

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

**Case No: 973/2013
Heard: 01/07/2013
Delivered: 08/08/2013**

In the matter between:

THE NAMA KHOI MUNICIPALITY	First Applicant
THE SPEAKER OF THE NAMAKHOI LOCAL MUNICIPALITY: JOSHUA CHARLES LOSPER	Second Applicant
THE MAYOR OF THE NAMA KHOI LOCAL MUNICIPALITY SCHALK WILLEM LUBBE	Third Applicant
WILLEM STEENKAMP JORDAAN	Fourth Applicant
GERT JACOBUS COETZEE	Fifth Applicant
KATRINA SOLDA VENTURA	Sixth Applicant
STEPHANUS JAN COETZEE VAN WYK	Seventh Applicant
WILLEM JACOBUS GOEDEMAN	Eighth Applicant
VERONICA VAN DYK	Ninth Applicant
THE MUNICIPAL MANAGER, NAMA KHOI LOCAL MUNICIPALITY: AUBREY BAARTMAN N.O.	Tenth Applicant

AND

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR LOCAL GOVERNMENT:
NORTHERN CAPE PROVINCIAL
GOVERNMENT**

First Respondent

LORENZO FABIO FABER

Second Respondent

EDLYN FERDINAND MARITZ

Third Respondent

FRANSCISCUS ZAVIER CUPIDO

Fourth Respondent

SIMON KLEINBOOI

Fifth Respondent

GEORGE CLOETE

Sixth Respondent

SERAH DAHLIA HOSKINS

Seventh Respondent

GILLIAN YVETTE PIETERS

Eighth Respondent

ALETTA MAXINE MAARMAN

Ninth Respondent

JUDGMENT

MAMOSEBO AJ

[1] This is an application for interim relief (Part A) by the applicants pending a review application (Part B). Having heard argument by Adv Ploos Van Amstel SC assisted by Adv Simon for the applicants and Adv Nkosi-Thomas SC for the first respondent and Adv Standton for the second to ninth respondents on 01 July 2013 and having read the documents filed I reserved judgment and ordered as follows:

(1) That neither party shall convene any other council or

special council meeting of the first applicant[Nama Khoi Municipality], pending the finalization of Part A of this application; and,

- (2) Neither party shall, pending finalization of Part A of this application, institute any further application or proceedings in relation to any matter that forms the subject of the applications brought under case numbers 817/2013, 943/2013 and 973/2013, except in the event of a breach of the provisions of the orders granted under case numbers 817/2013, 943/2013 and 973/2013.

[2] The Nama Khoi Municipality (the municipality), has been duly established in terms of s12 of the Local Government: Municipal Structures Act, 117 of 1998 ("the Municipal Structures Act") with its seat at the municipal offices in Namakwa Street, Springbok, Northern Cape. The second applicant is the Speaker and councillor of the municipality, Mr Joshua Charles Losper, the third applicant is its Mayor, Mr Schalk Willem Lubbe, the fourth to ninth applicants are its councillors: They are Mr Willem Steenkamp Jordaan, Mr Gert Jacobus Coetzee, Ms Katrina Solda Ventura, Mr Stephanus Jan Coetzee Van Wyk, Mr Willem Jacobus Goedeman and Ms Veronica Van Dyk. The tenth applicant is the Municipal Manager, Mr Aubrey Baartman NO. The second to tenth applicants are members of the Democratic Alliance (DA) and the Congress of the People (Cope) who jointly constitute the municipal Coalition.

[3] The first respondent is the MEC for Local Government in the Northern Cape ("The MEC"), the second to ninth respondents are

councillors in the municipality: They are Mr Lorenzo Fabio Faber, Mr Edlyn Ferdinand Maritz, Mr Franciscus Xavier Cupido, Mr Simon Kleinbooi, Mr George Cloete, Ms Serah Dahlia Hoskins, Ms Gillian Yvette Pieters and Ms Aletta Maxine Magerman, respectively. The respondents are members of the African National Congress (ANC).

[4] The relief sought by the applicants is:

- (a) To maintain the status quo of the municipality, the municipal council and the councillors until the proposed review proceedings have been finalized;
- (b) To restrain and prohibit the MEC from interfering in the activities of the municipal council.

[5] Part A of this application was set down on the urgent roll for 25 June 2013 before Coetzee AJ under case number 943/2013 who postponed it to 01 July 2013. He granted the following order:

5.1 The application stands down until Monday 01 July 2013;

5.2 The respondents, if they so wish, to file their answering affidavits by no later than 14:00 on Thursday 27 June 2013;

5.3 The applicants to file their replying affidavits by no later than 16:00 on Friday 28 June 2013;

5.4 The second up to and including the ninth applicant, the second up to and including the ninth respondent (herein after referred to as "the "Councillors") and the tenth applicant attend the council meeting of the first applicant

[the municipality] of the 27 June 2013, and remain in attendance thereat until:

5.4.1 Councillor HS Apollis is duly inaugurated; and

5.4.2 The 2013/2014 draft budget is approved;

5.5 The meeting of 27 June 2013 shall take place at the council chambers of the first applicant and shall remain convened at the council chambers of the first applicant until items 5.4.1 and 5.4.2 above are concluded.

5.6 Neither party shall interfere with the proper functioning of the council of the first applicant in addressing the agenda as per the Court Order granted on 20 June 2013 under case number 943/2013;

5.7 Neither party shall convene any other council meeting or special council meeting of the first applicant, pending the finalization of Part A of this application. It is recorded that the council meeting of the [municipality], pending the finalization of part A of this application, shall be the meeting convened to commence on 27 June 2013 at 10:00 and that neither the second applicant [the Speaker], nor any other person purporting to act on his behalf, shall postpone the meeting of 27 June 2013;

5.8 Neither party shall, pending the finalization of Part A of this application, institute any further application or proceedings in relation to any matter that forms the subject of the

applications brought under cases number 817/2013; 943/2013 and 973/2013, except in the event of a breach of the provisions of the orders granted under cases number 817/2013, 943/2013 and 973/2013;

5.9 The inauguration of the newly elected councillor for Ward 1 of the [municipality], Mr HS Apollis, at the Namakwa District Municipality on 20 June 2013 to be annulled;

5.10 The costs of today are reserved for determination on 01 July 2013.

[6] It need also be mentioned that prior to the application before Coetzee AJ on 25 June 2013 the same parties appeared before Williams J on 03 June 2013 under case number 817/2013, who granted the following order:

6.1 The 1st respondent is directed to apply his mind in considering whether the 2nd to 9th respondents should be removed from the offices as councillors of the 1st applicant in terms of the Local Government Municipal Systems Act, 32 of 2000, and Section 4(2) of the Code of Conduct for Councillors;

6.2 The 1st respondent is directed to authorize the 1st applicant to take such steps as may be deemed necessary to pass the Annual Municipal 2013/2014 Budget of the 1st applicant at a date later than 1 July 2013, if necessary, but in any event as soon as practically possible;

- 6.3 *The relief set out in prayers 1; 2.1; 2.2; 2.4 and 2.7 stand over for later determination;*
- 6.4 *The applicants are granted leave to file supplementary affidavits, if necessary, by 16:00 on 10 June 2013;*
- 6.5 *The respondents are to file the answering affidavits by 14 June 2013;*
- 6.6 *The applicants are to file their replying affidavits, if any, by 21 June 2013;*
- 6.7 *The date for the argument of the application must be arranged between the parties and the Registrar;*
- 6.8 *The Costs of today [03/06/2013] stand over for later determination.*

[7] The applicants initially asked the Court for the following prayers which for convenience will be listed as appearing on the notice of motion:

- 4.1 The [MEC] be interdicted and restrained from instructing and/or designating Ms M Brandt, Municipal Manager of Namakwa District Municipality, to convene a council meeting of the municipality to be held at 10:00 on 27 June 2013 at the Nama Khoi municipality; and the letter issued by Ms Brandt to this effect, on the instruction of the [MEC] be declared invalid;
- 4.2 [The MEC] be interdicted and restrained from convening the council meeting scheduled for 27 June 2013 and/or any other future council meeting scheduled by [the municipality] at the Namakwa District Municipality;

- 4.3 [The MEC] to be interdicted and restrained from:
- (a) interfering with the duties of the Municipal Manager and the Speaker of the municipality; and/or
 - (b) preventing the Municipal Manager and the Speaker of the municipality from carrying out their duties; and/or
 - (c) doing anything whatsoever, that is directed at preventing the Municipal Manager and/or the Speaker of the first applicant to convene the council meeting of 27 June 2013 at the municipality and/or any future council meeting;
- 4.4 The second to ninth respondents are interdicted and restrained from taking any decision; and/or tabling any motion that is directed at changing the current status of any of the second to ninth applicants;
- 4.5 The first to ninth respondents are interdicted and restrained from taking any decision that is directed at and/or is intended to interfere with:
- (a) the administration of the [municipality]; and/or
 - (b) the position of the [Municipal Manager]; and/or
 - (c) the work of the [Municipal Manager];
- 4.6 The first to ninth respondents are interdicted and restrained from carrying out any action in any terms whatsoever which may affect the current status of the [municipal council], and/or which is intended at affecting and/or may affect the administration of the [municipality], save for the [MEC] to assist

in approving the budget of the [municipality];

- 4.7 No other council meetings are held, save for the meeting scheduled for 27 June 2013;
- 4.8 The inauguration of the newly elected councillor for Ward 1 of the [municipality], Mr HS Apollis, at the Namakwa District Municipality on 20 June 2013, by and/or on the instruction of the [MEC], be annulled.

Prayers 4.1, 4.2, 4.3(c) , 4.7 and 4.8 of the Notice of Motion have already been dealt with, which leaves for determination prayers 4.3 (a) and (b), 4.4, 4.5 (a), (b) and (c), and 4.6.

The background

- [8] In May 2011, Local Government Elections were held in the Nama Khoi area of jurisdiction. In consequence thereof, the DA won six wards; the ANC won eight wards, Cope won three wards. Cope and DA formed a Coalition as a result of which they held a one seat majority over the ANC. A former DA councillor resigned and crossed the floor to the ANC and caused an 8:8 equal number of votes between the ANC and the Coalition. Mr Hendrik Selodis Apollis subsequently won the vacated Ward 1 on 22 May 2013 as a member of the ANC, which caused the pendulum to swing the ANC way with the equation as ANC 9:8 the Coalition.
- [9] A municipal council is responsible for exercising powers and performing functions of the municipality. Although a Speaker has a casting vote, s30 (4) read with s30(1) of the Municipal

Structures Act requires a specified number of councillors to be present in a meeting to form a quorum. In this instance the municipality required a minimum of nine councillors to constitute a quorum. S 160(3) (a) of the Constitution of the Republic of South Africa, Act 108 of 1996, requires that there be a majority of members of the municipal council present before voting on any matter. The ANC respondent councillors missed attending three consecutive meetings (26 March 2013, 28 March 2013 and 25 April 2013). It was submitted on behalf of the applicants that these absences were deliberate and were intended to render the municipality dysfunctional in that the 2013/2014 budget which should have been tabled by the Mayor before 31 March 2013, at least 90 days before the start of the financial year, was aborted. The municipality is therefore paralysed as all expenditures are or would become unauthorized. A meeting was held on 27 June 2013 at which the budget was discussed and the inauguration of councillor Apollis as Ward 1 councillor was finalized.

[10] It is common cause that all these council meetings, including the one of 09 April 2013, were properly convened and all councillors signed an acknowledgement of receipt of the invitation to attend. However, the ANC councillors did not attend as reflected on the attendance registers attached to the applicants' papers. The meetings were scheduled to table and discuss the draft budget, the Integrated Development Plan and the public accounting committee report. The respondents' written response in respect of their failure to attend the meeting of 26 March 2013 is that they were busy with door to door

election campaigning that coincided with the council meeting.

The second respondent (Faber) was allegedly authorized by the municipality to attend a SALGA meeting in Kimberley on that date, an allegation disputed by the Coalition Speaker. The meeting of 09 April 2013 was cancelled by the Municipal Manager on 08 April 2009 as the Mayor had taken ill.

- [11] The Coalition applicants allege that there is political infighting between the adversaries as a result of which service delivery and good governance are being sacrificed at the altar of political expediency. Reference is made to the two meetings called by the respondents for 06 and 13 June 2013 to discuss the Integrated Development Plan and the draft budget. It is claimed that the real motive by the ANC was to unseat the members of the Coalition; more pertinently to elect a new Speaker, a Mayor and thereby dissolve the Coalition and substitute it with an ANC executive. The Speaker in para 54 of his founding affidavit states that submissions were made by him and the Coalition Mayor on 05 April 2013 to the MEC to intervene in the stalemate but the MEC has failed to take appropriate action against the defaulting respondent councillors to ensure that the budget was approved timeously. This allegation is vehemently denied by the MEC who submits that he has done everything in his power to support the municipality and has applied his mind to the complaint and decided not to remove the respondent councillors.
- [12] In an effort to force compliance by the respondent councillors the Speaker wrote three threatening letters to them with a possibility of withholding their salaries if they continue to absent

themselves wantonly from council meetings. The subsequent withholding of their salaries was countermanded by an instruction by the MEC to the Speaker to pay out the withheld salaries of the second to ninth respondents, which were accordingly reinstated.

[13] There was an exchange of letters between the Speaker and the MEC pertaining to fixing the next date to convene a council meeting. The MEC proposed 14 June 2013 to inaugurate councillor Apollis as Ward 1 councillor and to attend to the draft budget. The Speaker indicated that a suitable date would be 20 June 2013 as the initial budget had to be adjusted. The draft budget had a surplus which did not cater for landfill sites and depreciation of assets. It is pointed out that National Treasury directed all municipalities to increase their tariffs. The MEC issued an instruction by letter to the Speaker that the council meeting should be held on 20 June 2013 for the suggested purposes as well.

[14] It is after the letter of 20 June 2013 was written by the MEC to the Speaker that a second interlocutory application under case 943/2013 was brought on an urgent basis to this Court and heard on 20 June 2013 by Coetzee AJ. The Coalition applicants were asking the Court to compel the MEC to apply his mind to whether or not the second to ninth respondents should be removed from their offices as councillors by not later than 28 June 2013 due to their said absenteeism; and that the said ANC respondents were not to attend any council meeting pending the MEC's decision. The Court was asked to direct that the meeting

of 20 June 2013 be suspended pending the outcome of such a decision. By agreement between the parties the Court ordered that the application be removed from the roll; *that the **Speaker, failing him, a person designated by the MEC, shall convene a council meeting** not later than 10 o'clock on 21 June 2013 to commence at 10:00 on Thursday, 27 June 2013 with the business of the day;* that the agenda shall include the inauguration of Mr Apollis as a councillor in the municipality; the presentation and adoption of the 2013/2014 budget; and that the special council meeting to remain convened or in session until the 2013/2014 budget was approved.

- [15] Counsel for the Coalition, Mr Ploos Van Amstel, argued that proceeding with the meeting in Springbok on 20 June 2013 while the urgent application was being heard on the same day in the Kimberley High Court shows the undermining of the authority of the Court by the MEC as he should have been present in Court that day. I should point out that the presence of the MEC in Court in an application was not a legal requirement. Counsel submitted that the MEC's procrastination to remove the second to ninth respondents, who belong to his party, and the fact that he gave written instructions to the Municipal Manager, a member of the Coalition, amounts to interference with the functioning of the municipality which the Court must prohibit through an interdict. This argument was, however, countered by counsel for the MEC, Ms Nkosi-Thomas that the date of 20 June 2013 for the meeting came from the applicants. Para 5 of their letter Annexure JL 13 reads:

“Our clients have instructed us to give an undertaking that a meeting will be convened on 20 June 2013, which is only a week away.”

[16] In order to put into perspective what has been characterized as interference by the MEC the relevant sections of the Municipal Structures Act as well as the Code of Conduct are quoted below.

16.1 The Code of Conduct for Councillors, Schedule 1 of the Local Government: Municipal Systems Act, 32 of 2000, provides:

“Attendance of meetings

3 *A councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member, except when-*

- (a) leave of absence is granted in terms of an applicable law or as determined by the rules and orders of the council; or*
- (b) that councillor is required in terms of this Code to withdraw from the meeting.*

Sanctions for non-attendance of meetings

4(1) *A municipal council may impose a fine as determined by the standing rules and orders of the municipal council on a councillor for:*

- (a) not attending a meeting which that councillor is required to attend in terms of item 3; or*
 - (b) failing to remain in attendance at such a meeting.*
- (2) ***A councillor who is absent from three or more consecutive meetings of a municipal council, or from three or more consecutive meetings of a committee,***

which that councillor is required to attend in terms of item 3, must be removed from office as a councillor.

- (3) Proceedings for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure which each municipal council must adopt for the purposes of this item. The uniform standing procedure must comply with the rules of natural justice.”** (own emphasis added)

Breaches of the Code

16.2 14(1) A municipal council may-

- (a) Investigate and make a finding on any alleged breach of a provision of this Code; or
 - (b) Establish a special committee-
 - (i) to investigate and make a finding on any alleged breach of this Code; and
 - (ii) to make appropriate recommendations to the council.
- (2) If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-
- (a) issue a formal warning to the councillor;
 - (b) reprimand the councillor;
 - (c) **request the MEC for local government in the province to suspend the councillor for a period;**
 - (d) fine the councillor; and
 - (e) **request the MEC to remove the councillor from office.”** (Emphasis added)

- (4) The MEC for local government **may** appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office.
- (5) The Commission's Act 8 of 1947, or where appropriate, applicable provincial legislation, may be applied to an investigation in terms of sub-item (4).
- (6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may –
 - (a) Suspend the councillor for a period and on conditions determined by the MEC;
 - (b) Remove the councillor from office.

(7) Any investigation in terms of this item must be in accordance with the rules of natural justice.
(emphasis added)

[17] Para 6 of the aforementioned letter, JL 13, further reads:

"This brings us to another aspect of the matter which is troubling in the extreme. You appear to have ignored the part of the court order which instructs you to investigate the removal of the councillors who failed to attend meetings."

[18] It is apposite to quote from item 13 of the Code of Conduct for Councillors, which states:

Duty of a chairperson of municipal councils

13(1) *If the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of this Code has been breached, **the chairperson must:***

- (a) *authorize an investigation of the facts and circumstances of the alleged breach;*
 - (b) *give the councilor a reasonable opportunity to reply in writing regarding the alleged breach; and*
 - (c) *report the matter to a meeting of the municipal council after paragraphs (a) and (b) have been complied with.*
- (2) *A report in terms of sub item 1 (c) is open to the public.*
- (3) ***The chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.***
- (4) *The chairperson must ensure that each councilor when taking office is given a **copy** of this Code and that a copy of the Code is available in every room or place where the council meets.” (My emphasis)*

Interference by the MEC (first respondent)

[19] I have noted the order by Williams J which directed the MEC to apply his mind to consider whether the second to ninth respondents should be removed from office as councillors. Item 13 of the Code cited above in para 16, requires the Chairperson, who is also the Speaker, to submit a report to the MEC after he had investigated the matter and afforded the respondent councillors an opportunity to comment as required by the Code. However, this requirement has been superseded by the Court order Williams J made on 03 June 2013 directing the MEC to apply his mind, which order appears in para 6 above.

[20] In ***Bangtoo Bros v National Transport Commission*** 1973 (4) SA 667 (N) at 685 A-D, Henning J stated:

"I am for the moment concerned with what is meant by the expression 'apply its mind to the matter', certain aspects of which have already been covered by this judgment. It seems to me essential that the tribunal is essentially obliged to consider all relevant and material information placed before it. To pay mere lip-service to this obligation is not sufficient, just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them. The problem arises whether the Court is concerned with the degree of importance which the tribunal attaches, in the exercise of an honest judgment, to the relevant considerations. Take a case, for example, where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant, is given weight far in excess of its true value. Accepting that the tribunal is the sole judge of the facts, can it be said that it has in the circumstances postulated properly applied its mind to the matter in the sense required by law? After much anxious consideration I have come to the conclusion that the answer must be in the negative."

[21] I have further noted the order by Williams J directing the municipality to take such steps as may be deemed necessary to pass its Annual Municipal 2013/2014 Budget at a date later than 01 July 2013, if necessary, but in any event as soon as practically possible. This order, coupled with the undertaking to hold the meeting on 20 June 2013 by the applicants, cannot be seen as interference by the MEC because he was mandated to carry out certain official functions.

[22] S139 (4) of the Constitution reads:

*"If a municipality cannot or does not fulfill an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, **the relevant provincial executive must intervene** by taking **any appropriate steps** to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and –*

- (a) appointing an administrator until a newly elected Municipal Council has been declared elected; and*
- (b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality." (My emphasis)*

[23] Item 4(2) of the Code of Conduct for Councillors provides that a councillor who is absent from three consecutive meetings of a municipal council must be removed from office as a councillor. Item 4(3) requires that rules of natural justice must be applied which are in conformity with the Uniform Standing Procedure which each municipal council must adopt for purposes of this item. The word 'must' denotes that the adoption of this procedure is peremptory. Therefore, the *audi alteram partem* rule which is fair and transparent must be observed. It is interesting to further note that item 14(7) also emphasizes that the investigation has to accord with rules of natural justice.

[24] I have noted that the municipality has not adopted any Uniform Standing Procedures which are essential for the municipality to address issues of governance and regulate the conduct of

councillors. In my view, failure by the municipality to develop such procedures should not be used as a scapegoat to hamstring the effective and efficient functioning of a municipality in line with its constitutional imperatives. Rules of natural justice ensure the safeguarding of the principle of *audi alteram partem*. It promotes and respects the participation of those who will be affected by the outcome but also aims at improving the quality and rationality of administrative decision-making. Goldstone J in ***Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO*** 2001 (1) SA 29 (CC) linking the importance of fairness to the growth of discretionary power said the following at para 24:

"In modern States it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the Rules of procedural fairness are thus all the more important.... Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner."

See also ***De Lange v Smuts NO*** 1998 (3) SA 785 (CC) para 131, where Mokgoro J said:

"Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything

more than chance."

[25] The applicants argue that an interim interdict pending the outcome of the review should be granted because their prospects of success in the review application are high. The applicants must show the requisites for the grant of temporary interdict pending the determination of the main action. In ***LF Boshoff Investments (Pty) Ltd v Cape Town Municipality: Cape Town Municipality v LF Boshoff (Pty) Ltd*** 1969 (2) SA 256 (C) Corbett J said at 267 B-F:

"Briefly these requisites are that the applicant for such temporary relief must show -

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.

(See Gool v Minister of Justice and Another, 1955 (2) SA 682 (C) at pp. 687 - 8; Pietermaritzburg City Council v Local Road Transportation Board, 1959 (2) SA 758 (N) at p. 772). Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the

Court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action (see Gool's case, supra)." See also **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 E – 635C.

[26] I am satisfied that the application by the applicant Coalition is not *bona fide*. It anticipates the inevitable. The Coalition has realized and has in fact said so in so many words that the ANC majority (with the addition of Apollis) intends to bring a motion of no confidence in the DA/Cope Mayor and Speaker and institute their own executive. Well, this is how democracy works.

[27] Mr Ploos Van Amstel has argued that the facts in this matter are similar to those in the Australian case of **Shire of Waroona and Fitzpatrick** [2007] WASAT 219 (29 August 2007). In that case the Court observed at para 19-20:

"(19) The object of the section is readily apparent. In effect, it imposes an obligation on councillors to attend meetings, and not to fail to attend three consecutive meetings unless the reasons are such that the council has considered the circumstances and made express resolution to grant leave of absence. Whether

that strict rule should be relaxed to cater for exceptional circumstances, and whether the Tribunal should have some discretion to consider exceptional circumstances, is a matter for government. Given the circumstances of this case, the Tribunal proposes to forward a copy of this decision to the Minister for Local Government for information.

(20) It is appropriate to take the opportunity to make an observation about a matter asserted in Mr Fitzpatrick's letter of 18 May 2007. That is the proposition that a Councillor needs to be in attendance to apply for leave of absence. There is nothing in s2.25 which requires the attendance of a member at the meeting at which leave of absence for some future meeting is granted. It is necessary that leave of absence be granted prior to a particular meeting. Thus it would not appear possible, if a member is unexpectedly prevented from attending a particular meeting, to have a motion of leave for absence moved at that meeting. Where, however, a member absent at one meeting, anticipates that he or she will not be able to attend the following meeting, there is nothing to prevent the Council resolving to grant leave of absence in respect to the following meeting, notwithstanding the absence of the member at the time the motion is put and carried."

For the foregoing reasons the councillor was removed from office. However, in the matter at hand, and for the reasons that follow it is not necessary for me to determine the issue of the removal of the ANC councillors. However, I would be failing in my duty if I did not point out that it is the height of irresponsibility to default on attending a properly scheduled

council meeting on the flimsy pretext that they, the ANC councilors, were canvassing for votes. I will leave it there for present purposes.

[28] It is not the purpose of this application to decide whether the nine ANC councillors must be removed. This application has to determine whether the minority DA/Cope Coalition must remain in power pending the determination by the municipal council or the MEC or the Court in a review application on whether the nine ANC councillors disqualified themselves as councillors through their alleged failure to attend three consecutive council meetings.

[29] It is up to the DA/Cope Coalition to bring the review application for the removal of the nine ANC councilors (Part B of the relief sought) irrespective of the fact that they are unsuccessful in this application. As is the practice in this Division such a review will have to serve before two judges.

[30] It is as well to remind all the councillors, irrespective of their party affiliation, of what the Preamble in the Local Government Municipal Structures Act, 117 of 1998, provides:

"Whereas there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfill their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy environment by working with communities in

creating environments and human settlements in which all our people can lead uplifted and dignified lives;

Whereas municipalities across our country have been involved in a protracted, difficult and challenging transition process in which great strides have been made in democratising local government; and

Whereas municipalities now need to embark on the final phase in the local government transition process to be transformed in line with the vision of democratic and developmental local government."

Costs

[31] For the foregoing reasons the application must fail. No case has been made out for costs *de bonis propriis* against the 2nd to 10th applicants. The costs will follow the result.

ORDER

- 1. Application for the interim relief is refused.**
- 2. The applicants are to pay the costs of this application together with the previous applications of 03 and 25 June 2013 on party and party scale.**

M C MAMOSEBO
ACTING JUDGE

Northern Cape High Court, Kimberley

On behalf of the Applicant:	Adv. C Ploos Van Amstel
Assisted by :	Adv C Simon
Instructed by:	Messrs Cornelissen Inc
On behalf of the First Respondent:	LG Nkosi-Thomas SC
Instructed by:	Mr O F Lategan
	Office of the State Attorney
On behalf of 2nd – 9th Respondents:	Adv A Stanton
Instructed by:	Messrs Duncan & Rothman Inc