

SOUTH AFRICA / JUDGMENT

Posthumous N.O and Others v Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs and Others (1586/2020) [2020] ZANCHC 78 (9 November 2020) [2020] ZANCHC 78

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams, Mofokeng

CASE / FILE NUMBER

1586/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

CASE

NO: 1586/2020

Date

heard: 03-11-2020

Date

delivered: 09-11-2020

In

the matter between:

MATTHEW
POSTHUMOUS N.O
1ST APPLICANT
HENDRIK
BOOYSEN
2ND APPLICANT
ELFREDINE
GERALDINE BEKKERS
3RD APPLICANT
AND
THE
MEMBER OF THE EXECUTIVE COUNCIL
FOR
COOPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS

AND TRADITIONAL AFFAIRS
1st
RESPONDENT
THE
PREMIER OF THE NORTHERN CAPE
2nd
RESPONDENT
THE
EXECUTIVE COUNCIL OF THE NORTHERN CAPE
3rd
RESPONDENT
THE
RENOSTERBERG LOCAL MUNICIPALITY
4th
RESPONDENT
MORNE
HOOGBAARD N.O
5th
RESPONDENT
THE
PIXLEY KA SEME DISTRICT MUNICIPALITY
6th
RESPONDENT
THE
MINISTER FOR COOPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS
7th
RESPONDENT
THE
CHAIRPERSON OF THE NATIONAL
COUNCIL
OF PROVINCES
8th
RESPONDENT
HANS
OLIPHANT N.O
9th
RESPONDENT
JOHANNES
NIKLAAS N.O
10th RESPONDENT
MARY
ELIZABETH BITTERBOS
11th RESPONDENT
SARAH
FELICITY JANTJIES
12th RESPONDENT

CORAM:

WILLIAMS J et MOFOKENG AJ:

JUDGMENT

WILLIAMS J:

1. This is an urgent application to review and set aside (i) the decision of the Executive Council of the Northern Cape (the PEC) at the behest of the Member of the Executive Council for Co-operative Governance, Human Settlements and Traditional Affairs (the MEC) to dissolve the Renosterberg Local Municipality (the Municipality) pursuant to section 139 of the Constitution of the Republic of South Africa, 1996, and (ii) the appointment of an administrator for the Municipality

Background

2. The towns of Petrusville, Phillipstown, Van der Kloof and Keurkieskloof fall within the jurisdiction of the Renosterberg Local Municipality.
3. For years these communities have borne the brunt of poor service delivery and financial mismanagement by the Municipality.
4. The Municipal Council invited the MEC for COGHSTA, Mr B Vass and the Premier of the province to an urgent community meeting held on 30 June 2020 for the purpose of an urgent intervention on issues relating to Eskom. The complaints and allegations against the Municipality which emanated from this meeting included inter alia;
 - 4.1 The Municipality's inability to repay an Eskom electricity debt which had escalated to an amount of R88 million, despite the rate payers paying their municipal accounts, including electricity, without fail. The result is that these communities are often without electricity for up to 16 hours a day.
 - 4.2 Other third party and statutory payments were not maintained by the Municipality. The Municipal Manager and Councillors present confirmed this allegation. (It later transpired that the Municipality has for some time not paid over Pension Fund contributions with the result that some employees were unable to retire because they could not rely on receiving a pension);
 - 4.3 The communities suspect serious maladministration, corruption and lack of consequences to the officials;
 - 4.4 Councillors are too involved in personal political infighting to hold proper and effective Council meetings;
 - 4.5 Service delivery has been affected to such an extent that the police station has no electricity and is inaccessible to the community via telephone; and

4.6 The Municipal Manager and Councillors did not know basic information about the state of affairs of the Municipality.

5. A separate meeting with the Councillors revealed that: inter alia

5.1 No financial information or section 71 reports were placed before the Municipal Council;

5.2 The Councillors' remuneration exceeds the gazetted determination;

5.3 The municipal supply chain management is contrary to the Local Government: Municipal Finance Management Act, 50 of 2003 (the MFMA) and the Code of Conduct for Councillors; and

5.4 The Municipality is unable to appoint senior officials due to its financial predicament.

6. The upshot of the meetings was that the MEC immediately informed the MEC of Finance/ Provincial Treasury of the situation and requested support in putting in place a team of officials to conduct an urgent assessment/ investigation into the veracity or otherwise of the allegations and the state of affairs of the Municipality.

7. On 2 and 3 July 2020 the MEC informed the Mayor of the Municipality and the Executive Mayor of the Pixley Ka Seme District Municipality

respectively that a team of senior officials from the Provincial Treasury and COGHSTA would be conducting a fact finding assessment/investigation into the state of affairs of the Municipality in order to make decisions based on factual and reliable information and that the team will commence its duties on 6 July 2020 and provide a report of their findings on 13 July 2020. The necessary support and cooperation from all Counsellors, the accounting officer and administration were requested.

8. The Municipality unfortunately did not provide the necessary support and cooperation to the investigating officials, despite the Mayor and certain Councillors acknowledging that the Municipality was dysfunctional in various respects.

9. As a result of the uncooperative attitude of the Mayor and Municipal Manager, the MEC on 13 July 2020 invoked section 106(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 in an attempt to compel the Municipality to provide previously requested information and documentation.

10. When this process appeared to be unfruitful, the Provincial Executive Council resolved on 20 August 2020 inter alia that it "approves the intervention by dissolving the Municipal Council of Renosterberg Local Municipality in terms of section 139(1) (c) and 139 (5) (1) (c) of the Constitution of the Republic of South Africa, 1996." The MEC was also authorised to appoint an administrator for the Municipality until a new Municipal Council has been elected.

11. The necessary notices in terms of section 139 (3) (a) of the Constitution were submitted to the Minister of Cooperative Governance and Traditional Affairs, Dr Dlamini-Zuma and Minister A Maseko, the Chairperson of the National Council of Provinces on 24 August 2020.
12. On 4 September 2020 the Municipality gave notice to the MEC in which a dispute was declared in terms of section 41 of the Intergovernmental

Relations Framework Act 13 of 2005 (the IGRF Act).

13. On the same day, 4 September 2020, the MEC instructed the Mayor to convene a series of Special Council meetings to be held on 7 September 2020 essentially to communicate to the relevant communities that the Municipality had been dissolved. Instead the Municipality issued a media statement on 7 September informing the community of the MEC's unlawful conduct in purporting to dissolve the Municipality.
14. It is against this background that the application for review is brought. The applicants are Councillors of the Municipality, as are the ninth, eleventh and twelfth respondents. The tenth respondent is the Mayor. The ninth to 12th respondents do not oppose the application. So too the fourth respondent, the Municipality and the fifth respondent, the Municipal

Manager.

15. Only the MEC opposes the application. The Premier of the Northern Cape, the third respondent, the Minister for Cooperative Governance and Traditional Affairs, the seventh respondent and the Chairperson of the National Council of Provinces, the eighth respondent, have filed notices to abide the court's decision.

The grounds of review and discussion

16. The grounds of review are twofold and purely procedural. The applicants challenge the lawfulness of the MEC's decision to give effect to the dissolution of the Municipal Council in violation of:

16.1 The peremptory waiting period of 14 days prescribed in section 139(1)(c) read with section 139 (3) (b) of the Constitution; and

16.2 The peremptory dispute resolution mechanisms set out in the IGRF Act.

17. I deal with the second ground of review first. During argument before us Ms Tulk who appeared for the applicants with Ms Kgole, correctly abandoned this ground. Section 39(1) (b) of the IGRF Act categorically states that Chapter 4 of the IGRF Act, which deals with the settlement of intergovernmental disputes and the procedure to be followed once a dispute is declared "does not apply. . . to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution".

18. The argument proceeds however that the dispute resolution mechanism contained in the IGRF Act should have been used as a guide by the MEC to first attempt to resolve the issues within the Municipal Council before imposing the extreme measure of dissolution of the Council.
19. The argument is that given the willingness of the Mayor and the Municipal Manager to meet and co-operate with the investigative team and the MEC, less stringent measures such as those contained in section 139(1)(a) and (b) of the Constitution would have been appropriate. Subsection (1)(a) entails the issuing of a directive to the Municipal Council describing the extent of the failure to meet its obligations and stating any steps required to meet its obligations. Subsection (1) (b) refers to the assumption of responsibility by the relevant Provincial Executive for the relevant obligations in that Municipality to the extent necessary.
20. The problem with this argument is firstly that the appropriateness of a less stringent measure than dissolution was never raised in the applicant's papers – in fact the founding affidavit specifically states in paragraph 17 and 18 thereof that:

“17. A further peculiarity of this case, and which makes it different to other cases where a decision in terms of section 139 of the Constitution has been challenged, is that the Court need not go into the alleged merits underlying the first respondent's decision.

18. Once it is appreciated that the first respondent's decision not only violated the minimum procedural requirements set out in section 139 of the Constitution itself, and further violated the peremptory dispute resolution mechanisms set out in the IGRF Act, the “merits” do not matter.”

Secondly, the submission that the municipality was willing to meet and co-operate is not all supported by the correspondence emanating from the Municipal Manager and the Mayor themselves.

21. For instance on 7 July 2020 the Municipal Manager responded to a request to meet by the leader of the investigating team as follows:

“Your unreferenced letter of July 6 reached me earlier today.

I am unaware of any arrangement to meet with you tomorrow, July 8.

Refer to Mayor Niklaas's letter of even date to MEC Bentley Vass and note that I will be available by prior arrangement with Ms Esme Kelem – details contained in the said letter to Vass, during week 30.

I shall not be meeting with you tomorrow, July 8.”

22. On 10 July 2020, in correspondence between the Municipal Manager and the lead investigator, the Municipal Manager states the following, amongst other:

"I am keen to meet with you and to work together with all who are committed and able to contribute to improved service delivery.

I confirm, as I did in a letter to MEC Vass on July 7, in a letter to you on July 7 and in a WhatsApp message to you on July 9 that a meeting where all relevant parties may be assumed to be able to attend can be arranged for week 30: July 20 through 24.

Yet you persist in some erroneous assumption that documents will be emailed to you and sundry by today, Friday 10 July 2020; and that the Assessment/investigation will commence on Monday 13 July 2020 at our Petrusville offices from 10H00.

Not so, sir

I am at a loss to understand the current sudden urgency of your desire for engagement. The mismanagement being identified and dealt with at present dates from the commencement of the current term in 2016, and remained undetected by your office and your oversight. Kindly allow Renosterberg to attend, finally, under competent management, to position itself before demanding attention inevitably destined to distract from the exigent tasks at hand.

I repeat, in order that there can be no misunderstanding, that Renosterberg functionaries can and will only be available for engagement during week 30. I will not meet with you on Monday, 13 July; my staff will not meet with you on Monday, 13 July."

23. On 13 July 2020 the Municipal Manager writes to the MEC. Excerpts from this communication reads as follows:

"I have received your letter emailed at 14h23 today at 15h43 and am flabbergasted that an MEC would stoop to demand the corpus of

information specified to be delivered within some five-odd business hours. The demand speaks to objectionable form. (In fact the list of required documents was sent on 6 July 2020 already).

I repeat, in order that there can be no misunderstanding, that Renosterberg functionaries can and will only be available for engagement during week 30, upon your compliance with a reasonable request to diarise."

(Own insertion)

24. On 24 July 2020 the Mayor sends an e-mail to the MEC (responding in part to a letter from the MEC on 23 July seeking reasons why the PEC should not intervene) containing inter alia the following:

"It had been clearly communicated that municipal functionaries had been busy compiling the data required for inspection and engagement during week 30, this week past."

"Also too, the municipal offices had been closed on Wednesday, July 20, due to a COVID-19 scare, and the MM is currently in isolation. The offices will reopen on August 3, and all engagements earlier expected, will have to stand over until week 32:3 to 7 August.

I find it alarming that you could demand specific compliance within a period dominated by a health crisis and in the face of a particular

manifestation of the crisis in Renosterberg.

I refer you to the Parliamentary Monitoring Group Workshop on Section 139 Interventions in Municipalities and general observations, of November 5. 2019, warning against the deplorable use of Section 139 “as a political tool to settle scores among party members, and was a result of political infighting and instability.”

I repeat, in order that there can be no misunderstanding, that Renosterberg functionaries are keen to make use of your assistance:

have nothing to hide, and will be available for engagement during week 32, upon your compliance with a reasonable request to diarise

meetings and submissions with Ms Kalem.”

25. There are further communications from the Municipality in the same vein, which I do not intend to encumber this judgment with. What is clear though, is that the correspondence do not evince a willingness to co-operate but rather an obdurate persistence in attempting to delay in dealing with the burning situation within the Municipality and an insistence to deal with the problems on its own terms.
26. I may at this stage mention that as far as sub-section (1) (b) is concerned, that the MEC did in fact assume responsibility in respect of the Eskom debt by dealing directly with Eskom. This action was met with huge criticism and accusations of unnecessary interference which could scupper ongoing negotiations between the Municipality and Eskom.
27. The argument relating to a less stringent measure in the spirit of co-operation is in my view unfounded and completely without merit.
28. I turn now to the issue of the premature dissolution of the Municipal Council.

The relevant portions of Section 139 read as follows:

“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)
- (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)
- 5. If a municipality, as 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)

(8).

29. The complaint appears to have originated initially as a result of the MEC directing the Mayor that Special Council meetings be held on 7 September 2020 to inform the communities of the dissolution of the Municipality. The argument is that the MEC sought to give effect to the dissolution one day before the permitted effective date in terms of section 139(3)(b). The 14 day waiting period after the section 139(3) (a) notices had been sent to the Minister and the NCOP expired on 8 September 2020.

30. When the MEC in his answering affidavit drew attention to the fact that the decision to dissolve the Municipality was made both in terms of section 139 (1) and section 139 (5) and that a dissolution in terms of section 139(5) does not provide for a waiting period before it takes effect, the applicants developed their argument as follows: Notwithstanding the fact that the PEC involved both section 139(1) and 139(5), the MEC had elected to proceed in terms of section 139(1) in that in his notice to the Chairperson of the NCOP, he specifically stated that “the dissolution will only take effect within fourteen (14) days from the date of receipt of the notice by the Council (NCOP) unless set aside by the Cabinet Member or the Council (NCOP) before the expiry of those 14 days.”

As such the argument goes, the MEC and/or the PEC are bound by their election.

31. The flaw in this argument, as correctly pointed out by Ms Nkosi – Thomas SC who appeared for the MEC with Ms Ntuli, is that section 139(1)(c) constitutes a discretionary intervention in local government while section 139(5) constitutes a mandatory intervention as referred to in section 137 and 139 of the MFMA respectively.

32. Section 139(3) of the MFMA specifically states that:

“An intervention referred to in subsection (1) (mandatory intervention) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.”

(Own insertion)

34. The PEC invoked both section 139(1) (c) and 139(5) (b) of the Constitution apparently because the jurisdictional factors for both interventions were found to be present. In terms of section 139(1), a failure by the Municipality to fulfil an executive obligation and in terms of section 139(5), a crisis in its financial affairs in the terms described in the subsection. The factual position is however that the dissolution in terms of section 139(5) (b) supersedes that in terms of section 139(1) (c), which would effectively mean that the 14 day waiting period does not apply.
35. The MEC has admitted in his supplementary answering affidavit to making a mistake in his notification to the NCOP. He acknowledged that he does not have the authority to vary the terms of the PEC resolution, which makes no reference to a 14 day waiting period and that he did not seek to do so.
36. The applicants in my view cannot rely on the MEC's mistaken utterances in the face of legislation to the contrary. In my view the application for review cannot succeed.

Costs

37. The only issue left to be determined is the costs of the application. I see no reason why costs should not follow the result. However the issue of the costs of 13 October 2020 remain to be discussed.
38. The application was brought in two parts. Part A which was enrolled for 13 October 2020 sought orders pending the final determination of Part B (the review), inter alia interdicting the decision by the PEC to dissolve the Municipality, interdicting the MEC from giving effect to the decision, interdicting

the MEC from appointing an administrator or if so appointed from acting and taking decisions in such capacity, permitting the applicants to continue serving as Councillors and the Municipality to continue operating and functioning with all power and authority

ascribed to it by in law.

39. When the matter came before Mamosebo J on 13 October 2020, Part A of the application was withdrawn by agreement between the parties and an expedited date for the hearing of the review was obtained. According to Ms Tulk, the MEC was late in filing his answering

affidavit which reached the applicants only two days before the hearing, which was the reason the matter could not proceed on that

date and the agreement reached to withdraw Part A. Ms Nkosi-Thomas on the other hand contends that there was no urgency in

Part A in any event since the horse had already bolted as far as the relief sought therein and that that was the reason it was considered expedient that Part A be withdrawn.

40. The reason for Part A being withdrawn does however not shift the normal rule that costs follow the result. In my view it is only reasonable and appropriate that the applicants pay the costs relating to 13 October 2020 as well. Ms Nkosi-Thomas has argued for costs to include the costs of two counsel. I see no reason in the circumstances of this matter why it should not be allowed.

In the circumstances the following order is made.

The application for review is dismissed with costs, inclusive of the costs of 13 October 2020 and the costs of two counsel.

CC WILLIAMS

JUDGE

I Concur

AM MOFOKENG

ACTING JUDGE

For Applicants: Adv. R Tulk, with Adv. K T Kgole

Mabuza Attorney

c/o Duncan & Rothman

For 1st Respondent: Adv. L G Nkosi-Thomas SC with Adv. N Ntuli

Mjila & Partners Attorneys

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Prepared on 11 October 2026 · Esheria