“The question thus formulated is whether what the applicant did constituted compliance with the statutory provision viewed in the

light of their purpose. A narrow textual and legalistic approach is to be avoided.”

[75] The fact that non-compliance with statutory or other legislative provisions is not always fatal, has been affirmed in numerous cases. In *Liebenberg NO and others v Bergrivier Municipality* 2013 (5) SA 246 Cc, the Constitutional Court stated at para [25] that “a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny

being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory

provisions in particular and the legislative scheme as a whole.”

- [76] In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (5) SA 199 SCA, at para [22], it was held that “[I]t is clear from the authorities that even where the formalities required by statute are peremptory, it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved.”
- [77] In the present matter, the object of Rule 15.2 has not been canvassed on the papers, but it seems that the Rule is more tailored where voting happens in chambers by the show of hands. In this event, the comings and goings of those entitled to vote can lead to confusion and miscalculation of the votes, for obvious reasons. There seem to be no logical purpose for strict compliance with this Rule where voting takes place by secret ballot.
- [78] In the result, even if there was not strict compliance with Rule 15.2 by the speaker in that he left the meeting before voting was concluded and entered again with Kritzinger, who also entered the venue after voting had commenced, such non-compliance in my view should not render the whole voting process invalid. In any event, we must be mindful of the circumstances under which the impugned meeting and voting took place, relating to the state of disaster and the resultant lockdown regulations and directives applicable. Allowing Kritzinger to vote after others had casted there votes was a rational measure put in place by the speaker to avoid possible contamination.

COSTS and CONCLUSION

- [79] The respondents advised that in the event of the application being dismissed, they did not seek a cost order. I agree that in the present matter, no cost order should be made. In my view, the events and circumstances which lead up to the application was strange to everyone concerned, and unfamiliar measures had to be taken in order for the Municipality to continue with its business. The applicants were entitled to have these tested by the court.
- [80] In the circumstances, the application is dismissed, with no order as to costs.

HOCKEY AJ

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