IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. 553/2019

In the matter between:

THE UNEMPLOYED PEOPLES MOVEMENT **Applicant/Respondent**

and

THE PREMIER FOR THE
PROVINCE OF THE EASTERN CAPE **1st Respondent/Applicant**

THE EXECUTIVE COUNCIL FOR THE
PROVINCE OF THE EASTERN CAPE **2nd Respondent/Applicant**

THE MEC FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS FOR THE
PROVINCE OF THE EASTERN CAPE **3rd Respondent/Applicant**

THE MEC FOR TREASURY, ECONOMIC
DEVELOPMENT AND TOURISM FOR THE
PROVINCE OF THE EASTERN CAPE **4th Respondent/Applicant**

THE NATIONAL COUNCIL OF PROVINCES **5th Respondent**

THE MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **6th Respondent**

THE MINISTER OF FINANCE **7th Respondent**

MAKANA MUNICIPALITY **8th Respondent/Applicant**

THE EXECUTIVE MAYOR OF MAKANA MUNICIPALITY (MR MPHALWA) **9th Respondent/Applicant**

THE MUNICIPAL MANAGER OF MAKANA MUNICIPALITY (MR MENE) **10th Respondent/Applicant**

THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION **11th Respondent**

THE SOUTH AFRICAN METAL WORKERS UNION **12th Respondent**

THE INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION **13th Respondent**

THE COUNCIL OF THE MAKANA MUNICIPALITY **14th Respondent**

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **15th Respondent**

JUDGMENT

STRETCH J.:

1. The first, second, third, fourth, eighth, ninth, tenth and 14th respondents have brought applications for leave to appeal (collectively referred to as the application for leave to appeal) certain orders which this court granted on 14 January 2020 (hereinafter referred to as the "main application"). These, inter alia, directed the Eastern Cape Executive Council (the 2nd respondent) to

forthwith dissolve the Council of the Makana Municipality (the 14th respondent) and to take certain steps including the appointment of a temporary administrator and the approval of a temporary budget or other measures intended to give effect to a recovery plan to provide for the continued functionality of the Municipality.

2. The applicant (the Unemployed Peoples Movement) opposes the application, and has simultaneously filed an application in terms of section 18 of the Superior Courts Act 10 of 2013 ("the Act"), for an order enforcing the judgment and the orders made in terms thereof, in the event of leave to appeal being granted. This application is likewise opposed by all of the aforementioned respondents.

3. By agreement amongst the parties, the two applications were set down to be heard simultaneously through the medium of on-line video conferencing.[1] For ease of reference, I shall refer to the applicant in the original application and in the application in terms of section 18 of the Act as "the UPM". I shall refer to the first four respondents in the original application and the applicants in the application for leave to appeal as "the province" or "the provincial respondents" unless the context states otherwise. I shall describe Respondents eight, nine, ten and 14 in the original application who are also applicants in the application for leave to appeal, collectively as "the municipality", "the municipal respondents" or "the local respondents" unless otherwise indicated.

Section 17 of the Superior Courts Act

4. Section 17 (1) of the Act inter alia permits the granting of leave to appeal where the court is of the opinion that the appeal *would*[2] have a reasonable

[1] In accordance with regulations promulgated to facilitate the functioning of courts during the Covid 19 national lock down.

[2] In *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* (unreported LCC case no LCC14R/2014 dated 3 November 2014, cited with approval by the full court in *The Acting National Director of Public Prosecutions v Democratic Alliance* – unreported GP case no 19577/09 dated 24 June 2016 at para 25) the Land Claims Court held in an *obiter dictum* that the wording of this subsection (by the use of the word 'would' as opposed to 'may') raised the bar of the test that now has to be applied to the

prospect of success, or if there is some other compelling reason why the appeal should be heard, such as the existence of conflicting judgments on the matter under consideration or, as contended on behalf of the municipal respondents, because issues of public importance have been raised and the public office of the municipality and the province have, to an extent, been called into question.

5. Because time is of the essence, the reasons which follow with respect to the application for leave to appeal will not incorporate a closed list but will seek to traverse the main contentions raised by the parties. Broadly stated, it is contended on behalf of the respondents that another court will overturn certain findings and set aside certain orders made by this court on the grounds that this court erred/misdirected itself in one or more of the following respects:

    a. in declaring certain failures on the part of the municipality to have been in breach of section 152(1) and 153(a) of the Constitution, and declaring such breaches to have been inconsistent with the provisions of the Constitution and accordingly invalid to the extent of the inconsistencies;
    b. in finding that the jurisdictional facts for a mandatory intervention in terms of s 139(5) read with sections 139 and 140 of the Local Government Municipal Finance Management Act 56 of 2003 ("the MFMA") are present and have consistently been present;
    c. in granted relief not prayed for, in the sense that this court granted relief in terms of s 139(5) when the applicant sought relief under s 139(1) of the Constitution;
    d. in directing the provincial respondents to take steps which had already been taken;
    e. in directing the provincial respondents to dissolve the municipality in terms of inter alia the provisions of s 139(5)(b) of the Constitution, when they are

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merits of the proposed appeal before leave should be granted. In *Notshokovu v S* (unreported SCA case no 157/15 dated 7 September 2016 at para 2) it was held that the appellant faces a higher and stringent threshold in terms of this subsection, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

still in the process of implementing a recovery plan in terms of the provisions of s 139(5)(a) of the Constitution;

f. in finding that the intervention underway at the municipality during 2015 was a s 139(5) intervention, and that the municipality had failed to take legislative measures to implement the terms of the 2015 draft financial recovery plan ("FRP).

g. in making an adverse costs order against the respondents.

Orders "A" and "B"

6. As fully discussed in the judgment, s 172 of the Constitution compels this court to declare any law or conduct which is inconsistent with the Constitution, invalid (ie unlawful) to the degree of the inconsistency. Once so declared, this court is empowered to make any order which is just and equitable.

7. It is contended that it is a matter of simple logic that a failure to do something cannot be declared invalid, and that no argument was presented on the question of invalidity. Nor was it argued that failure to act triggers s 172(1)(a) of the Constitution, which in turn, opens up the door for recourse to s 172(1)(b).

   I do not agree. During the main application it was argued on a number of occasions that the municipality was guilty of "unlawful activity" and in breach of the terms of s152 and the provisions of s 153 of the Constitution, and that once a declaration of unlawfulness or invalidity has been made, this court was "empowered by the Constitution, beyond any subordinate legislation, to issue an order which is just and equitable". At page 36 of the transcript of closing argument, UMP's counsel states the following:

   'So it's plain also to the extent that there is a suggestion that the decision, a discretion vested in the province is a discretion to determine whether or not there is a failure is not such a discretion, the discretion that is vested in the province is whether or not to implement this strategy, but whether or not there has been a failure of the obligations is objectively ascertainable and has been clearly established, and your Ladyship is entitled to make such a finding. We say it's a separate consideration to

address the question raised by your Ladyship (does your Ladyship have the power to make such an order), but the failure is something that your Ladyship is patently entitled to decide. And we say for that reason the declarator is relevant …'

8. It is contended that the declarator which the UPM had sought in its first prayer, ought to have referred to section 152(2) which obliges municipalities to strive, within their financial and administrative capacities, to achieve the objects set forth in ss (1)[3]. The argument then seems to be that reference to s152(1) as opposed to s152(2) in the declaration of invalidity is a misdirection in the sense that a failure cannot be declared invalid.

9. This court went to great lengths to duplicate, word for word, the legislation which it intended referring to at the beginning of its judgment. This included sections 152 and 153 of the Constitution. The first part of s 152 lists the five objects of local government. The second part, insofar as its inclusion may have been necessitated, directs the municipality to make its best endeavours to fulfil these five objects. I am not sure how exactly the respondents would have liked the declarator to have been worded without using the word "failure". Section 153 is part of the Constitution. It is prescriptive in the sense that it outlines the purposes or goals of local government and commands a municipality to make its best endeavours to "bring about or accomplish by effort, skill or courage"[4] these purposes or goals. Section 172 of the Constitution obliges a court which has concluded that a local sphere of government such as Makana municipality has not achieved (viz, has failed to achieve) its Constitutionally mandated objects, and has not complied (viz, has failed to comply) with its Constitutionally mandated duties, as reflected by the manner in which it has behaved in a specific way (viz, by doing too little or nothing), and/or in the manner in which it has directed its efforts or managed its administration (viz, by doing too little or nothing), and/or in the manner in which it has organised its administration, budgeting and planning (viz, by

[3] These objects being to provide democratic and accountable government for local communities, to ensure the provision of services to communities in a sustainable manner, to provide social and economic development, to promote a safe and healthy environment and to encourage the involvement of communities and community organisations in the matters of local government.
[4] The definition of "achieve" in the Concise Oxford English Dictionary.

doing too little or nothing), and/or in the manner in which it has carried out its Constitutionally framed objects and duties (viz, by doing too little or nothing), to officially announce and make it clearly known (in other words, to declare) that such conduct (ie doing too little or doing nothing) is not compatible or in keeping with (ie it is inconsistent) with the Constitution. It further obliges the same court to declare that such conduct (which has manifested itself in a demonstrable failure on the part of the municipality to ensure the provision of services to its community in a sustainable manner, and in a demonstrable failure to promote a safe and healthy environment for its community, and in a demonstrable failure to structure and manage its administration, budgeting and planning processes, and in a demonstrable failure to give priority to the basic needs of the community, and finally, in a demonstrable failure to promote the social and economic development of the community), to the extent that it manifests the failures which I have been at pains to outline, does not support the intended point or objects of local government and does not comply with the duties of municipalities and with the Constitution, which conduct in the result is legally unacceptable and that such lackadaisical[5] conduct will not be Constitutionally countenanced.

10. It has further been contended that this court erred in making a declaration of invalidity when the UPM did not ask for it. It is so that the relief which the UPM sought was for this court to declare that the municipality is in breach of s 152 and s 153(a) of the Constitution. This court, granted such relief in para "A" of its order. Thereafter it referenced its order by specifically mentioning s 152(1). Once such a finding had been made, it would have been remiss of this court

[5] "Lackadaisical" according to the Concise Oxford English Dictionary, is a term used to reflect "lacking enthusiasm and determination; carelessly lazy ('a lackadaisical defence left Spurs adrift in the second half') and is synonymous with unenthusiastic, uninterested, indifferent, uncaring, unconcerned, casual, insouciant, apathetic, sluggish, aimless, idle, and a "couldn't-care-less" demeanour. The prevalence of this demeanour was emphasised by Mfenyana AJ in *Makana Unity League v Makana Municipality* (unreported judgment in Grahamstown case no 1869/2019 handed down on 4 March 2020) where the executive mayor and the municipal manager in the matter before me were found to be in contempt of the order of Pickering J made as far back as 8 September 2015 with respect to environmental compliance in connection with the local waste disposal site, also referred to in my judgment. They were sentenced to six months' imprisonment wholly suspended on certain conditions and were further directed to pay the costs of the application on the scale as between attorney and client, inclusive of the costs of two counsel. The matter was also referred to the National Director of Public Prosecutions to consider whether the municipal manager (who deposed to the affidavits in the matter before me) lied under oath and whether he should be prosecuted for perjury.

not to invoke the provisions of s 172, irrespective of whether that formed part of the applicant's prayer. This is so because it is mandatory for a court to pronounce upon evidence before it which clearly demonstrates a state of affairs which is inconsistent with the spirit, purport and objects of the Constitution, whether such a state of affairs was created by overt conduct, misconduct, passive conduct or inaction.

11. The mandate which this court has been given to vindicate the Constitution when deciding a constitutional matter within its power was emphasised by the President of the SCA in *Ngomane and Others v Johannesburg (City) and Another*[6]. In that matter the respondent municipality had confiscated and destroyed the personal effects and materials belonging to several destitute and homeless people who had made a home for themselves on a traffic island in the middle of a street in the Johannesburg CBD. The SCA agreed with the High Court's dismissal of their application for a spoliation order; alternatively, for an order that they be provided with similar material and possessions. Constitutional relief was not sought before the court of first instance. Notwithstanding this, Maya P on appeal found that the confiscation and destruction of their property was a patent, arbitrary deprivation of their constitutional rights (in breach of section 25(1) of the Constitution), and a breach of their right to privacy enshrined in s 14(c) of the Constitution, which included the right not to have their possessions seized. The court held that the impugned conduct constituted a breach of their right to have their inherent dignity respected and protected (in terms of s 10 of the Constitution).[7] In this regard Maya P went on to say the following:

'[22] In the circumstances, the respondents' conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)(a) thereof. This finding entitles the applicants to appropriate relief for the violation of

[6] 2020 (1) SA 52 SCA
[7] At para 21

their fundamental rights as envisaged in s 38 of the Constitution.[8] As to what constitutes 'appropriate relief', the Constitutional Court said in *Fose*[9]*:*

'It is left for the court to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'

And in para 69:

'(T)his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it … Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

[23] Although the applicants sought only the return of their property, it bears mention that a claimant in respect of a constitutional breach that has been established is *not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued.*[10]'

12. In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*[11]*,* Madlanga J, writing for the majority, said the following:

'In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though

[8] Section 38 of the Constitution provides that when a body of persons like the UPM approaches the High Court and alleges nothing more than that a right in the Bill of Rights has been infringed or simply threatened, the High Court may grant appropriate relief, including a declaration of rights.
[9] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 18 and 19
[10] Emphasis added. See also *Modderfontein Squatters v Modderklip Boerdery; President of the Republic of South Africa and Others v Modderklip Boerdery* 2004 (6) SA 40 (SCA) para 18; *Carmichele v Minister of Safety & Security and Another* 2001 (4) SA 938 (CC); *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *President of the RSA and Another v Modderklip Boerdery* 2005 (5) SA 3 (CC) para 53; *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).
[11] 2018 (1) BCLR 1179 at paras 68-75

this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity …

What must be paramount in the relief that a court grants is the vindication of the rule of law.[12] The effect of that is the reversal of the consequences of constitutionally invalid conduct….

The specific circumstances of a given matter may displace what should ordinarily be the position. In *Mhlope* we granted just and equitable relief that *was at odds with the extant statutory provisions.* Mogoeng CJ held that the failure of the Electoral Commission to compile a voters' roll in accordance with section 16(3) of the Electoral Act was at "odds with the structures not just of the law but also of the rule of law. When it came to a choice between scuppering the local government elections which – in terms of the Constitution – had to take place by a certain date and upholding the strictures of the law, the Court opted for allowing the elections to go ahead. …

What starkly helps illuminate why section 172(1)(b) of the Constitution empowers us – where justice and equity dictate – to go so far as to make orders that are at odds with extant law is the Canadian Supreme Court's decision in the *Manitoba Language Rights* case.[13] …

The relevance of this is that – despite the fact that ordinarily the Canadian Supreme Court had to invalidate all the affected laws without more – it did not do so because justice, equity and indeed the rule of law dictated otherwise. …

Despite the continued validity of those provisions we were able – in the exercise of the section 172(1)(b) power – to make an order at variance with them.[14]

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[12] See *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) at para 130 where Madlanga J had stated the following: 'The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end no court should be loathe to declare conduct that either has no legal basis or constitutes a *disregard for the law* (emphasis added), inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so.'

[13] *Re Manitoba Language Rights* [1985] 1 SCR 721

[14] *Mhlope (above) from paras 69 to 75*

13. Having declared in paras “A” and “B” of its order that the municipality’s behaviour was inconsistent with the Constitution and therefore unlawful, and having declared that the jurisdictional facts for a mandatory intervention in the affairs of the Municipality were indeed present (the latter also having been the case of at least the provincial respondents in the main application), this court in my view, was not only entitled to but mandated by the Constitution to invoke the provisions of s 172(1)(b) and to exercise its discretion to make any order, as long as that order was both just and equitable, including an order that was not asked for, in line with SCA authority such as that in *Fose* and subsequently followed in *Ngomane*.

14. With respect then to the contentions that this court erred in declaring failure to act invalid/unlawful and to set that conduct aside, and that this court erred in granting relief not prayed for, I am of the opinion that there are no reasonable prospects that another court would differ from this court’s findings. In my view the approach which this court adopted, as stated in its judgment, was both just and equitable in that it reflected a balanced approach between the concerns expressed by the applicant and those expressed by the provincial respondents (which concerns were not disputed or addressed by the municipal respondents).

15. At the hearing of the application for leave to appeal, it was in any event submitted on behalf of the provincial respondents that the declarator[15], set forth at para “B” of this court’s order, is correct inasmuch as the court, in doing so, followed the position of the provincial respondents. This concession was made for the first time at the hearing dealing with the application for leave to appeal and the section 18 application, the deponents for the respondents having repeatedly denied under oath during the main application, that section 139(5) had previously been resorted to, which finding this court had nevertheless made on the evidence before it in the main application.

[15] The declarator at para B states that the jurisdictional facts for mandatory intervention by the Province in the affairs of the Municipality (as envisaged in section 139(5) of the Constitution read with sections 139 and 140 of the Local Government: Municipal Finance Management Act 56 of 2003 (“the MFMA”), are present and have consistently been present in the past.

Orders "C" and "D"

16. The contention is however, that this court erred in making the order at para "C", firstly because it was not asked for (which I have already dealt with), and secondly because it was not necessary, because the provincial executive had already taken a decision to have recourse to this section and had already commenced with the "implementation" of a recovery plan. This somewhat belated revelation on the part of the provincial respondents was fully traversed in this court's judgment.[16]

17. In brief, according to the answering affidavit of the Head of CoGTA (the deponent for the third respondent in the main application), the MEC for CoGTA had decided to oppose the main application on 10 April 2019, and had "resolved" to "recommend" to the Executive Council (the second respondent) that, "as a result of the crisis in the financial affairs of the municipality, which has resulted in serious and persistent material breaches of its obligations to provide basic services or to meet its financial affairs, a recovery plan be imposed aimed at securing the municipality's ability to meet its obligations pursuant to the provisions of section 139(5) of the Constitution, read with sections 139 and 140 of the MFMA".

18. In this affidavit (dated 26 April 2019) the deponent undertook to inform the court of the outcome of this "resolve" to "recommend", after the second respondent had held a meeting. He bore no knowledge of when the meeting (which had been scheduled for 26 April 2019 but had been cancelled) would be held. That, on the evidence, was the long and the short of it as far as the proposed s 139(5) intervention was concerned, ie a personal resolve on the part of the Head of Cogta, speaking as the deponent for the third respondent,

[16] Judgment p53 onwards

to recommend such intervention, adding that he fully expected to be authorised by the remaining provincial respondents in due course.[17]

19. This having been the only evidence on oath regarding the s 139(5) intervention, viewed in the context of the full history set forth in the judgment, this court can hardly be criticised for having couched para "C" of its order in the form of a direction to seal the undertaking to implement a recovery plan. I do not believe that another court would arrive at a different conclusion on this point. The respondents are, in any event, not prejudiced by this order. It serves merely to confirm that which the third respondent's deponent had apparently resolved to do.

20. The respondents further contend that the fact that the provincial executive (the second respondent) has been directed to "implement" (as opposed to "impose") a recovery plan in terms of s 139(5)(a) read with s 139(6) and sections 139 and 140 of the MFMA, having "due regard" to the existence and terms of the 2015 plan, is a significant parting of ways with the MFMA since the provincial executive plays no role when it comes to the formulation of these plans. In my view, this criticism obfuscates the issues and is based on a misreading of the order and the extent of its mandate when read in conjunction with the judgment, and the actual wording of s 139 of the Constitution and sections 139 and 140 of the MFMA. The provincial executive has not been ordered to "formulate" a plan. It has been directed to "implement" one, and in the course of doing so, to have "due" (viz "reasonable" or "appropriate") regard to the fact that a "logical" and "well thought out" draft of such a plan (100 odd pages in total), produced .with the assistance of the National Treasury's Municipal Finance Recovery Service[18],

[17] Over and above this, the affidavit was not deposed to by the third respondent, but by the Head of Cogta, stating that he had been authorised to depose thereto on the third respondent's behalf, and that he "fully expected" to be similarly authorised by the other Provincial respondents. No authorisations or confirmatory affidavits were ever attached to the answering papers.

[18] In compliance with s 13(1)(a) of the MFMA (see p 144 of the main application papers). The contention on the part of the local respondents that I cannot make this order as the Financial Recovery Unit is not a party to these proceedings is also misplaced, even if the 2015 plan did not exist. As pointed out by counsel for the seventh respondent in the main application (the Minister of

was already in place and makes specific provision for upgrading and long-term implementation. I do not believe that the order, which invites the respondents to make use of tools already at their disposal, in order to further an expressed goal, should and would be construed as an error or a misdirection on the part of this court. In my view, it does not compel the provincial executive to do anything beyond that which it is statutorily permitted to do. As for the phraseology expressed in the order (the inadvertent use of the word "implement" instead of "impose"), the order states that the terms and provisions of section 139(5)(a) apply (which use the word "impose"), as well as sections 139 and 140 of the MFMA which make it clear that the municipality is paired with the word "implement" and the provincial executive with the word "impose".[19]

21. The argument is, in any event, academic in view of the provincial respondents' admission recorded at the hearing of these applications, that since the launching of the main application, the provincial treasury has requested the National Treasury's Municipal Finance Recovery Service (the "MFRS") to rework and update the existing financial recovery plan which was prepared for the municipality during 2014, and adopted by the municipality in 2015 at the instance of the then administrator who had been appointed by the provincial executive, and that that intervention had also been pursuant to the provisions of section 139(5) of the Constitution.[20]

22. I now turn to para "D" of the order, directing the Executive Council to dissolve the municipal council and to appoint an interim administrator. As mentioned in this judgment, this relief was granted as being "just and equitable" in terms of section 172 of the Constitution. According to my understanding, it is contended on behalf of the respondents that this court erred in invoking the provisions of s 139(5)(b) in the absence of proven

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Finance) this unit falls under the minister of finance and was accordingly represented when the main application was opposed and abides the judgment.

[19] This is clearly a question of semantics. Arguably "imposing" a plan may in any event involve some degree of "implementation" (ie putting into effect).

[20] As found by this court in its judgment based on all the evidence before it, despite the respondents' denial in the main application and in their grounds in support of the application for leave to appeal, that this had happened.

jurisdictional facts to trigger such an intervention, and also in disrespect of the provincial executive's discretion to make an election between invoking either para (b) or para (c).[21]

23. I reiterate that the orders were made after due consideration of the lengthy history of this matter (and particularly that which is either common cause or which has not been disputed or explained) and aimed at relief which would be both just and equitable in the circumstances. This was fully traversed in the judgment. Indeed, the provincial respondents' resistance to this part of the order, which was intended to assist rather than to obstruct (with full knowledge that the Constitution allows for an elective) as pointed out in the judgment, came as a surprise. What I have stated on this aspect and the doctrine of separation of powers is better expressed by the author David Dyzenhaus as follows:

> 'At one level then, my ambition is to sketch the basis for a productive account of the relationship between the three powers – the legislature, the government and the judiciary. I will try to show that it is better to understand their relationship in terms of what they share and not in terms of what separates them, since their separation is in the service of a common set of principles. The powers are all involved in the rule-of-law project. They are committed to realizing principles that are constitutional or fundamental, but which do not depend for their authority on the fact that they have been formally enacted. In order to count as law or as authoritative, an exercise of public power must either show or be capable of showing that it is justifiable in terms of these principles.'[22]

24. As explained in the judgment, the provisions of s139(5)(b) were not arbitrarily invoked. Insofar as it may have been necessary for them to be present when making "any order which is just an equitable" when acting in terms of the provisions of s 172, I am of the view that sufficient jurisdictional facts were present to trigger the taking of such a step as being a just and equitable one.

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[21] Para (c) provides that if the circumstances exist for a mandatory intervention, and Council has not been dissolved, the provincial executive must assume responsibility for the implementation of the recovery plan to the extent that the Municipality cannot or does not otherwise implement the plan.

[22] The Constitution of Law: Legality in a Time of Emergency (Cambridge University Press) page 5

25. The facts which amount to a failure on the part of the municipality to fulfil its constitutional obligations to its people have not been disputed. On 7 May 2018 the municipality was accused in writing of failing to comply with the 2015 financial recovery plan and the revenue enhancement strategy. The CoGTA Minister (the sixth respondent) replied three months later. In the letter under reply this accusation was not denied. During the main application the very same evidence was presented on oath. Again it was not denied. Indeed, it was ignored. In the answering affidavit filed on behalf of the provincial respondents, the deponent thereto, whilst making much of the appropriate legislation which ought to have been resorted to by the UPM, did not dispute that the Council ought to be dissolved. The 2015 financial recovery plan itself states that should the municipality "delay or fail" to implement the financial recovery plan the provincial government "must" consider alternative measures, including "…the appointment of a new administrator or the dissolution of Council."[23] One of the principle reasons for the UPM to have launched the main application in February 2019, was that after four years of reminders, queries and prompting, (both in respect of the local and provincial respondents)the municipality had still not implemented the financial recovery plan despite its stated urgency way back in 2015. To my mind there is no clearer case of "delay or failure" as expressed in the judgment sought to be appealed. More importantly, the provincial executive (which appears to have drafted the introduction to the 2015 draft financial recovery plan commencing with its decision to "institute an intervention") had done absolutely nothing about this unfortunate state of affairs. This, despite the bouquet of options open to it, both in terms of section 139(1) and section 139(5).[24] Simply stated, it exercised no election at all.

[23] At p142 of the papers in the main application.
[24] Section 139(1) inter alia states that when the municipality cannot or does not fulfil its obligations in terms of legislation or the Constitution, the provincial executive may intervene by taking "any appropriate steps to ensure fulfilment of that obligation including issuing a directive to Council, or assuming responsibility for the relevant obligation or dissolving the municipality and appointing an administrator. The wording of section 139(5) compels the provincial executive, if the municipality is in serious or persistent material breach of its obligations to provide basic services or to meet its obligations etc, to impose a recovery plan and to either dissolve the municipality or to implement the plan itself, if the municipality fails to do what is necessary to give effect to the plan.

26. In heads of argument submitted on behalf of the municipal respondents in the application for leave to appeal, the following is [erroneously] stated:

> 'More importantly, the erroneous reliance by the court on the LRC letter led it to conclude that there was, in effect a section 139(5) intervention instead of the actual section 139(1)(b) one. This led the Court to make an order directing the respondents to dissolve the municipal council, even though the court made no finding with respect to a failure to approve legislative measures to implement the financial recovery plan by the municipality during 2015, or thereafter."

27. As I have said before, and in terms of a long line of decisions, once a court has found and declared conduct to be unlawful and inconsistent with the Constitution, it may make any order as long as that order is just and equitable, particularly in the circumstances of that specific case. In these specific circumstances, this court is by virtue of the facts at its disposal, not precluded from making the order at para "D" (assuming for the moment that there is no evidence that the municipality "cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect the recovery plan")[25]. I have difficulty in understanding to what extent the UPM was expected to present more evidence, against an admitted background that a recovery plan has been in place since 2015 and that the municipality failed to implement it (without giving any reasons for its failure to do so) and that the provincial executive simply did nothing about it. This was pointed out in no uncertain terms in the May 2018 letter of the LRC to CoGTA's MEC (the third provincial respondent) with a copy to the acting municipal manager (the contents of which the respondents once again simply ignored in the application papers) as follows:

> 'Makana municipality is in breach of section 152(1) of the Constitution. The municipality has failed to ensure the provision of services to the Makana community in a sustainable manner and failed to promote a safe and healthy environment. Nor does it adhere to section 153(a) of the Constitution which provides that: "*A*

[25] The exact wording of section 139(5)(b)

municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community." …

'The Financial Recovery Plan and Revenue Enhancement Strategy have not been complied with. Both are legally significant documents that should have guided Makana decision-making and should have been treated as 'live' documents requiring review and updating as progress was made. One year after the election of the present Council (July 2017), councillors were canvassed about the FRP and few Councillors were even aware of the existence of the FRP.'[26]

28. The only reasonable inference to draw in the circumstances (and which this court did draw), and in the absence of any rebutting evidence from the municipality to the contrary, is that the municipality, by virtue of its inaction, has not approved any measures necessary to give effect to the recovery plan and that the provincial executive took no further steps. If this were not the case, there would have been some evidence, however sparse, that the municipality was at least making some efforts to try and implement the plan, and/or that the provincial executive was at least making some efforts to encourage this, rather than to be pussyfooting around its very existence, as the respondents did up until the hearing of this application. Indeed, the respondents not only initially disputed that such a plan was formulated with reference to s 139(5) (which is now admitted after judgment in the main application), but they also did not deny the UPM's evidence that many of the present councillors were totally oblivious to the existence of such a plan, despite the fact that the plan itself states the following:

'It is emphasised that the responsibility to implement the Plan rests with the municipality. *The Plan must be monitored by Council, the Mayor and the Administrator (until exit) and Municipal Manager to ensure successful implementation …* The financial recovery plan must be submitted by the Administrator, Municipal Manager for *adoption by Council and immediate implementation by Makana municipality.*'[27]

[26] Main application judgment page 48.
[27] Main application judgment pages 27 and 37

29. The plan itself provides for the provincial government to consider alternative measures should the Municipality *delay or fail* to implement the plan, including the extension of the term of office of the current administrator, or the appointment of a new administrator or the dissolution of Council. Once again it has not been disputed that the appointment of administrators and the extension of their terms has been tried, has been tested and has failed. The only remedy which both the Constitution and the MMFA provides for which has not been resorted to, is the dissolution of Council, particularly Council which had the opportunity (having been newly elected immediately after the release of the plan), to make constructive use of these new and custom-crafted tools available to it – a plan carefully considered and strategically designed and formulated to save Makana Municipality and to uphold and protect the constitutional rights of the people.

30. As stated before, it was only at the hearing of the application for leave to appeal that it was brought to the attention of this court that prior to the formulation of the 2015 plan, the provincial executive had in fact recommended and resolved to approve the implementation of sections 139(1)(b) and 139(5) read with sections 139 and 140 of the MFMA. It was only at the hearing of this application that the third respondent's deponent tendered an apology to this court for the fact that this had not been discovered earlier, and for the provincial respondents having founded their application for leave to appeal on the premise that this court (in its judgment) had been wrong in that regard, and that it had just coincidentally been discovered that the 2015 plan could be reworked (as suggested in my judgment) without following the relevant sections of the MFMA to devise a plan from start (as was argued in the application before me).

31. Whilst I am pleased to hear this, the about turn in the stance adopted by the provincial respondents simply reinforces this court's judgment that the left hand has not known what the right hand has been doing/not doing for a substantial period (particularly in the light of the sovereignty of the *trias politica* which counsel for the provincial respondents was at pains to

emphasise in arguing the application for leave to appeal before me), and that but for the intervention of the UPM, “same old, same old” would no doubt still be in existence today. This unexpected *volt farce* (despite being better late than never), attracts severe criticism with respect to housekeeping matters at both local and provincial level as was stated in this court’s judgment even before the provincial respondents changed their version. Inter alia, it makes a mockery of the provincial respondents’ evidence on oath in the main application, which states:

‘Although the support that has been rendered to the Municipality by multiple stakeholders is expected to yield fruitful results, a mandatory intervention involving the *development* of a Financial Recovery Plan is regarded as also necessary.’

32. Indeed, Makana’s particular situation and the way in which it has been handled thus far is so embarrassing at so many different levels that, had National intervention been called for (as provided for in section 139(7) of the Constitution) this court would have been constrained to have given serious consideration to granting such relief. In the premises the respondents throughout can hardly be heard to defend themselves and claim good prospects of success on appeal, based on academic nit-picking about choices of phrase from laypersons whose only claim is and has been, to vindicate the Constitution. On the contrary. As already stated in the judgment in the main application, the respondents have egg on their face. They ought to be hanging their heads in shame.

33. As referred to by the UPM in the application papers in the main application (which was not disputed), UPM falls within a category of persons who are entitled to enforce their Constitutional rights by virtue of the provisions of s 38 of the Constitution, which reads as follows:

‘Anyone listed in this section has a right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.’

34. In the main application it was not disputed that the applicant was entitled to approach this court and that the Constitutional rights of its people as set forth inter alia at sections 10, 24 and 27 had been infringed. As stated in *Ngomane* (above):

> 'This obviously caused them distress and was a breach of their right to have their inherent dignity respected and protected.
>
> In the circumstances, the respondents' conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)(a) thereof. This finding entitles the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution.'[28]

35. Having regard to the long history of, and the cause of the problems which have been besetting Makhanda and the fact that its Council blatantly ignored solutions specifically formulated for it to incorporate, and the fact that the provincial executive did not bother to intervene at any level, this court found it just and equitable to make the order set forth in para "D". I am satisfied that there are no prospects that another court would find that this court erred or misdirected itself in doing so.

Order "E"

36. With respect to the costs order at para "E", I am likewise of the view that that too was an order which was both just and equitable in the circumstances, and that it is highly unlikely that another court would conclude differently. The order in my view, was tempered considerably, regard being had to the fact that the UPM had prayed for a costs order to include the costs of three counsel.

Any other compelling reason

[28] At para [22]. See also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) where the appeal court likewise crafted a constitutional remedy not originally prayed for, and in so doing expressing the view that it did not think that formulating an appropriate constitutional remedy required the court to seize upon a common-law analogy and force it to perform a constitutional function (at para 26).

37. One further aspect deserves mention. Counsel for the local respondents has submitted that the judgment is *res nova* and that because it involves public powers and officials, leave to appeal should be granted in any event. My understanding of this term is that it generally describes an issue of law or a case that has not previously been decided. It has also been suggested that this judgment is likely to set a precedent for the dissolution of municipalities across the country. That is not the case at all. This is not a discreet issue of public importance which will have an effect on future matters. I say this for the simple reason that this case was decided on the facts pertaining to the Makana municipality in particular, and the paucity of the evidence placed before this court in response to a host of serious allegations supported by evidence which had mounted over a period of at least five years. It is a very particular situation accompanied by a long history of non-compliance with a recovery plan that has, admittedly, been in place. It goes without saying that other municipalities faced with the same challenges are bound to have differing approaches on the facts, and that a diversity of judgments and orders are bound to emanate from the courts, dependent on the circumstances of each case. This court has by no means made new law. I have mentioned but a few of many cases where this court has interpreted the provisions of the Constitution and where courts across this country have invoked the provisions of s 172 when just and equitable remedies have been called for. Whilst the substantial importance of the case to the parties may constitute a compelling reason why an appeal should be heard, it is not in my view a determinative factor when deciding whether to grant leave to appeal, particularly since the bar for the test to be applied has been raised. I would like to believe that all litigation is of substantial importance to the parties, lest they make themselves guilty of vexatious or frivolous litigation. As stated by the SCA in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre:*[29]

'That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.'

[29] 2016 (3) SA 317 (SCA) at 330C

The section 18 application

38. In all these circumstances, and those which I have not mentioned after a careful re-reading of the papers, this court's lengthy judgment, the heads of argument and the written argument as well as paying careful attention to the submissions made on behalf of all the parties, I am of the opinion that there are no reasonable prospects that the appeal would succeed. In the premises I intend making an order refusing the application for leave to appeal. Such an order means that my order in the main application is no longer suspended. That being the case, the application for the enforcement of my order pending the application for leave to appeal becomes academic and serves to be adjourned *sine die.* I did not hear any of the legal practitioners suggesting anything to the contrary during argument. The only question which remains, is the costs of the section 18 application. It was briefly contended by counsel for the UPM that it is entitled to the costs of the application. I am not inclined to agree. Had the application been successfully argued subsequent to the application for leave to appeal having been lodged with the registrar, but before the latter was argued, the UPM would have been entitled to its costs. The two applications were however argued during one sitting, at High Court level. The respondents may wish to escalate their application, in which case this court's order in the main application will once again be suspended affording the UPM another opportunity to utilise the provisions of s 18 should it wish to do so, presumably on the same papers, duly supplemented. The fate of the application itself, even if only in respect of costs, is dependent on whether the respondents intend taking the appeal process any further. In my view it is undesirable and inappropriate for this court to deal with the issue of the costs of the section 18 application, when it is not known whether the status of the application will change or remain extant. To my mind the costs ought, at this stage, to be reserved.

The costs of the application for leave to appeal

39. As I have said, when I gave judgment in respect of the main application, I did not award the UPM the costs of three counsel. I did not make this decision

lightly. In my judgment I pointed out that if it were not for the UPM having sought relief from this court, it is unlikely that the provincial respondents would have become pro-active. To that end, the UPM were successful. On the other hand, the relief which this court granted was to some extent crafted by the court itself in the form of just and equitable constitutional relief, and to some extent appears to have been invoked by the provincial executive in any event. A fourth factor which this court was alive to when considering costs was the fact of the municipality's financial crisis. Having said this, the parties have put a substantial amount of effort into this application for leave to appeal. The respondents collectively have managed once again, to make use of the services of four counsel, two of whom are senior. In the premises I am of the view that the UPM is likewise entitled to the costs of at least two counsel.

Order:

1. **The applications for leave to appeal are dismissed with costs, inclusive of the costs of two counsel, to be paid by the applicants jointly and severally, the one/more than one paying the other/others to be absolved.**

2. **The application in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 is adjourned *sine die,* with costs reserved.**

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I.T. STRETCH
JUDGE OF THE HIGH COURT

Date heard: 8 May 2020
Date handed down by electronic mail: 21 May 2020

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