



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 186/14

In the matter between:

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY Applicant

and

**CHAIRPERSON, NORTH WEST PROVINCIAL
EXECUTIVE COMMITTEE** First Respondent

PREMIER, NORTH WEST PROVINCE Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF LOCAL GOVERNMENT
AND HUMAN SETTLEMENTS, NORTH WEST
PROVINCE** Third Respondent

**MINISTER, COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS** Fourth Respondent

**CHAIRPERSON, NATIONAL COUNCIL
OF PROVINCES** Fifth Respondent

**SPEAKER, PROVINCIAL LEGISLATURE
OF THE NORTH WEST PROVINCE** Sixth Respondent

KHULU NAIR N.O. Seventh Respondent

INDEPENDENT ELECTORAL COMMISSION Eighth Respondent

Neutral citation: *Ngaka Modiri Molema District Municipality v Chairperson,
North West Provincial Executive Committee and Others* [2014]
ZACC 31

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J

Decided on: 18 November 2014

Summary: Section 167(6) of the Constitution — direct appeal and access — urgency in ensuring the immediate provision of basic sanitation, water and other services

Section 139(1) of the Constitution — provincial intervention in local government — no need for Court to intervene — urgent interim needs of community met by administrator’s powers following refusal of temporary interdict order

Sections 152 and 153 of the Constitution — sections 4(2)(f) and 73 of the Local Government: Municipal Systems Act — basic municipal services

Section 27(1) of the Constitution — right of access to water

ORDER

On appeal from the North West High Court, Mahikeng (Hendricks AJP) and in the application for direct access:

1. The fourth respondent’s application for condonation is granted.
2. The application for leave to appeal is dismissed.
3. The application for direct access is dismissed.

JUDGMENT

THE COURT:

[1] Municipalities are the face of government to the communities they are supposed to serve. If they fail in their executive obligation to provide services to the people, and if exceptional circumstances warrant it, the Constitution provides that the Provincial Executive may step in to dissolve the Municipal Council and appoint an administrator.¹ That situation provides the background to this application.

[2] The North West Provincial Executive Council (Province),² purportedly acting in terms of section 139(1)(c) of the Constitution, dissolved the applicant (Municipality) on 3 September 2014 and appointed the seventh respondent, Mr Nair, as administrator. The Municipality then approached the North West High Court, Mahikeng (High Court) for two kinds of relief.³ In Part A of its notice of motion, the Municipality sought temporary relief to prevent the administrator from interfering in the Municipality's affairs and for a suspension of the decision to dissolve it

¹ Section 139(1) reads in relevant parts:

“When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

...

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.”

² Represented by the first, second and third respondents.

³ The Municipality did so at the instance of the suspended municipal manager.

(temporary interdict application), pending finalisation of the relief sought in Part B. In Part B, the Municipality sought the review and setting aside of the decision to dissolve it (review application).

[3] The High Court dismissed the temporary interdict application. The review application is still pending in the High Court. The Municipality seeks leave to appeal directly to this Court against the refusal to grant the temporary interdict application and also for direct access in terms of section 167(6)(a) of the Constitution for the review application to be heard by this Court.⁴

[4] The Municipality seeks to justify this direct appeal and access to this Court on the ground of urgency. Urgency there is indeed, but it lies in ensuring the immediate provision of basic sanitation, water and other services to the affected communities and not in restoring the status of municipal councillors to the position from which they complain they have been unjustly removed.

[5] The nub of the Municipality's complaint was summarised thus in the High Court judgment:

“[A]s a municipality, [it] is entitled to remain in office and not be dissolved or replaced by an administrator because the councillors were elected by the communities. Furthermore, the decision to dissolve the council had infuriated a

⁴ Section 167(6) reads in relevant parts:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court”.

number of officials who resisted the implementation of the intervention of the North West Provincial Government. The conduct of these officials, so it is alleged, caused turmoil and instability in the [Municipality's] administrations and seriously prejudic[ed] the [Municipality] in the execution of its function and powers. If the interim relief is granted, so it was further contended, the resistance to the enforcement of the decision will also be addressed.”⁵

[6] In the founding papers in this Court the Municipality makes allegations that rights, in particular, the right of access to water, have been infringed or threatened.⁶ For example, the Municipality alleged that the intervention by the Province has had “an extremely prejudicial impact upon the [Municipality] . . . more importantly the community which it serves, resulting . . . in a failure to provide water services to certain communities within the municipal area”. In motivating the granting of leave to appeal and direct access, the Municipality points to the “prominence which the municipal service delivery (and in some instances, the lack thereof) is currently receiving”.

⁵ *Ngaka Modiri Molema District Municipality v Chairperson of the North West Provincial Executive Committee and Others*, unreported judgment of the North West High Court, Mahikeng, Case No M390/2014 (High Court judgment) at para 8.

⁶ Section 27 reads:

- “(1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

See also *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC) at paras 47-50.

[7] The Municipality further points out that in early October the municipal services of water and sanitation came to a standstill and that these services were not provided to the affected communities. This is because staff members conducting emergency services and water and sanitation services were locked out of the Municipality's premises to the "detriment of service delivery and the community." The High Court did refer to the argument that "the local community residents in the municipality area . . . will suffer irreparable harm and prejudice", but found no plausible reason why the Municipality would not obtain substantial redress for its own concerns in due course.⁷

[8] Relying on this Court's decision in *OUTA*,⁸ the High Court dismissed the temporary interdict application. It found that the Municipality, as distinct from individual councillors, suffered no harm, let alone irreparable harm.⁹ It noted that it was not sufficient to allege in the replying affidavit that councillors will suffer harm because "of loss of earnings in salaries".¹⁰

[9] This reveals a fundamental flaw in the Municipality's application for leave to appeal against the refusal by the High Court of the temporary interdict application. It needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councillors, but in the continued disruption of basic essential services to the people and communities the Municipality

⁷ High Court judgment above n 5 at paras 15-6.

⁸ *National Treasury and Others v Opposition to Urban Trolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223; 2012 (11) BCLR 1148 (CC) (*OUTA*) at paras 45-7.

⁹ High Court judgment above n 5 at para 11.

¹⁰ *Id* at para 12.

is supposed to serve. The people who may suffer the real harm are not party to these proceedings. It is because of the alleged failure in its executive obligation to them that the Municipality was dissolved.

[10] For this and the other reasons relating to the interests of justice referred to in *OUTA*¹¹ the application for leave to appeal against the refusal of the temporary interdict application must fail. Neither the Municipality nor the municipal councillors will suffer irreparable harm. If the review application is successful they may be re-instated. There is no urgency affecting their interests. The potential urgency lies in ensuring the delivery of basic services to the people and communities. In light of the allegation that it was the Municipality itself that failed to ensure the provision of these services in the first place, the High Court can hardly be faulted for finding that the balance of convenience did not favour a continuation of that allegedly dire situation.

[11] For largely the same reasons it is not in the interests of justice for this Court to grant direct access to determine the review application.¹² The urgency does not relate to the interests of the Municipality and the determination of the section 139 constitutional dispute is one that ordinarily would not call for this Court's immediate intervention. It must run its course in the High Court.

¹¹ *OUTA* above n 8 at paras 22-9.

¹² See section 167(6)(a) of the Constitution quoted above at n 4. For a conspectus of relevant considerations, see *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 26; *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 12-21; *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at paras 9-16; and *Satchwell v President of the Republic of South Africa and Another* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

[12] However this Court may not ignore the plight of those people who are not parties to the court proceedings and whose interests lie at the heart of the matter, namely the people and communities who reside within the area of jurisdiction of the Municipality. We have a wide just and equitable remedial jurisdiction that is not necessarily dependent on a finding of constitutional impropriety.¹³

[13] The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation. In *Joseph*¹⁴ this Court held that sections 152 and 153 of the Constitution, which set out the objectives of local government, read together with sections 4(2)(f) and 73 of the Local Government: Municipal Systems Act,¹⁵ impose an obligation on every municipality to provide basic municipal services to their inhabitants irrespective of whether they have a contractual relationship with the municipality or not.¹⁶

[14] In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. At the very minimum, the state

¹³ *Zulu and Others v eThekweni Municipality and Others* [2014] ZACC 17; 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC) at para 62; *Minister of Safety and Security v Van Der Merwe and Others* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) at para 59; and *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at paras 95-7.

¹⁴ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55; 2010 (3) BCLR 212 (CC).

¹⁵ 32 of 2000.

¹⁶ *Joseph* above n 14 at paras 35-40.

must refrain from interfering with existing rights.¹⁷ It is clear that where access to water, sanitation, electricity and fire and emergency services once existed but is then taken away due to a dispute within or relating to the management of a municipality, there may be a violation of fundamental rights of the inhabitants.

[15] On 22 October 2014 we issued the following directions:

“The applicant and the respondents are directed to file affidavits not exceeding 20 pages, on or before Monday, 27 October 2014, on the following matters—

- a) whether there has been any cessation or interruption in the provision of basic municipal services to the communities within the area of the Ngaka Modiri Molema District Municipality;
- b) if the answer to a) is yes, what has been the cause; extent and geographic reach; duration; and the period over which the cessation or interruption has occurred;
- c) in the circumstances of this case, who, under the Constitution or any law, is obligated to provide said basic municipal services; and
- d) if basic municipal services are not presently being provided, why this Court should not order the individuals or officials responsible in terms of the law for providing them to do so forthwith.”

[16] The respective responses to these directions are instructive. There is agreement that there has been widespread and continuing disruption of basic services to people and communities. In response to the Court’s directions, the Municipality states that there is uncertainty pertaining to who is lawfully in charge of its operation. Further, “a significant and notable increase in problems have been experienced in the municipal area . . . pertaining to the rendering of the municipal services”. Because of

¹⁷ See *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 46 and *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 34.

the non-provision of these services, the Municipality further alleges that people have rioted by burning tyres and blocking roads, throwing rocks into non-functioning boreholes and destroying non-functioning infrastructure.

[17] The administrator, Mr Nair, states that some communities in the Dinokana, Madibogo and Setlagole villages have not had water for years, even though the district received funding for water and sanitation. He adds that there were further problems, in respect of the quality of the water and sanitation services, that led the national government to issue a warning about the drinking of water in the Municipality. The administrator also asserts the communities have protested due to the interruption in services.

[18] The administrator explains further that an emergency plan is in place aimed at restoring services and that “virtually all areas affected by the disruption in services had been reconnected. This also explains why there has been relative calm in community protests”. He identifies the employees who are important in providing the services and states that he does “not intend to exclude [him]self in the list of people who may be ordered to continue with the provision of services to the communities”. He states that he does not have a difficulty with any order by the Court compelling the provision of services and that an order of this kind will assist him in the discharge of his responsibilities as administrator. At the end of the affidavit he states:

“However, when the Court considers whether to grant any order I ask that cognisance be taken of the facts on the ground as described in the [Joint Operations Centre] report attached hereto as well as the plan which I have instituted, which is also

attached hereto. In this regard I ask that a balance be struck between the supervision by this Court and the steps which are already being taken to address the breakdown in the services”.

[19] The fourth respondent (Minister) responded late to the directions and seeks condonation. The explanation given is reasonable. Condonation must be granted.

[20] The Minister’s affidavit in the main confirms the administrator’s version insofar as the reason for intervention to restore basic services, the disruption in the process and the return to normality are concerned. The Minister underscores the administrator’s authority to act in restoring basic services.

[21] Despite this, the Municipality makes the assertion that “a court order directing the individuals and officials to perform the services will not necessarily resolve the service delivery problems” because the breakdown in services is “the direct result of the unlawful usurping of the powers and functions of the municipal administration”. It reiterates that what is needed is an order directing the administrator not to usurp and exercise those powers and functions.

[22] This reaction harks back to the original grounds the temporary interdict application was founded on, namely that officials were “infuriated” by the dissolution decision and their conduct “caused turmoil and instability” in the administration.¹⁸ That this reprehensible conduct is continuing is apparent from the administrator’s

¹⁸ See [5].

affidavit. He records that there has been resistance by some employees that necessitated disciplinary measures to “normalise the situation”. He states that, “[t]o a large extent, as at the time of the filing of this affidavit, the situation at the [M]unicipality has returned to normality, although there are still areas of disruption”. It is common cause that the Municipal Council has resolved to resist any attempt to implement the decision and that the employees of the Municipality who have returned to work resist taking instructions from the administrator.

[23] The effect of dismissal of the application for leave to appeal against the refusal of the temporary interdict application by this Court is that, pending the finalisation of the review application, the lawfulness of the administrator’s intervention in restoring services is beyond question. That effectively provides the administrator with the legal authority that will assist him in the discharge of his responsibilities, rendering any further order this Court might issue now superfluous. If any further interference occurs after the order of this Court, the remedy for the administrator would be to approach the High Court for relief. And the same goes for complaints about any alleged failure in performance by him of his responsibilities.

[24] In view of the fact that an adverse costs order against the Municipality will place an additional financial burden on residents, no costs order will be made.

Order

[25] The following order is made:

1. The fourth respondent's application for condonation is granted.
2. The application for leave to appeal is dismissed.
3. The application for direct access is dismissed.

For the Applicant:

Lizel Venter Attorneys.

For the Second, Third and Seventh Respondents:

Hogan Lovells (South Africa)
incorporated as Routledge Modise Inc.

For the Fourth Respondent:

State Attorney.