"Reportable"

In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 229/2021

In the matter between:

EXECUTIVE COUNCIL OF THE WESTERN CAPE PROVINCE	**First applicant**
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT, ENVIRONEMENTAL AFFAIRS AND DEVELOPMENT PLANNING	**Second applicant**
WESTERN CAPE MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES	**Third applicant**
ADMINISTRATOR (FINANCIAL RECOVERY) OF KANNALAND LOCAL MINICIPALITY	**Fourth Applicant**

AND

KANNALAND LOCAL MUNICIPALITY + AND 20 OTHERS	**Respondent(s)**

JUDGMENT – 07 OCTOBER 2021

LEKHULENI AJ:

INTRODUCTION

[1] This matter comprises of two sections. Part A served before this Court on an urgent basis when the applicants sought an order interdicting and restraining the first to tenth respondents *("municipality")* from taking any steps that would negatively impact on the achievement of the objects and intent of the plan including the taking or implementing a decision to lift or terminate the first applicant's intervention in terms of section 139 (5) of the Constitution of the Republic of South Africa, Act 108 of 1996 *("the Constitution")* and / or taking or implementing decisions to terminate the role and function of the fourth applicant as Administrator (Financial Recovery) of the first respondent. The interim order was granted by the urgent Court in this regard.

[2] Subsequent thereto, the matter came before me for the adjudication of Part B. In this instance, the applicants seek an order *inter alia*, declaring that the intervention by the first applicant, in respect of the fulfilment of the executive obligations of first respondent, in terms of section 139(5) of the Constitution read with section 139(1), 141 and 142 of the Local Government Municipal Finance Management Act 56 of 2003 *("MFMA")* is lawful and subsists until termination in terms of section 148(3) of the MFMA. The applicants also seek an order reviewing and setting aside the resolution by the first respondent's municipal council taken on 16 November 2020 that lifted or terminated the applicant's intervention in terms of section 139(5) of the Constitution; directing the respondents to co-operate, and ensure that all employees of the first respondent co-operate with the first and fourth applicants in respect of the intervention of the provincial executive and the implementation of the financial recovery plan.

THE FACTUAL MATRIX

[3] It is common cause that in 2016 the first respondent (*"Kannaland municipality"*) experienced a financial crisis such that it was unable to meet its obligations and financial commitments. In terms of section 139(5) of the Constitution, the first applicant had to take steps to intervene directly in the management of the municipality.

[4] At a meeting held on 29 November 2016 between officials from the provincial government and municipal officials, the Executive Mayor of the Kannaland municipality confirmed that the municipality was experiencing a financial crisis and could not meet its obligations. On 02 December 2016 the municipal council resolved to request the provincial executive to intervene in its affairs in terms of section 139(5) of the Constitution to provide the municipality with a targeted support package and to appoint one or more implementation managers. Pursuant thereto, the provincial executive accepted the invitation and on 07 December 2016, the provincial executive resolved to intervene in the municipality's affairs in terms of section 139(5) of the Constitution. The provincial executive did not dissolve the municipal council nor appoint an Administrator to take over the running of the municipality's affairs. Instead, the provincial executive authorised the development of a financial recovery plan as envisaged in section 139(5)(a) of the Constitution.

[5] The plan was developed and on 17 March 2017, the provincial executive imposed the recovery plan as a framework for the rehabilitation of the municipality. The aim of the recovery plan was to place the municipality on a sustainable footing

so that it may function as an effective, efficient and financially stable organisation capable of providing services to the community on a sustainable basis. The municipal council was initially tasked with overseeing the implementation of the plan. Section 146 of the MFMA described the manner in which a financial recovery plan had to be implemented. The relevant parts of this section provides as follows:

> '(1) If the recovery plan was prepared in a mandatory provincial intervention referred to in section 139-
>
> *(a)* the municipality must implement the approved recovery plan;
> *(b)* all revenue, expenditure and budget decisions must be taken within the framework of, and subject to the limitations of, the recovery plan: and
> (c) the municipality must report monthly to the MEC for finance in the province on the implementation of the plan in such manner as the plan may determine.
> (2) The financial recovery plan binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget and legislative measures giving effect to the budget, but only to the extent necessary to achieve the objectives of the recovery plan.'

[6] The applicants aver that in the event the municipality does not take the necessary measures to implement the approved financial recovery plan, section 146(3) of the MFMA provides that the provincial executive may either dissolve the municipal council or assume responsibility of the implementation of the plan itself. This section provides:

> '(3) The provincial executive must in terms of section 139(5)(b) of the Constitution either—
>
> (a) dissolve the council of the municipality, 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 within the time frames specified in the plan and—
>
> (i) appoint an administrator until a newly elected council has been declared elected; and;

(ii) approve a temporary budget and revenue-raising measures, and other measures to give effect to the recovery plan and to provide for the continued functioning of the municipality; or

(b) assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not take executive measures to give effect to the recovery plan.'

[7] In December 2018, the provincial executive determined that the municipality had not taken the necessary measures to implement the recovery plan. The provincial executive subsequently resolved that as from 05 December 2018, it would implement the plan. The provincial executive also resolved that it would appoint an Administrator to implement the plan on its behalf. The Administrator was vested with all powers necessary to ensure the proper implementation of the recovery plan, including the municipality's executive powers. The Administrator was also required to ensure that the municipal manager and all senior managers were enabled to take all and any decisions as may be necessary for the proper implementation of the recovery plan failing which, the Administrator was entitled to take such decision himself after consultation with the municipal manager.

[8] Notwithstanding the appointment of the Administrator, the municipal council was not dissolved. The municipal council retained their legislative powers provided that they could be exercised in congruence with the recovery plan. The municipal counsellors retained their membership and salaries. The Administrator was entrusted with all the municipality's financial executive and administrative powers necessary for the implementation of the recovery plan. The municipal council on the other hand retained residual executive's powers only to the extent that these did not impact on the recovery plan and its implementation thereof. Prior to November 2016, the

Administrator interacted with the municipal council and attended all meetings of the municipal council. He advised the municipal council on how best to avoid issues that could affect the municipal finances. Up until October 2020, his advice was invariably followed by the councillors.

[9] The Administrator made strides in stabilising the municipality's financial affairs. Some of the significant strides made by the Administrator was the review of the municipality's' organisational structure and the development of a fit-for-purpose organogram that meets the municipality's operational and financial needs. This development was approved and adopted by the municipal council on 31 May 2020. It was expected that once this organogram is implemented, it would result in a cost saving of approximately R8, 900, 000 (*eight million and nine hundred thousand rand*) for the municipality.

[10] However, despite the intervention of the Administrator the municipality remains in dire financial straits. On 02 August 2020 the National Minister of Finance at the instance of the provincial executive, approved a process to amend the plan in terms of section 144 of the MFMA. On the said date, the National Minister of Finance authorised the Municipal Finance Recovery Services *("MFRS")* to assist with the review and amendment of the recovery plan. The amendment was aimed at capitalising on the achievements made and to ensure that the recovery plan is updated so that it could meet the municipality's needs going forward. The term of the Administrator was as well extended with effect from 01 December 2020 until the first sitting of the municipal council after the 2021 local government elections.

[11] It is common cause that during September 2020 the Executive Mayor of the municipality fell ill and became unable to exercise his functions as an executive mayor and ultimately went on sick leave. The sixth respondent (Councillor Antonie) thereupon assumed the position of executive mayor. Under his stewardship as mayor, the municipal council took decisions which led to the applicants launching this application. Among others, it is alleged that the municipality have taken steps to conclude a multi-decade contract with a company called Innovasure for the provision of energy, water services and infrastructure to the municipality. The applicants aver that this contract did not meet the regulatory requirements to be treated as an unsolicited bid in particular Regulation 37(2) of the Municipal Supply Chain Management Regulations. Among others, this regulation provides that an unsolicited bid may only be considered if the person who made the bid is the sole provider of the product or service. Furthermore, it was alleged that the municipal council contravened various rules regarding municipal procurement and has not been concluded in compliance with a transparent process.

[12] The applicants' state that the respondents have resolved to establish a new organisational structure which consists of a bloated contingence of political appointees and is unnecessary and unaffordable. However, the respondents have given an undertaking to not enter into a binding financial commitment in respect of the hiring of new personnel pending the hearing of Part B of this application. The respondents undertook to ensure that the vacant posts in essential roles will be filled by internal secondment which will not attract additional costs.

[13] On 16 November 2020 at the meeting of the municipal council, the council passed a council resolution which effectively terminated the Administrator and the implementation of the recovery plan. Pursuant to that resolution, on 17 November 2020 the Administrator informed the municipal council that the resolution by council that was taken on 16 November 2021 was *ultra vires* and of no force or effect as the council did not have the statutory authority to resolve on matters reserved by the Constitution for provincial sphere of government.

[14] The provincial minister also engaged the municipal council in correspondences and informed them that they regarded the resolution of 16 November 2020 as unlawful and of no force or effect. In addition, the provincial minister sought some undertakings from the municipal council that the municipality would cooperate with the Administrator in the implementation of the recovery plan and would cease all efforts of terminating the provincial executive's intervention. Notwithstanding, on 30 November 2020 the municipal council subsequently passed a resolution to terminate the provincial executive's intervention and also to terminate the services of the Administrator. On 03 December 2020 the municipal manager issued communication indicating the expiration of the Administrator's term of contract, and further indicated that the Administrator was no longer part of the municipality and that municipal officials were no longer to take instructions from him.

[15] On 08 December 2020, the Administrator received written notification of the resolution of the 30 November 2020 aimed at lifting the provincial intervention. He was informed that the effect of the resolution lifting the intervention was that the Administrator's services at Kannaland municipality came to an end. He was

requested to vacate the offices of the municipality by the end of that day. On 10 December 2020 the municipal council met and resolved that councillors should refrain from leaking information pertaining to the affairs of the municipality and items on the agenda to the MEC and that disciplinary action would be instituted against any councillors who were found to have leaked information.

[16] The applicants averred that the respondents have taken the law into their own hands by purporting to terminate the mandatory intervention and the Administrator's role. It is also the applicant's case that the respondents have undermined the implementation of the objectives of the recovery plan, where the plan contains the objects of reviewing and implementing expenditure management systems to ensure efficient and effective service delivery in line with the municipal priorities. The applicants contend that the council's conduct is adversely affecting the gains made in stabilising the municipality.

[17] The municipality on the other hand admits that there was a crisis in the financial affairs of Kannaland municipality in 2016 as reflected in the minutes of the municipality in which a resolution was taken requesting the provincial government to intervene in terms of section 139(5) of the Constitution. However, it was not for the province to make a determination and prepare a financial recovery plan and to recommend appropriate changes to the budget. The respondents contend that this authority is assigned exclusively to national government by section 139 of the MFMA. The respondents contend that in terms of the Constitution in particular section 40, the model of government consists of the three spheres: national, provincial and local.

[18] Of importance is that each sphere must respect the institutional and functional integrity of the other. While national and provincial spheres are permitted to undertake interventions, including assuming control over affairs of another spheres, they are not entitled to take over the functions of the municipal sphere save in exceptional circumstances, and even then, only temporarily and subject to strict limitations and protocol. The respondents contend that the applicants intervened in the Kannaland municipality in terms of section 139(5) of the Constitution which is the most drastic form of intervention. For the sake of completeness, section 139(5) of the Constitution provides in relevant parts as follows:

> "(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive **must –**
> (a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services for its financial commitments, which-
> (i) is to be prepared in accordance with national legislation;
> (ii) ..."

[19] It is the respondents' case that the intervention in terms of section 139(5) is so intrusive such that the national government must be intimately involved from the start, to serve as a check and balance on the potent of the provincial power. The respondents' state that it is not for the provincial executive to make a determination and prepare a financial recovery plan and to recommend appropriate changes to the budget as this authority is assigned exclusively to national government by section 139 of the MFMA which provides:

'(1) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly-

*(*a) request the Municipal Financial Recovery Service-

(i) to determine the reasons for the crisis in its financial affairs;

(ii) to assess the municipality's financial state;

(iii) to prepare an appropriate recovery plan for the municipality:

(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan: and

(v) to submit to the MEC for finance in the province-

(aa) the determination and assessment referred to in subparagraphs (i)

and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance: and

(b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.

(2) The MEC for finance in the province must submit a copy of any request in terms of subsection (1)(a) and of any determination and assessment received in terms of subsection (1)(a)(v) (aa) to-

(a) the municipality;

(b) the Cabinet member responsible for local government: and

(c) the Minister

[20] The gravamen of the respondent's case is that the intervention by the applicants was *void ab initio* and constitute a nullity because it was executed by the provincial executive off its own bat. National government was effectively excluded or side-lined when it should have been closely involved from the word go. The respondents relied on section 139(1) of the MFMA cited above which enjoins the provincial executive to request the MFRS, a unit of the national treasury, to

determine the reasons for the crisis at the municipality, assess the situation and to prepare a recovery plan. According to the respondents, none of that happened in this instance. The respondent contends that the provincial executive acted for all intents and practical purposes alone in conflict with the Constitution and the peremptory provisions of section 139(1) of the MFMA. Notably, there is no evidence that the intervention in Kannaland was channelled through national treasury. Instead, the provincial treasury was assigned the task. The respondents relied specifically in section 141(2) of the MFMA which provides that only the MFRS may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139 which was the case in this matter.

[21] The respondents asserted that the provincial executive did not respect the separation of powers between the spheres of government established in the constitution more in particular in that the provincial executives' conduct was disproportionate to what was necessary to address the difficulties in the financial affairs of the municipality and failed to respect the functional and institutional integrity of local government.

[22] In summary, the respondents impugned the intervention by the applicants on two grounds. First, the respondents relied on section 141(2) of the MFMA which expressly states that only the MFRS may prepare a recovery plan for the municipality. The section also lists a number of bodies that the person compiling the recovery plan must consult when preparing the recovery plan. Secondly, the respondents relied on section 139(5)(b) of the Constitution and contended that the appointment of an Administrator comes only after the dissolution of council. In this

case, Kannaland council was not dissolved and as a result an essential jurisdictional fact for the appointment of the Administrator is absent. The respondent states that the belated request in August 2020 to the national minister of finance to review and amend the plan was too little too late as the nullity of the recovery plan could not be cured *post facto* by an amended or revised plan drafted by the MFRS. The respondent contended that the intervention itself contravened section 139(5) of the Constitution. The plan also failed to comply with the jurisdictional facts required by section 139 of the MFMA and thus the intervention was unlawful and unconstitutional. The respondent avers that because the intervention was void *ab initio,* the applicant's application falls to be dismissed on that basis alone.

[23] With regard to the appointment of the Administrator, the respondents cited section 139(5)(b) of the Constitution and contended that the appointment of the Administrator is permissible as an option if the municipal council has been dissolved. For the sake of completeness, section 139(5)(b) of the Constitution provides:

> '(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.'

[24] In this intervention, the respondent contends that the municipal council was not dissolved, meaning that an essential jurisdictional requirement for the appointment of the Administrator has not been satisfied. To this end, the appointment of the Administrator was void *ab initio*.

[25] It is also the respondent's view that in the event that this court finds that the intervention stands until it is set aside, the first respondent launched a conditional counter-application and that same should succeed for the same reasons advanced above. In the conditional counter-application the respondent seeks an order reviewing and setting aside the decision of the executive council of 05 December 2018 that a mandatory intervention in terms of section 139(5)(c) of the Constitution be imposed on the conditions so imposed. The respondents also seek an order setting aside the appointment of the Administrator for the municipality and that the mandatory intervention by the executive council of 05 December 2016 in terms of section 139(5)(c) of the Constitution be declared unlawful, unconstitutional and of no force or effect.

ISSUES

[26] The issues that this court is called upon to determine can succinctly be summarised as follows:

1. Whether the intervention by the first applicant in terms of section 139(5)(c) of the Constitution read with ss 139(1), 141, 142 of the MFMA was lawful or not, and if not, whether it should subsist until it is lawfully terminated; if lawful, whether the reactive challenge raised by the respondent in the conditional-counterclaim should succeed or not.
2. Whether the applicants' alleged non-compliance with the provisions of section 139(5) of the Constitution read with sections 139 and 157(2) of the MFMA

vitiated the legality of their intervention and the appointment of the Administrator;

3. Whether or not the municipality can terminate the intervention pronounced upon by the executive as it attempted to do so in November 2020;
4. Whether the applicants are entitled to the declaratory relief that their intervention was lawful on the terms prayed for.

ANALYSIS OF THE PARTIES SUBMISSIONS AND APPLICABLE LEGAL PRINCIPLES

[27] For reasons of completeness, I deem it prudent to consider the issues raised above ad seriatim.

Whether or not the intervention by the first applicant in terms of section 139(5) of the Constitution read with ss 139(1), 141, 142 of the Local Government Municipal Finance Act was lawful.

(a) The imposition of the Financial Recovery Plan

[28] The reactive challenge raised by the respondent in its counterclaim and the determination of the lawfulness of the intervention by the provincial executive in the municipality are inextricably imbricated and I will deal with them together. It is a common cause factor that during 2016 the Kannaland municipality experienced a material crisis in its financial affairs such that it was in serious breach of its obligations to provide basic municipal services and various financial commitments. On 02 December 2016 the municipality resolved to engage the applicant to intervene

in the municipality in terms of section 139(5) of the Constitution for the implementation of a recovery plan. The intervention by the provincial executive was requested by the municipal council of the first respondent at a council meeting. On 07 December 2016, the provincial executive took a decision to intervene in terms of section 139(5)(a) of the Constitution read with ss 139(1), 141 and 142 of the MFMA to impose a financial recovery plan on the municipality.

[29] It is also not in dispute that in December 2018, the provincial executive determined that Kannaland municipality had not taken the necessary measures to implement the recovery plan and it resolved to implement the plan and to appoint an Administrator to implement the plan on behalf of the provincial executive. The applicant impugned the two decisions made by the provincial executive. The respondent contends that whilst it is not in dispute that the municipality requested the provincial executive to intervene, however it is disputed that the provincial executive had the power to exercise authority without statutory or constitutional source. The respondent contended that what was envisioned by the decision to call for an intervention was that the provincial executive would prepare the recovery plan; that the national treasury would recommend appropriate changes to the municipality's budget; furnish the provincial finance minister with a determination of the reasons for the crisis and provide an assessment of the financial state of the municipality.

[30] The problem of the plan established by the respondent, so the argument goes, excluded the national treasury and this was a fatal flaw of the genesis of the intervention. According to the respondent, from the start the provincial executive

treated this as a permissive intervention in terms of section 139(1) of the Constitution as opposed to section 139(5) of the Constitution.

[31] In my view, a proper pronouncement on this critical issue lies in the proper examination and interpretation of section 139 of the Constitution as well as sections 139, 141 to 143 of the MFMA. The Constitution requires a purposive approach to statutory interpretation.[1] The starting point should be section 39(2) of the Constitution which provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[32] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[2] the Constitutional Court interpreted this provision to mean, *inter alia*, that the Constitution requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution.

[33] Mindful of the imperative to read and interpret legislation purposively in conformity with section 39(2) of the Constitution, I turn to consider the question whether, the intervention by the applicant in terms of section 139(5) of the Constitution was lawful or not. Section 139 of the Constitution makes provision for two types of interventions, namely, a permissive intervention in terms of section

[1] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC) at para 24.
[2] 2000 (10) BCLR 1079 (CC) at para 22,

139(1) and a mandatory intervention in terms of section 139(5). A provincial executive has a discretion in terms of section 139(1) to intervene at a local government if among others, the municipality cannot fulfil its executive obligations in terms of the Constitution and / or legislation. An intervention in terms of section 139(5) on the other hand, is obligatory and mandates the provincial executive to intervene where the municipality is in crisis in its financial obligations to provide services or to meet its financial commitments.

[34] A section 139(5) intervention is called for when the financial problems have reached crisis proportions calling for more intrusive mandatory remedial steps, in which case the intervention may entail both executive and legislative measures, the latter requiring the dissolution of the municipal council.[3] The obligation in terms of section 139(5) is peremptory and there is no discretion to be exercised by the provincial executive. It has been said that the intervention in terms of section 139(5) rests on two legs.[4] Firstly, manifest jurisdictional facts has to be present, in that the municipality has to be in serious or persistent material breach of its obligations to provide basic services; alternatively, the municipality has to be in serious or persistent material breach of its financial commitments. The second jurisdictional fact requires that either or both of these two factual situations must have been caused by a crisis in the municipality's financial affairs. For the sake of brevity, section 139(5) of the Constitution provides as follows:

> 'If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its

[3] Steytler & De Visser *Local Government Law of South Africa* (Issue 11, November 2018) at 15 – 46, 47.
[4] See *Unemployed People's Movement v Eastern Cape Premier and Others* 2020 (3) SA 562 (ECG) at para 52.

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 service 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 their recovery plan.'

[35] As alluded to hereinabove, Kannaland was in financial crisis that caused it to breach its constitutional obligations of service delivery and it admitted that it cannot meet its obligations or its financial commitment in a material fashion. The intervention by the applicant in terms of section 139(5) was a sequel to this crisis. The jurisdictional requirement set out above existed in this matter prior to the intervention by the applicant. In its founding affidavit the applicant alluded to the fact that during 2016 the municipality experienced a crisis in its financial affairs and as a result, it was in serious and material breach of its basic service delivery obligations and its financial commitments. The municipality requested the provincial council to intervene in terms of section 139(5). Indeed, the provincial executive intervened. It

must be stressed from the outset that the intervention had to comply with the Constitutional prescripts laid down in section 139(5) of the Constitution.

[36] The respondent questioned the decision of the provincial executive of 07 December 2016 for not requesting the MFRS to conduct the determination, assessment and preparation of the financial recovery plan. The respondent contended that the provincial executive instructed its provincial treasury to perform these statutory duties, even though this was a mandatory intervention in which sections 139(5) of the Constitution read with sections and 139(1) and 141(2) of the MFMA applied. To this end, the respondent argued that the resultant plan was a nullity and substantively unlawful. It is the respondent's contention that the plan was unlawful because a plan for a mandatory intervention needs to be consulted with the affected parties by the MFRS. It was contended that the provincial executive avoided the constitutional checks and balances introduced by parliament in mandatory intervention at its peril and that the resultant plan and intervention on the basis of such plan is also a nullity.

[37] In my view, this contention is correct. Section 139(5) of the Constitution must be read in tandem with sections 139(1) and 141 of the MFMA. Section 139(1) of the MFMA makes it abundantly clear that if a municipality as a result of a crisis in its financial affairs as was the case in Kannaland, admits that it is unable to meet its financial commitments, the provincial executive must request the MFRS to determine the causes for the financial crisis, to assess the municipality's financial state; to prepare an appropriate change to the municipality's budget and to submit to the MEC for finance in the province. Section 141 enjoins the MFRA as the only body that

may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139.

[38] In this case, the provincial executive requested the provincial treasury to prepare the recovery plan for the municipality in accordance with the procedural and substantive requirements set out in section 141 and 142 of the MFMA. The provincial executive also requested the provincial treasury to recommend appropriate changes to the municipality's budget and to provide the provincial minister with a determination and assessment. The impugned recovery plan records that it was prepared and finalised by the provincial treasury pursuant to the provincial intervention undertaken by the provincial executive in the municipality in terms of section 139(5) of the Constitution read with section 139(1)(a) and 141 to 143 of the MFMA.

[39] The applicant's contention that it was agreed that the provincial treasury would do the preparatory and consultative work in respect of the intervention which would later be vetted, to the extent necessary, by the MFRS is at variance with the express provisions of the section 139(1)(a) read with section 141 of the MFMA which clearly vests this responsibility upon the MFRS to prepare the recovery plan and to do the necessary consultations. It was asserted by the applicant that when the provincial executive adopted this procedure of delegating the provincial treasury to prepare the plan, it was because the provincial treasury was closer to the relevant municipality and better acquainted with its financial affairs.

[40] The provincial executive also contended that the collaborative approach allowed for the most efficient deployment of scarce public resources while at the same time ensuring that both national and provincial governments fulfilled their constitutional and statutory functions. In my view, this argument is misplaced and misses the point. It must be borne in mind that when the MFMA was passed, the legislature was aware of this fact. Notwithstanding this knowledge, the legislature entrenched and directed that a recovery plan must be prepared by the MFRS in the national treasury.

[41] Furthermore, and most importantly, the intervention of a provincial executive over a municipality has been circumscribed by legislation. Section 139(1)(a) of the MFMA is giving effect to section 139(5) of the Constitution which enjoins a provincial executive to impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide for basic services or its financial commitments. This section derives its authority from the Constitution which is the supreme law of the land in this Country. Section 139(5)(a)(i) of the Constitution also commands that the recovery plan for an intervention in terms of section 139(5)(c) must be prepared in accordance with legislation. The MFMA is the legislation envisaged by section 139(5)(a)(i) of the Constitution. Once the plan is prepared, it 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.

[42] As discussed above, section 141(2) provides that only the MFRS may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139. In my view, the legal duty imposed by section 141(2) is peremptory and

commanding. There is no implication in the relevant provision of the MFMA that this duty may be delegated or abdicated. As a consequence thereof, the provincial executive could not lawfully and constitutionally assume such duty as it purported to do.

[43] In my judgement, the plan prepared had to comply with the provisions of this Act. The plan had to be prepared by the MFRS based at the national treasury as prescribed by section 139(5) of the Constitution. It is a constitutional imperative that this responsibility had to be heeded by the relevant organ of state. As I see it, there are cogent reasons why a recovery plan of this magnitude should be prepared by the national treasury. The dispute between the parties in this matter is between two spheres of government concerning their respective constitutional and statutory authority. Parliament in its infinite wisdom sought to introduce constitutional checks and balances in the imposition of financial recovery plans by provinces on local governments. Thus, in the case of mandatory provincial interventions in terms of section 139(5)(a) of the Constitution, and sections 139(1), 141 and 142 of the MFMA it has imposed exceptional and exclusive duties upon the MFRS which is a function of national treasury and thus a part of the national sphere of government.[5]

[44] Steytler and De Visser[6] addresses this point with admirable brevity when he states:

> 'As soon as the provincial executive (through either the MEC for local government or the MEC for finance) becomes aware of the seriousness of the

[5] Section 157(1) provides that a Municipal Financial Recovery Service is hereby established as an institution within the public service. (2) The Municipal Financial Recovery Service from part of, and functions within, the national treasury.
[6] Steytler & De Visser *Local Government Law of South Africa* (Issue 11, November 2018) at 15 – 50(2).

situation, it must promptly request the municipal financial recovery service… to prepare a financial recovery plan. Unlike the case of a discretionary *intervention, where any suitable person may prepare a plan, the provincial executive's choice is restricted to the Recovery service.'*[7] (the emphasis is mine)

The plan is submitted to the MEC for finance for approval. Unlike the case with a recovery plan in terms of a discretionary intervention, where the MEC may make amendments, the role of the MEC is restricted in this case to reviewing two matters. Firstly, the MEC must verify that the procedural requirements for the drafting of the plan have been complied with, namely, who should be consulted, what factors to take into account, and the comment procedure. Secondly, the MEC must verify that the substantive requirements for a financial recovery plan have been met.'[8]

[45] Most importantly, the Constitution provides that the national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* ("*supra"*), the court noted that 'section 40 of the Constitution defines the model of government contemplated in the Constitution.[9] In terms of this section, the government consists of three spheres:

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[8] Steytler & De Visser *Local Government Law of South Africa* (Issue 11, November 2018) at 15 – 50(3).

[9] See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (3) SA 293 (CC) at para 43. Section 40 provides: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.'

the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and not assume any power or function except those conferred on it in terms of the Constitution.[10]

[46] The strict procedures laid down in the Constitution and the MFMA had to be complied with in order to protect the autonomy of the three spheres of government. The provincial executive in this matter usurped the statutory and constitutional responsibilities assigned to the national sphere of government by the legislature. These duties are set out in section 131(1)(a); 141 and 141(3) of the MFMA. The often quoted seminal piece of Japhta J, in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others,*[11] is apposite in this matter. The learned justice stated:

> 'The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by ss 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice to say, that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional

[10] Section 41(1) provides, in relevant part: 'All spheres of government and all organs of state within each sphere must - *(e)* respect the constitutional status, institutions, powers and functions of government in the other spheres; *(f)* not assume any power or function except those conferred on them in terms of the Constitution'

[11] 2010 (6) SA 182 (CC).

circumstances, but then only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.'[12]

[47] In my view, the procedure that was followed by the applicant in preparing the plan was inconsistent with the Constitution. It was impermissible and at best it is unconstitutional for the MFRS or the national treasury to abdicate its responsibilities and to delegate its authority to a different sphere of the government. I appreciate the fact that there were efforts made by the provincial treasury to comply with the peremptory provisions of the section 139(1)(a) and 141 of the MFMA however these efforts were made inconsistent with the Constitution. It was not competent for the provincial treasury to prepare a plan, a responsibility that is assigned to MFRS. In its replying affidavit, the applicant contends that the MFRS lacked the institutional capacity necessary to perform from scratch and without assistance, all of the ground work required for the tasks envisaged by section 139(1) of the MFMA. As a result, the provincial treasury and the provincial executive did much of the ground work for the intervention which was subsequently reviewed and approved by the national treasury. It is not clear on what basis it is alleged that the MFRS was incapable of discharging its constitutional duties. The sweeping statement of the provincial executive is not supported by the averments of Ms Kavitha Ruplal the Head of the Municipal Recovery Service. In her affidavit, she does not allude to the fact that the MFRS was incapable of discharging its constitutional duties. Instead, she states that it was agreed that the provincial treasury would do the preparatory and consultative work in respect of its intervention in the municipality.

[12] At para 43.

[48] It must be stressed that the averments of Ms Ruplal are contradictory to the decision that was taken by the Provincial Executive in December 2016. In its recovery plan the provincial executive stated as follows:

> "This financial recovery plan has therefor *been prepared and finalised by the provincial treasury pursuant to the provincial intervention undertaken by the provincial executive* in the municipality in terms of section 139(5) of the Constitution read with sections 139(1)(a) and 141 to 143 of the MFMA.' (The emphasis is mine)

[49] From this excerpt, it is observable that the decision was taken by the provincial executive in December 2016 that the provincial treasury should prepare a plan for the municipality in accordance with the procedural and substantive requirements set out in section 141 and 142 of the MFMA. Put differently, it was the provincial executive that directed the provincial treasury to conduct the necessary assessment and to prepare the financial recovery plan and to make recommendations on the appropriate changes to the municipal budgets and revenue raising measure. This, in my judgment was a statutory duty exclusively assigned to the national sphere of government in terms of section 141(2) of the MFMA. The MFRS was not involved in the decision to appoint the provincial treasury to prepare the plan and to do the necessary assessment and consultation. In my considered view, this decision offends the principle of legality and the rule of law. It was said this

principle was ‘implicit in the Constitution’ and reflected the notion that ‘the exercise of public power is only legitimate when lawful.[13]

[50] Notably, the plan itself does not record any collaboration between the provincial treasury and the MFRS. Instead, the plan records that it was prepared and finalised by the provincial treasury pursuant to the provincial intervention undertaken by the provincial executive. Furthermore, the email exchange between Ms Cossa of the MFRS and Ms Sigabi of the provincial executive paints a clear picture that the MFRS was only expected to make inputs on the plan that was prepared by the provincial treasurer. From the email correspondence dated 08 December 2016, the Acting Chief Director of Local Government Finance at the provincial treasury sent an email to Ms T Cossa of the national MFRS in which she attached a copy of the Cabinet resolution of section 139(5) intervention of the Constitution they were instituting at Kannaland municipality. She indicated that the intervention revolved around a financial recovery plan and that the province will play a major role as the provincial treasury with regard to this intervention. In response, on 01 February 2017, Ms Cossa addressed an email to Ms Sigabi stating that:

> “I hope your efforts at Kannaland municipality are progressing well. Kindly share Kannaland’s draft financial recovery plan. Upon review we will provide you *(sic)* inputs.”

[51] On 02 February 2017 Ms Sigabi responded to the email of Ms Cossa and stated:

[13] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 59.

‘Please find the draft FRP for Kannaland as tabled to their council for consideration and provisions of comments. As usual your comments will be greatly appreciated before this gets finalised.’

[52] On 07 February 2017 Ms Cossa of the MFRS wrote to the provincial treasury and stated:

“Find attached our inputs on the draft financial recovery plan for your consideration as you finalise the plan.

[53] From these correspondences, it is abundantly clear that this plan was prepared by the provincial treasury in conflict with the constitutional prescripts. In my view, providing an opinion or inputs that helps someone make a decision is not the same as assuming the responsibility of performance of a specific duty. In the same way, providing inputs is not the same as assuming responsibility for the MFRS’ obligations in terms of section 139(5) of the Constitution read with section 139(1) (a) of the MFMA. It must be stressed that the intervention of the provincial council was mandatory in terms of section 139(5) of the Constitution. The intervention of the provincial council was not discretionary as envisaged in section 137 of the MFMA in terms of which the provincial executive could take any appropriate steps referred to in section 139(1) of the Constitution. What I also find very concerning is that this plan was drafted and prepared by the provincial treasury and was tabled at the council meeting for consideration before it was even presented to the MFRS for comments. In my view, this irregularity and the illegitimate displacement of the MFRS’ responsibilities was in conflict with section 139 of the Constitution and sections 139(1)(a), 141 and 142 of the MFMA.

[54] I am in complete agreement with the views expressed by the respondent's counsel that the process envisaged in section 139(1)(a) of the MFMA was not done in line with the Act and the Constitution. It was the MFRS and not the provincial treasury that should have determined the reasons for the crisis in Kannaland. This was in conflict with the peremptory provisions of section 139(1)(a)(i) of the MFMA. The provincial executive assigned all the functions of the MFRS to the provincial treasury. It was anticipated that MFRS will assess the municipality's finances and prepare an appropriate plan for the municipality. In this case, this responsibility was done by the provincial treasury. In my view, the provincial treasury had no authority to prepare the plan or to recommend the changes of the municipality's budget. Furthermore, there is no indication that the final approval process for the approval of the plan was followed as required by section 143 of the MFMA. Section 143(2) enjoins the Provincial Minister to verify a recovery plan prepared by the MFRS and ensure that the process in section 141 had been followed and that the criteria in section 142 are met. Once the plan complies with sections 141 and 142 the Provincial Minister had to accept the plan of the MFRS and approve it.

[55] In my considered view, the applicant flagrantly disregarded the mandatory provisions of section 139(5) of the Constitution read with section 139(1)(a) of the MFMA. The provincial executive had no authority to impose a financial recovery plan of its own creation. It was a responsibility that could not be delegated to the provincial treasury. In addition, section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. An administrative decision

that fails to comply with the substantive prescripts of the Constitution or statutory provision is invalid and of no force or effect. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,*[14] the constitutional Court stated:

> 'It seems central to the conception of our Constitutional Order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.'[15]

[56] In essence, the provincial executive failed to comply with the substantive and the procedural requirements set out provided by the Constitution and the MFMA. The provincial executive did not respect and observe the separation of powers between the three spheres of government established in the Constitution. It is my considered view that such failure was fatal and unconstitutional. Pursuant to this finding, I deem it unnecessary to consider the reactive challenge raised by the respondent as it was dependent upon the outcome of this finding. Furthermore, notwithstanding the finding of the unlawfulness of the intervention I made hereinabove, I deem it proper to consider the second ground raised by the respondent relating to the appointment of the Administrator.

(b) The appointment of an Administrator

[14] 1999 (1) SA 374 (CC)
[15] At para 58

[57] As discussed above, it is common cause that in November 2016 at a meeting of officials from the Provincial Government and municipal officials, the mayor of the municipality confirmed that the municipality was experiencing financial crisis and could not meet its financial obligations. Subsequent to this meeting, on 02 December 2016 the municipality resolved to request the provincial executive to intervene in terms of section 139(5) of the Constitution and on 07 December 2016 the provincial executive resolved to intervene in the Municipality's affairs in terms of section 139(5)(c) of the Constitution.

[58] In *Premier, Western Cape and Others v Overberg District Municipality and Others*,[16] the court observed that 'broadly stated, section 139 of the Constitution permits and requires provincial governments to supervise the affairs of local governments and to intervene when things go awry.' The difference between section 139(5)(c) and 139(5)(b) is that in respect of the former, the provincial executive assumes responsibility for the implementation of the recovery plan to the extent that the municipality cannot implement the plan. This intervention is less drastic in that it allows the municipal council to remain in place, albeit with curtailed powers and responsibilities.

[59] The purpose is a co-operative governance relationship between the municipality and the provincial executive to implement the plan. The Provincial executive empowers and adds capacity in the municipality to implement the plan. Section 139(5)(b) on the other hand, entails a total take over by the provincial

[16] 2011 (4) SA 441 (SCA) at para 1.

executive. It is drastic and it requires the dissolution of the municipal council and for the appointment of an administrator. It has been said appointing an administrator is a stop gap option that is meant to pave the way for an election.[17]

[60] In *casu*, it is a common cause that the intervention by the Provincial executive was in terms of section 139(5)(c) of the Constitution as described above. The provincial executive did not dissolve the municipal council and it did not appoint the Administrator as envisaged in section 139(5)(b) of the Constitution when the intervention was imposed in December 2016. The proposed plan was prepared by the provincial treasury at the instruction of the provincial executive and was implemented on the municipality on 17 March 2017. On December 2018, the provincial executive determined that the municipality had not taken the necessary measures to implement the plan and it resolved to implement the plan. It also resolved to appoint an Administrator to implement the plan on behalf of the provincial executive. The administrator was vested with all powers necessary to ensure the proper implementation of the plan, including the municipality's executive powers.

[61] In my view, the appointment of the Administrator in terms of section 139(5)(c) by the provincial executive was in conflict with the MFMA. If the provincial executive intended to appoint an Administrator as it purported to do in this case, it should have invoked section 139(5)(b) and dissolved the municipal council. The Constitution and the MFMA does not envisage a dual or a concurrent intervention and / or administration in terms of section 139(5)(b) and 139(5)(c). If the municipality was not implementing the recovery plan as it is alleged by the applicant, it was expected of

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17 *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* (18577/2020) [2020] ZAGPPHC 119; [2020] 2 All SA 793 (GP) (29 April 2020) at para 89.

the executive council to dissolve the municipal council and appoint an Administrator until a newly elected municipal council was declared elected. In my view, an intervention in terms of section 139(5)(b) cannot co-exist with an intervention in terms of section 139(5)(c) as this will create two conflicting centres of power.

[62] To this end, I agree with the views expressed in *Mere v Tswaing Local Municipality and Another,*[18] where the court found that any intervention in terms of section 139(1)(c) of the Constitution entails an actual dissolution of the municipal council until it can be replaced by a newly elected council. The Administrator is for all practical purposes an interim council, to be replaced with a new council once elected.

[63] Accordingly, the argument expressed by the respondent's legal representative is apposite in this regard. He contended that if an administrator is appointed, but the council remains in place, one can anticipate perpetual squabbling between these competing centres of power. The respondent's counsel contended that this is what happened in Kannaland. Counsel asserted on behalf of the respondent that there was an unhealthy situation in which the council remained unhappy with what it viewed as usurpation of powers by distant Cape Town, but the Administrator continually found himself frustrated by what, from his point of view, is unreasonable resistance from the very local leadership that required drastic intervention in the first instance.

[64] It must be stressed that the Constitution only provides for the appointment of an Administrator in the event of a dissolution of the council in terms of section

[18] [2015] 10 BLLR 1035 (LC).

139(5)(b) of the Constitution. In this case, the municipal council was not dissolved and section 139(5)(b) was not engaged by the provincial executive. The use of an Administrator to take over the executive functions of the municipality while the council is still in office is no remedy and such process is not included anywhere in section 139. Indeed, this practice has no basis in law. The subsequent appointment of the Administrator by the provincial executive while it purported to act in terms of section 139(5)(c) of the Constitution was in my considered view unlawful and inconsistent with the Constitution. This leads me to the third issue for consideration.

Whether or not the Municipality can terminate the intervention pronounced by the executive as it attempted to do in November 2020.

[65] It is common cause that on 16 November 2020 the municipal council held a special council meeting in which a resolution was passed lifting the mandatory provincial intervention imposed by the provincial executive. At this meeting, the municipal council resolved to recall its previous resolution to ask for intervention in terms of section 139 and that the intervention be lifted with immediate effect. The Administrator appointed by the provincial executive informed the council that they had no power to terminate the intervention. That under section 139(5) of the Constitution, an intervention is started and brought to an end by the relevant provincial executive. Pursuant thereto, there were a number of correspondences exchanged between the provincial executive and members of the municipal council on the legality of the termination of the intervention. The Local Government Minister as well addressed a correspondence to the respondents on 20 November 2020 informing them that the plan remains in place and that they should cooperate with

the Administrator. Instead, on 08 December 2020 the acting executive mayor addressed a correspondence to the Administrator informing him that he should vacate the municipal offices as council resolved to uplift the intervention.

[66] It has been argued that the municipal council had no power to bring the mandatory intervention to an end. The court was referred to section 148 of the MFMA which regulates the termination of mandatory provincial interventions. The relevant part of that section reads as follows:

(2) A mandatory intervention referred to in section 139 must end when –

(a) the crisis in the municipality's financial affairs has been resolved; and

(b) the municipality's ability to meet its obligations to provide basic services or its financial commitments is secured.

(3). When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify –

(a) the Municipality;

(b) the Minister, in the case of a mandatory intervention;

(c) the Cabinet member responsible for local government;

(d) any creditors having pending litigation against the municipality;

(e) the provincial legislature;

(f) organised local government in the province.

[67] I am in agreement with the views expressed by applicant that a provincial intervention may only be brought to an end by the provincial executive, which will

notify the municipality accordingly. From the above provisions, it is also clear that intervention only comes to an end when the financial crisis of the municipality has been resolved and the municipality is able to provide basic services and meet its financial obligations. I also share the views express by my sister Mangcu-Lockwood AJ (as she then was) who dealt with part A of this matter that it is the municipality that receives notification from the provincial executive not the other way round.[19] The learned justice observed that it would not make sense, in any event, for the termination of a mandatory intervention to be at the behest of a municipality, especially when it was the conduct of the latter that led to the mandatory intervention in the first place.

[68] Having said that, I must emphasise the fact that the circumstances of this case are a bit novel and different. As discussed hereinabove, the provincial executive appropriated authority to itself, that it did not have. It purported to delegate to the provincial treasury the statutory duty to determine the reasons for the crisis in the financial affairs of Kannaland; to assess the financial state of the municipality, to consult with the statutory parties, and to prepare a financial recovery plan. This responsibility is exclusively assigned to the MFRS of the national treasury. As I have found earlier in this judgment, the mandatory intervention under section 139(5)(a) of the Constitution inclusive of assumption of power by the provincial executive and the purported power to delegate the provincial treasury to prepare the recovery plan are contrary to the peremptory provisions of ss 139(1), 141 and 142 of the MFMA which exclusively assigns those statutory duties to the MFRS. In my view the plan was in conflict with the constitutional right from the beginning and is unlawful.

[19] At para 46.

[69] Furthermore, the decision of the provincial executive to appoint an Administrator, while purporting to act in terms of section 139(5)(c) of the Constitution was unlawful and inconsistent with section 139(5)(c) of the Constitution. I am aware that the intervention, the plan as well as the appointment of the Administrator have been extant since March 2017 and December 2018 respectively, without any objection from the respondents, however that does not validate the fact that the applicants acted contrary to the provisions of the Constitution and the MFMA. *In Department of Transport and Others v Tasima (Pty) Ltd,*[20] the Constitutional Court stated as follows:

> 'These decisions make patent that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This includes the exercise of public power. Moreover, when confronted with unconstitutionality, courts are bound by the constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to "morph into a valid act". However, for the reasons developed through a long string of this court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality.'[21]

[70] What I find very concerning in this intervention is the protracted and inordinate length of the intervention. It started in 2016 and it is still extant to date. The court was informed that the purported plan is proposed to last until the local government

[20] 2017 (2) SA 622 (CC)
[21] At para 146.

elections in October/November 2021. The contract of the Administrator was also extended until the new 2021 local government elections. In my view, an intervention of this nature that is aimed at lasting for five years (from one election to the other) is not a temporary measure that is envisioned by the Constitution. This is tantamount to a permanent intervention under the guise of section 139 of the Constitution. In my view, it infringes the functional and operational integrity of the three arms of government.

[71] This extended intervention coupled with the appointment of an Administrator with the municipal's executive powers caused conflict at the municipal council as it created two centres of power. The Administrator conflicted with the council and the municipal manager of the municipality. This prompted the council to pass a resolution terminating the intervention. In my view, the prolonged intervention infringes on the autonomy of the local government. It was certainly not temporary or to the extent necessary as contemplated in the Constitution. National and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures.[22]

[72] As far as the allegations concerning the fact that the municipality is at the verge of making huge financial commitments with Innovasure (Pty) Ltd a renewable energy company, I am of the view that there is no agreement at this stage between Innovasure and the Municipality. At this stage there is currently a council approval for the memorandum of understanding which is not a binding agreement. Furthermore,

[22] *City of Johannesburg Metropolitan v Gauteng Development Tribunal and Others* 2010 (6) SA 293 (CC) at para 44.

from the documents filed it would appear that Innovasure would carry all the risk and provide the funding even if a final agreement is signed. However, if such agreement is considered it is expected that the municipality would follow the correct processes as proposed by the national treasury to engage the services of Innovasure should it become necessary.

[73] It has also been argued that the municipality is wasting money on redundant personnel. It is common cause that the council voted to amend its staff component. The municipality has indicated that no staff will be actually appointed pursuant to the revised staff establishment and that the amendment does not automatically entail that new officials will necessarily be hired to fill the vacancies. The municipality has also alluded to the fact that in the interim the vacant essential posts will be filled by internal secondments. If I understood the municipality' case correctly, this entails that there will be no additional expenditure to the municipality.

[74] In any event, it is the municipal council that enjoys legal authority to employ personnel that are necessary for the effective performance of its function. However, it is expected that in the exercise of that right, the municipality will act responsibly and also take into account its budgetary constraints and ensure that it does not prejudice its residence by appointing redundant staff. However, I am of the view that in this case there is no basis in law or fact why the court should interfere with the decision taken by the municipality which in my view serves the best interest of the municipality and its community.

[75] From the aforegoing, I am of the view that the preparation and the imposition of the implementation plan by the applicant was unlawful and unconstitutional. As a consequence thereof, the applicant's application should fail.

[76] In the result, the following order is granted.

76.1 The applicant's application is dismissed with costs, such costs to include the costs of two counsels and the costs for the hearing of the matter in respect of Part A.

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT

Appearances:

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	Adv. Ashley Pillay
Instructed by:	**Shireen Karjiker State Attorney**
Counsel for Respondent:	Adv. Denzil Potgieter
	Adv. Jean Pierre Snijders
Instructed by:	**Steven Hill McGregor Erusmus**