IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 3752/2022

In the matter between:

RETIEF ODENDAAL	First Applicant
DEMOCRATIC ALLIANCE	Second Applicant

and

MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS EC	First Respondent
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent
ECONOMIC FREEDOM FIGHTERS	Fourth Respondent
NORTHERN ALLIANCE	Fifth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY	Sixth Respondent
FREEDOM FRONT PLUS	Seventh Respondent
DEFENDERS OF THE PEOPLE	Eight Respondent
PATRIOTIC ALLIANCE	Ninth Respondent
ABANTU INTEGRITY MOVEMENT	Tenth Respondent
UNITED DEMOCRATIC MOVEMENT	Eleventh Respondent
AFRICAN INDEPENDENCE CONGRESS	Twelfth Respondent
GOOD	Thirteenth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Fourteenth Respondent
MIINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifteenth Respondent

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

JUDGMENT

POTGIETER J

A. INTRODUCTION

[1] The first respondent ("the MEC") gave notice on 27 July 2022 to the Executive Mayor of the second respondent ("the Metro") in terms of section 16(3) of the Local Government: Municipal Structures Act[1] ("the Municipal Structures Act") to amend the existing notice in terms of section 12 of the Municipal Structures Act in respect of the Metro. The effect of the amendment is to change the existing type of the Metro from a mayoral to a collective executive system with ward participation. The latter system allows for the exercise of executive authority through an executive committee in which the executive leadership of the municipality is collectively vested. The former system vests the executive authority in the mayor assisted by a mayoral committee. The amendment was made on 1 December 2022 and was promulgated in the Provincial Gazette on 12 December 2022 effecting the said change in the executive system of the Metro.

[2] The change spawned the present application which was launched as a matter of urgency on 19 December 2022 by the then Executive Mayor, as the first applicant, and his political party, the Democratic Alliance ("DA"), as the second applicant. As more fully set out below, the first applicant has since been removed as Executive Mayor through a motion of no confidence and the governing DA led coalition has lost power to an African National Congress ("ANC") led coalition.

[3] The 3rd - 14th respondents are the various political parties that are represented on the municipal Council and the 15th respondent is the national Minister of Cooperative Governance and Traditional Affairs.

[4] The application was brought in two parts as had become the wont in matters of this nature. Part "A", which I am seized with, is for interim interdictory relief preserving the

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[1] Act 117 of 1998

status quo ante pending the determination of Part “B”, (which is presently standing over), dealing with the review of the decision of the MEC to change the executive system (“the impugned decision”).

[5] The application is opposed by the MEC who filed a comprehensive answering affidavit. The 5th, 8th, 11th, 13th and 14th respondents all filed affidavits in largely similar terms supporting the relief sought by the applicants. The affidavit of the 13th respondent (“*GOOD”)* was deposed to on 23 December 2022 after it had filed a notice on 21 December 2022 to abide the decision of Part “A”. All the affidavits in effect mirror the averments in the founding affidavit. None of the other respondents has entered the matter.

[6] Directions were sought and issued on 19 December 2022 in terms of Rule 12(a)(i) of the *Eastern Cape Joint Rules of Practice* stipulating a timetable for the filing of papers and heads of argument and enrolling the matter for hearing on 30 December 2022. On the latter date the matter was postponed by agreement between the applicants and the MEC to 16 February 2023 stipulating a new timetable for filing papers and heads of argument. The operation of the MEC’s notice promulgated on 12 December 2022 was suspended until the final determination of Part “A” of the application and costs were reserved.

[7] On 10 February 2023 *GOOD* filed a more substantive answering affidavit deposed to on 9 February 2023, amongst others, reiterating its support for the relief sought by the applicants. The stated purpose of the affidavit was, *inter-alia,* to provide evidence in support of the application. It in fact made common cause with all material aspects of the applicants’ case. No condonation or leave was sought with regard to the filing of the further affidavit.

[8] On 15 February 2023, the MEC filed a notice of intention to apply at the hearing of the matter on 16 February 2023, for the striking out of the answering affidavits of *GOOD* as well as the 5th, 8th, 11th, and 14th respondents.

[9] Only the applicants, the MEC and *GOOD* were represented at the hearing on 16 February 2023. There were no appearances for any of the other respondents. Under those circumstances the presiding judge understandably expressed concerns about proceeding with the matter in view of the striking out application that had been filed the previous day. The upshot was that the matter was postponed to 16 March 2023 and *GOOD,* the 5th, 8th, 11th, and 14th respondents were afforded an opportunity until 23 February 2023 to indicate their attitude to the striking out application in writing and to file any submissions by 8 March 2023 with the remaining parties being able to respond by 10 March 2023. The costs were again reserved.

[10] On 24 February 2023 *GOOD* brought an application conditional upon the striking out application of the MEC succeeding, to be joined as the third applicant and that its answering affidavit and supplementary answering affidavit stand as its founding affidavits in the matter.

[11] This resulted in the MEC bringing an application, conditional upon the conditional application of *GOOD* succeeding to be joined as the third applicant, that the further answering affidavit of *GOOD* filed on 10 February 2023 be struck out.

[12] All these interlocutory applications involving the MEC and *GOOD* are opposed, save for *GOOD's* joinder application and the application for its 23 December 2022 answering affidavit to stand as its founding affidavit.

[13] At the hearing before me on 16 March 2023, the applicants were represented by Mr Mullins SC and Mr Bishop, the MEC by Mr Ngcukaitobi SC and Ms Sephton, and *GOOD* by Mr Van Reenen. None of the other respondents appeared at the hearing. The parties agreed to argue the interlocutory issues together with the merits of the application and for *GOOD* to be considered as a co-applicant for this purpose. It is apposite to deal with the interlocutory issues first before considering the merits of the application.

B. APPLICATION TO SET ASIDE THE ANSWERING AFFIDAVITS

[14] In view of the MEC's aforesaid stance in respect of *GOOD's* joinder as the third applicant and the status of its initial answering affidavit of 23 December 2022, it is only *GOOD*'s further affidavit filed on 10 February 2023 that remains included in the striking out application together with the answering affidavits of the 5th, 8th, 11th and 14th respondents.

[15] Only *GOOD* is opposing the striking out application.

[16] The application was brought on the grounds that it constituted an irregularity in violation of the accepted rules relating to motion proceedings for the respondents in question to have filed answering affidavits supporting the relief sought by the applicants. They could not do so under the guise of being respondents. The options at their disposal were to oppose the relief sought in which event they were entitled to file an answering affidavit refuting the applicants' case, to elect not to oppose the application but abide by the decision of the court, or be joined as applicants in order to make out their own case in support of the relief being sought by the applicants. The answering affidavits must therefore be struck out.

[17] The MEC submitted in his heads of argument that the application was brought on the basis that the relevant affidavits constituted irregular or improper proceedings and did not comply with rule 6 or the law dealing with the adjudication of motion proceedings.

[18] Reference was made to the well-known rule ordinarily applicable to disputes of fact in motion proceedings which was set out, *inter-alia,* in *Plascon Evans*[2]. In light of the

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

Plascon Evans approach, the respondent is required to deal in its answering affidavit with the case made out in the founding affidavit. It follows that the respondent is not obliged to deal with allegations in the affidavit of a co-respondent which happened to support the applicant's case, because there is no *lis* between the co-respondents. As a corollary the applicant cannot seek to make out its cause of action based on allegations in the answering affidavit which did not form part of the case in the founding affidavit. Since the co-respondent is not entitled to claim any relief until it enters the fray as an applicant, there is nothing for the respondent to oppose.

[19] It was pointed out that the further answering affidavit of 10 February 2023 contained evidence not brought before the court by the applicants and which is not relevant to the legal dispute, and furthermore supported a ground of review not raised by the applicants. The affidavit was not filed with the leave of the court (as is necessary when a party seeks to file a second affidavit). No condonation application was filed with it and no notice was filed withdrawing the earlier notice to abide. It was submitted that this amounted to an ambush.

[20] The MEC relied upon the matter of *Kruger & Others v Aciel Geomatics (Pty) Ltd*[3] for the proposition that it is not permissible and the court had no discretion to allow a co-respondent to file answering papers in which it seeks the relief sought by the applicant, while not taking steps for itself to be joined as an applicant in the proceedings. He contended that this would place the respondent in the position where it had to conduct a defence on two fronts, one against the applicant and one against the co-respondent.

[21] It was accordingly submitted on behalf of the MEC that the answering affidavits of the 5th, 8th, 11th, and 14th respondents and the further affidavit of *GOOD* deposed to on 9 February 2023 should be struck out with costs.

[22] Much of the argument on behalf of *GOOD* was devoted to the MEC's non-compliance with the procedure in rule 23. It was submitted that the application should

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[3] 37 ILJ 2567 (LAC) para [11]; [2016] ZALC 29. [*"Aciel Geomatics"*]

be dismissed on that ground alone. This is, however, a mischaracterisation of the application. The gravamen of the MEC's attack was that the relevant affidavits constituted irregular or improper proceedings. The application thus effectively resorts under rule 30 for the setting aside of the affidavits. However, virtually identical procedural requirements attach to both rule 23 and rule 30 applications.

[23] It is readily apparent that the application to strike out was sparked off by the further affidavit that *GOOD* filed on 10 February 2023, shortly before the hearing on 16 February 2023. As indicated, the only issue between the MEC and *GOOD* concerned the latter affidavit. Neither party complied with any of the prescribed procedural requirements in respect of either the filing of or opposition to that affidavit. This failure should in my view, not constitute a bar to dealing with the present application. The matter was fully argued and it is in the interests of justice for it to be decided.

[24] *GOOD* furthermore submitted that the MEC did not allege, nor could he have suffered, any prejudice due to the filing of the relevant affidavits which to a large extent dealt with issues that had already been traversed in the applicants' founding and replying papers. It was pointed out that the High Court has in fact permitted respondents to deliver papers making submissions in support of the relief sought by the applicant. Reference was made in this regard in the 13th respondent's heads of argument to *Resilient Properties (Pty) Ltd v Eskom Holdings & Others*[4]. In that matter the court had no difficulty with Eskom, as a respondent, supporting part of the relief sought to allow the applicant to make payment directly to Eskom in order to avoid having its electricity supply being interrupted due to the local authority having failed to pay its account to Eskom. Reference was also made to *Democratic Alliance v Minister of International Relations and Co-operation & Others (Council for the Advancement of the South African Constitution intervening)*[5]*, Public Protector of South Africa v Speaker of the National Assembly & Others*[6], and *Magidiwana & Another v President of the Republic of South Africa & Others*[7] where the court, according to *GOOD,* had no difficulty that some of the

4 2019(2) SA 577 (GJ) ["*Resilient Properties"*]
5 2017(3)SA 212 (GP) ["*Democratic Alliance*"]
6 [2023] 1 All SA 256 (WCC)
7 [2014] 1 All SA 76 (GNP)

respondents supported the relief that was sought by the applicant. It was also submitted that the matter of *Aciel Geomatics* relied upon by the MEC is distinguishable for a number of reasons. This included that, unlike the respondent in *Aciel Geomatics, GOOD* is not seeking independent relief but merely supports the relief sought by the applicant (although it must be added that this has changed now that it has brought a conditional unopposed application to be joined as the third applicant and itself seeking the relief applied for by the applicants); that *GOOD* has never been misleading or been a "*Trojan horse"* in respect of its support for the relief sought by the applicants; the *Plascon Evans* test finds no application in the matter; and *GOOD* is not seeking to advance a case while not being held liable for costs. During argument Mr Van Reenen handed up a copy of the judgment in the matter of *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning & Another*[8] where the second respondent, a municipality, had initially filed a notice to abide by the court's decision. It subsequently filed an answering affidavit supporting the relief sought by the applicant and containing wide-ranging attacks on the first respondent and his department generally. The latter applied for the striking out of the said affidavit on the ground that it constituted an abuse of the court process. The court in that matter held that the first respondent failed to show that it suffered any prejudice or that there was an abuse of the court process. The court held that it was open to a respondent who abides to file an affidavit setting out relevant facts and its position with regard to the application. This could be done even after having filed a notice to abide.

[25] The MEC submitted, as already indicated, that he was prejudiced because instead of having to contend with the applicants' case only, he was now also required to conduct a defence on the further front constituted by the case advanced by *GOOD*. He submitted that the cases cited on behalf of *GOOD* are of no assistance to it and pointed out that in *Resilient Properties,* Eskom supported only one aspect of the relief while it contested the remainder of the relief. *Aciel Geomatics* is not distinguishable because *GOOD* supported the relief sought by the applicant; it misled the court because it filed a notice to abide and thereafter filed two supporting affidavits; it filed the affidavits, one

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8 2012(3) SA 128 (WCC) ["*Clairison's CC"*]

only 3 days before the hearing, without leave of the court; it advanced submissions on grounds not included in the applicants' pleaded grounds of review; the *Plascon Evans* test applies because the applicants must make out their case in the founding affidavit and not on a case supplemented by *GOOD* in the further affidavit filed in support of the application; and *GOOD* asked in its supplementary affidavit that it should not be ordered to pay costs, regardless of the outcome of the case.

[26] Having considered the matter, I am in respectful agreement with the conclusion of the Labour Appeal Court in *Aciel Geomatics* that it is impermissible for a co-respondent to file answering papers which seek the relief sought by the applicant while not taking steps itself to be joined as an applicant in the proceedings. This would clearly prejudice the opposing respondent who must now contest the application on two fronts, namely in respect of the case of the applicant as well as that of the supporting respondent. In my view, the matter of *Resilient Properties* is distinguishable in that Eskom only supported the relief that was to its benefit and not relief that was inimical to the interests of a co-respondent. The matter of *Clairison's CC* is also distinguishable in that the first respondent in that matter failed to establish any prejudice and the second respondent did not independently seek the relief sought by the applicant. In any event, if that decision has to be understood as being contrary to the decision of the Labour Appeal Court in *Aciel Geomatics*, it does not constitute binding precedent and I respectfully decline to follow it. The present issue was not pertinently raised or considered in any of the remaining three decisions relied upon by *GOOD*.

[27] As indicated none of the 5th, 8th, 11th or 14th respondents is opposing the present application. For the reasons set out above, the answering affidavits filed by them fall to be set aside as irregular or improper proceedings in terms of rule 30. In my view no costs order should be made against them.

[28] As indicated, the further answering affidavit of *GOOD* deposed to on 9 February 2023, was filed without leave or seeking condonation, a few days before the hearing on 16 February 2023. At that stage a complete set of papers had already been filed in the

interdict application. For the same reasons as stated above, this affidavit similarly falls to be set aside as an irregular or improper proceeding in terms of rule 30.

[29] It is appropriate that *GOOD* should be ordered to pay the costs of the present application. I proceed to deal with the joinder application before considering the main application.

C. JOINDER APPLICATION IN RESPECT OF THE THIRTEENTH RESPONDENT

[30] As indicated, *GOOD* has made a conditional application to be joined as the third applicant should the striking out application succeed. In the event it did. *GOOD* also applied for its affidavit of 23 December 2022 to stand as its founding affidavit. This is not opposed by the MEC. It follows that this application should succeed. *GOOD* is not seeking costs in respect of its application.

D. THE MAIN (INTERDICT) APPLICATION

[31] As indicated, Part A of the application is for an interim interdict pending the review of the MEC's impugned decision. The requirements for such relief are trite, namely a *prima facie* right, though open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if interim relief is not granted and the ultimate relief is eventually granted; the balance of convenience must favour the granting of the interim relief; and the absence of any other satisfactory remedy.[9] The court retains an overriding discretion whether or not to grant an interim interdict which is clearly a

[9] *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012(6) SA 223 (CC) at [41] *"OUTA"*; Erasmus *Superior Court Practice* (2 ed) D6-16A.

discretionary remedy not least because of the need to consider the balance of convenience.[10]

[32] The nature of this discretion has been analysed in *Knox D'Archy Ltd & Others v Jamieson & Others*[11] where the court concluded that:

> *"It would seem to follow from the above case that the word 'discretion' was not used in a strict sense. That this word is capable of different meanings appears from Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited ('Perskor') 1992(4) SA 791 (A) at 796H-I and 800 C-G. In the present context the statement that a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."*[12]

[33] The above dicta in *Knox D'Archy* appear to be *obiter,* but they nonetheless accord with good sense. However, this issue has not been raised directly in this matter and nothing further needs to be said about it.

[34] The following observations of the Constitutional Court in *OUTA*[13] are apposite in the present matter where the impugned decision amounts to executive as opposed to administrative action:

> *"A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, provided they acted lawfully."*

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10 Erasmus *op cit* D6-23; *Hotz v University of Cape Town* 2017(2) SA 485 (SCA) at 497I fn 8.
11 1996(4) SA 348 (A) at 360E-362E ['*Knox D'Archy'*].
12 at 361H-I
13 fn 9 at para [26].

[35] In the context of the applicable test for granting interim interdicts the court in *OUTA* also confirmed the suitability of the well-known approach developed more than a century ago in *Setlogelo*[14] and refined 34 years later in *Webster*[15], but added the following considerations:

> *"[44] The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the inclusion is mandated by the Constitution itself.*
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> *[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*
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> *[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*

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14 *Setlogelo v Setlogelo* 1914 AD 221.
15 *Webster v Mitchell* 1948(1) SA 1186 (W).

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."

[36] The individual requirements for interim interdicts need to be considered against the above background and in the light of the case made out by the applicants.

1. <u>Prima facie right</u>

[37] Ordinarily in matters such as the present, a '*prima facie right may be established by demonstrating prospects of success in the review*'.[16]

[38] The majority decision in *Eskom Holdings SOC Limited v Vaal River Development Association (Pty) Ltd & Others*[17] pointed out that an applicant can invoke any constitutional right being violated by the impugned action in order to establish the present requirement and not only the right sought to be vindicated in the review. Furthermore, that *'multiple rights protected in the Bill of Rights can be violated by a single action … what informs the need for their vindication is the fact of their violation'*.[18]

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[16] *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014(4) SA 371 (CC) at [25].

[17] [2022] ZACC 44 (23 December 2022); 2023(5) BCLR 527 (CC) ["*Vaal River*"].

[18] at para [194].

The right to be protected '*may take whatever form based on what we know of that concept in common law, statutory law or in respect of constitutionally protected rights'*.[19]

[39] Applicants for an interim interdict thus need not only show prospects that the review will succeed, but could obtain the relief if any of their rights will be irreparably harmed in the interim.

[40] In *Economic Freedom Fighters v Gordan & Others; Public Protector and Another v Gordan & Others*[20] the Constitutional Court held that:

> *"In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances".*

[41] It is trite that the standard of proof in respect of the existence of the right is not a balance of probabilities, but the existence of the right may be open to some doubt. Furthermore, as pointed out at paragraph [51] of *OUTA* and confirmed at paragraph [292] of *Vaal River* that '*[i]f the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists*'.

[42] The Supreme Court of Appeal ("SCA") explained in *Simon NO v Air Operations of Europe AB*[21] that:

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19 At para [280].
20 2020(6) SA 325 (CC) at [42] (*"Economic Freedom Fighters"*).
21 1999(1) SA 217 (SCA) at 228 G-H.

> "*The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed".*

[43] In the present context, this means that in view of the applicants' reliance on the prospects of success of the review, they must show that no serious doubt can be cast on the grounds of review.

[44] It is necessary to consider the case of the parties with regard to the existence of a *prima facie* right.

[45] The applicants submitted that for the purpose of establishing a *prima facie* right, reliance is being placed on both the prospects of success of the review as well as the infringement of various constitutional rights should interim relief not be granted. The arguments in respect of these issues need to be set out and assessed in turn.

(a) Prospects of success of the review

[46] It was submitted on behalf of the applicants that if regard is had to the grounds of review, it is clear that the review will succeed since the MEC failed to throw serious doubt on the applicants' case. He instead strengthened their case. *GOOD* supported this contention. It submitted that the review grounds were strong and advanced similar arguments to those of the applicants in support of the relief sought.

[47] The applicants at this stage invoked four grounds of review, namely (a) ignoring public comments and participation; (b) ulterior purpose; (c) irrationality given the MEC's

reasons; and (d) ignoring an intergovernmental dispute. In its heads of argument *GOOD* placed emphasis on grounds (a) and (b). The above grounds need to be considered in turn bearing in mind that the review record is yet to be filed and the applicants' case is still to be supplemented. The court is required to peer into the review grounds to determine if there is a likelihood of the review succeeding, although any conclusions in this regard can only be provisional at this stage given, *inter alia,* that full papers have not yet been filed. Ultimately the merits of the review are for final determination by the review court.

(i) Public participation process

[48] The applicants as well as *GOOD* contended that the MEC's answering affidavit revealed that the public participation process was a farce because he had already decided to change the executive system long before the public participation process was completed. Section 16(3)[22] of the Municipal Structures Act requires the MEC to give written notice, at the commencement of the process to amend, to organised local government in the province and all affected municipalities of the proposed amendment of a section 12 notice. Before publishing the amendment notice the MEC must consult organised local government in the province and all affected municipalities and thereafter publish particulars of the proposed notice for public comment.

[49] The MEC gave notice of the intended amendment on 28 August 2022 and invited public comment within 14 days. On 27 September 2022 the MEC extended the period for public comment by a further 14 days. The earliest date on which the MEC could thus legitimately have taken the impugned decision was 15 days after the extension, namely on 12 October 2022.

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[22] The subsection provides as follows: '*(3) The MEC for local government must-*
(a) at the commencement of the process to amend a section 12 notice, give written notice of the proposed amendment to organised local government in the province and any existing municipalities that may be affected by the amendment;
(b) before publishing the amendment notice consult-
(i) organised local government in the province; and
(ii) the existing municipalities affected by the amendment; and
(c) after such consultation publish particulars of the proposed notice for public comment.'

[50] Reference was made to paragraph 43.7 of the MEC's answering affidavit where he stated that '*the decision was taken when the ANC was in control over the municipality, and it was not anticipated that it would lose power at that stage'.* It was furthermore pointed out that the ANC was in control of the municipality prior to 21 September 2022 being the date on which the DA led coalition assumed control of the municipality.

[51] It was submitted that the entire public participation process, certainly the process between 27 September to 11 October 2022, was therefore a sham. The MEC had by then already taken the impugned decision which fact renders the decision unlawful. The purpose of section 16(3) is to ensure consultation before a decision is taken. This purpose was flouted by the MEC who took the decision before consultation.

[52] The MEC submitted that the argument that public participation was ignored, is misguided. The decision that amended the municipal executive system was taken on 1 December 2022 as indicated in the relevant notice in the Provincial Gazette. The averments in paragraph 43.7 of the answering affidavit must be read in context. It is clear that the *'decision'* referred to is not the final decision to change the executive system, but the decision to initiate the process concerning the proposed change. This is evidenced by the letter of the MEC dated 27 July 2022 giving notice of the intention to amend the section 12 notice in respect of the Metro. This occurred when the ANC led coalition governed the Metro.

[53] In my view, if proper regard is had to the context of the relevant paragraph in the MEC's answering affidavit, it is readily apparent that it responds to the applicants' contention that the MEC was actuated by the purpose to protect his political party, the ANC, when the impugned decision was taken. The relevant averments in the answering affidavit were clearly directed at rebutting the contention that the MEC's aim was to secure the participation of the ANC in governing the Metro against the threat of it losing political power. Read in its proper context, the answering affidavit contends that there is no merit in the allegation that the MEC's purpose was to protect the ANC because the

latter was in control of the Metro at the time when the process to change the executive system was initiated. This is a far cry from the contention that the final decision was taken even before or shortly after the process was initiated. The notice to the Metro of 27 July 2022 was expressly given in terms of section 16(3)(a) of the Municipal Structures Act. Provincial Notice 477 of 2022 dated 1 December 2022 which published the amendment of the section 12 notice in respect of the Metro, expressly indicated that the amendment was being effected after the consultation process prescribed by section 16(3)(b) of the Municipal Structures Act had been engaged in.

[54] The contention that the public participation process was flouted is accordingly not supported by the facts. In my view the review ground that the MEC ignored public participation is not established on the papers as they stand.

(ii) Ulterior purpose

[55] As indicated, the applicants together with *GOOD* contended that the real purpose of the MEC in effecting the amendment was to protect the ANC. That is unlawful and warrants the setting aside of the impugned decision. As pointed out above, the MEC disputes this contention.

[56] In my view, the aforesaid contention is speculative. It is not supported by the facts. As indicated, the ANC led coalition was in power at the time when the process was initiated to amend the executive system. There is no basis for concluding that the MEC had anticipated on 27 July 2022 when the notice of intention to amend was given to the Metro, that the ANC would lose political power on 21 September 2022 as had subsequently occurred. There is neither a factual basis for such conclusion nor does it follow by necessary implication from the fact that the ANC subsequently lost power. This appears simply to have been part of the vagaries of coalition politics. It is demonstrated by the fact, dealt with below, that the DA led coalition government in the Metro has since lost power which currently once again vests in an ANC led coalition.

[57] It follows that no likelihood has been established of this ground succeeding.

(iii) Irrationality

[58] The applicants contend that the decision of the MEC is rendered irrational by the reasons advanced for such decision in the notice of 27 July 2022 as well as in the answering affidavit. The reasons given for the decision are that (a) the management and administration of the Metro have become politicised; (b) the mayoral committee and its section 80 committees do not function as a cohesive unit in that councillors do not cooperate with the mayor and committee members do not attend committee meetings; (c) coalition politics has undermined service delivery and accountability over the executive; and (d) the proposed change of the executive system will result in a more inclusive government.

[59] The applicants submitted with regard to the first reason (*politicisation of the administration*) that changing the executive system is irrational because the composition of the executive will not prevent political allegiances of the administration. The means used has no link to the purpose of preventing improper politicisation of the administration.

[60] The MEC indicated in response that there is overwhelming evidence of the politicisation of the administration. This is demonstrated, for example, by the power struggles surrounding the appointment of the Municipal Manager which resulted in a failure to appoint a Municipal Manager for an extended period of time; conflict between the Speaker and the Municipal Manager with regard to Council meetings; conflicts within the management involving two of the officials ostensibly appointed in quick succession to the position of Municipal Manager resulting in mutual attempts by the incumbents to have the opponent removed from the position; and a conflict between the Municipal Manager and the Executive Director of Safety and Security about closure of

the City Hall which led to a political stand-off resulting in the police having had to escort the Municipal Manager from the municipal offices after one of the political parties attempted to force open her office door to have her removed from office. The inability of the political parties to work together poisoned the atmosphere and politicised officials thus incentivising politicians and administrative officials to sabotage one another. The collective executive system which ensures proportional representation of political parties, removes this perverse incentive resulting from the *'winner takes all'* mayoral executive system. This, according to the MEC, establishes the required rational connection between means and ends. It is not required that there should be a perfect outcome or that in the court's estimation it is the best decision on the facts or even that the measure taken will result in the intended goal. Whether there are less invasive or more effective means of achieving the goal of eliminating political allegiances of the administration, falls outside the scope of the rationality enquiry. The choice between the two executive systems vests in the elected political branch of government and courts may not usurp that power or function. The court must recognise rational choices of that branch notwithstanding judicial preferences between the two systems.

[61] In my view, the applicants have failed to establish that the first reason was irrational. The decision to involve the political parties proportionally in the governance of the Metro is a rational means of defusing the current situation of political contestation and de-incentivising the wont for politicising the administration and to sabotage one another among politicians and officials alike. Whether there are better or more preferable means of achieving this end is not part of the objective of the rationality enquiry.

[62] Insofar as the second and third reasons (*dysfunctionality of the Council and of the committees; lack of service delivery and accountability*) are concerned, the applicants accept that promoting service delivery and municipal functionality is a legitimate purpose. However, it was contended that given the type of dysfunctionality raised by the MEC, changing the executive system to address those deficiencies is irrational for obvious reasons. The MEC recognises that the Municipal Council is the appropriate

structure to address the various issues that he raised. It is responsible to avert the dysfunctionality that is highlighted by the MEC. It appoints the Municipal Manager and approves budgets. The political composition of Council is the reason why councillors refused to cooperate. Council's resultant paralysis caused the withdrawal of national funding and compromised a water project. The MEC accepts that not even appointing an Administrator at the Metro would resolve the issues of concern. It follows that changing the executive system will not resolve any of these issues. It will not affect the balance of political power on the Council. The problems of appointing a Municipal Manager, adopting budgets or obtaining national funding will remain entirely unresolved. Changing the executive system for these reasons is thus irrational.

[63] The MEC disputed, what he termed, the fatalistic stance adopted by the applicants with regard to the inevitability of the non-cooperation among Council members. It was submitted that this attitude on the part of the applicants is regrettable and is not shared by the MEC. Councillors are legally and constitutionally bound to work together in the interests of the City and the residents. The lack of cooperation is not an inevitable outcome of their political affiliation, but is a conscious choice they make to sabotage one another. In any event, a crucial feature of the rationality enquiry is that it demands merely a rational connection, not perfect or ideal rationality. The view of the applicants is hardly relevant that the collective executive system has disadvantages and that a mayoral executive system offers advantages that are absent in a collective executive system. It is not part of the enquiry. The evidence shows that the severe service delivery problems in the Metro are related to political instability. These challenges arose under the mayoral executive system. Given its composition, the collective executive system may be less prone to deadlocks. It was further submitted that it would in any event be the height of irresponsibility for the MEC to simply fold his arms in the face of the crisis in the Metro.

[64] I cannot find without more that the perceived inevitable inclination of politicians to compete along party political lines, renders the decision of the MEC irrational to resort to a collective executive system to address the systemic problems of the Metro. It

cannot be concluded that the MEC's stance was not rational. In particular his view that the *'winner takes all'* nature of the mayoral executive system promoted the Metro's dysfunctionality and that a collective executive system would de-incentivise the contestation at the Metro in the interests of service delivery and municipal functionality.

[65] The applicants finally contend that the MEC's fourth reason (*improving inclusivity*) lacks merit. They submitted that it was irrational to amend the Metro's structure in order to ensure recognition is given in equal proportion to the major political parties (the ANC and DA) that garnered the same number of votes insofar as number of seats on the executive is concerned. Section 12 of the Municipal Structures Act does not authorise the amendment of the executive system to boost *'inclusivity'* and *'representation'.* It is illegitimate for an MEC to do so. It is naked political interference in the affairs of another branch of government for the MEC to nullify the resolution of a Municipal Council as to who is to constitute its executive, because he would prefer bigger parties to be represented in the executive. It undermines democracy and majority rule within the Council and is usurping its role between elections and after a stable coalition has formed. There is no rational link between a more representative executive and promoting decisions representing the will of the majority of residents or councillors. The parties represented on the executive might not make decisions that reflect the will of the majority of councillors or residents. Such will may well be thwarted because councillors are precluded from working together on the executive despite the possibility of having a coalition. Accordingly, even if the MEC acted for the reasons advanced, his decision is irrational.

[66] It was submitted on behalf of the MEC that it makes no sense to contend that it was illegitimate to change the type of executive system in order to promote or enhance inclusivity. It is plainly rational to create an inclusive government in the face of the crippling instability of the Metro. It is in line with the objectives of the Constitution. It does not interfere with the choices of the voters as the composition of the Council remains unaffected. The goal of an inclusive government is objectively rational where it plainly gives effect to the choices of the voters. The applicants' argument furthermore

ignores the provisions of section 160(8) of the Constitution which entitles Council members to participate and be fairly represented in Council committees in a manner consistent with democracy. The decision to install a collective executive system gives effect to those constitutional provisions. Ensuring that each political party is proportionally represented in an executive committee amounts to fair representation as required by the constitution. The applicants' grounds of review are accordingly weak.

[67] In my view, there is no merit in the applicants' contention that it was illegitimate for the MEC to pursue the goal of inclusivity. It is sanctioned by the constitution. It was not irrational for the MEC to change the executive system to create an inclusive government to address the current dysfunctionality and political instability that are paralysing the Metro.

[68] It follows that the applicants have not succeeded to establish that the decision of the MEC was irrational.

(iv) Intergovernmental dispute

[69] The material facts in this regard are not really in issue. The first applicant wrote to the MEC on 23 September 2022 declaring a formal dispute in terms of the Intergovernmental Relations Framework Act, 13 of 2005, ("IRFA") in respect of the relevant section 12 notice. The only response from the MEC appears to have been his letter to the first applicant dated 24 November 2022 requesting a meeting with regard to the section 12 notice either on 26 or 28 November 2022. The MEC requested the office of the first applicant to reply in writing by 25 November 2022. The first applicant failed to comply with the deadline but sent a WhatsApp message to the MEC's office on 29 November 2022 indicating that he did not receive the request for a meeting timeously and that it was only forwarded to him that same morning. He requested that the meeting be rescheduled. In its response the MEC's office confirmed that the message was forwarded to the MEC who was attending a meeting of the South African Local Government Association for the next two days. There was no further correspondence in

this regard. As indicated, the impugned decision was taken by the MEC on 1 December 2022 and was published in the Provincial Gazette on 12 December 2022.

[70] The applicants, supported by *GOOD,* submitted that once the formal dispute was declared, the MEC was precluded from taking the impugned decision and had to follow the binding process set out in IRFA for resolution of the dispute. The MEC breached these provisions by ignoring the dispute and taking the impugned decision regardless. It was accordingly contended that the applicants were entitled to compel compliance with the obligations under IRFA and to obtain appropriate relief in this regard. This included an interdict pending a review of the impugned decision taken in defiance of such obligations.

[71] The MEC contended that the intergovernmental dispute was declared by the second applicant, the DA. Only organs of state can declare a dispute. There is no evidence that the dispute enjoyed the support of the Council or that the political parties represented on the Council had an opportunity to make representations before the dispute was lodged. The DA elevates its dispute to the status of an interdict. There is no law stating that if a dispute is lodged, no other steps may be taken until the dispute has been resolved. The DA furthermore failed to show even on a *prima facie* basis that the complaint was actually submitted in terms of IRFA.

[72] It is neither possible nor necessary to finally decide the factual disputes raised by the MEC in respect of this issue. The applicants indicate that the dispute was submitted on behalf of the Metro. This is *prima facie* borne out by the fact that the notice of the dispute was given on a letterhead of the Metro emanating from the office of the Executive Mayor. The MEC's request for a meeting was addressed to the Executive Mayor. For present purposes, I am satisfied that there is no serious doubt that the applicants have, at least on a *prima facie* basis, established the formal declaration of an intergovernmental dispute by the Metro. This triggered the binding processes in terms of IRFA which were not followed. The MEC was accordingly *prima facie* precluded from taking the impugned decision prior to having complied with the obligations imposed by IRFA. Suffice it to say that for present purposes, this failure *prima facie* constitutes a

good ground of review of the impugned decision. The MEC has in my view failed to cast serious doubt upon the case made out by the applicants in this regard.

[73] The applicants have accordingly, on the above ground, set out a sufficient basis at this stage of the matter to support the conclusion that the review enjoys a reasonable likelihood of succeeding. As indicated, whether it will satisfy the reviewing court is for that court to determine.

(b) Breach of constitutional rights

[74] The affected rights being invoked by the applicants are first, the right of the first applicant, in terms of section 19(3)(b) of the Constitution, to stand for political office and, if elected, to hold office. This must also entail the right not to be removed from office unlawfully. The impugned decision of the MEC removed the first applicant from office. If the review succeeds, the first applicant's removal was unlawful and his right would have been violated every day that he was out of office in the interim period. Second, a similar violation of the section 19(3)(b) rights of the members of the mayoral executive committee (which included the single *GOOD* member of the Council) as a result of their removal from office pursuant to the impugned decision of the MEC. Third, the violation of the right of the residents of the Metro to have lawfully appointed political office bearers govern the municipality. This right is based on section 19(1) of the Constitution which allows citizens to make political choices; section 19(2) which guarantees free, fair and regular elections; and section 19(3) which entitles adult citizens to vote for legislative bodies.

[75] The applicants submitted that all these rights are negated if leaders are in office unlawfully. This would be the case if the impugned decision is implemented in the interim and the review eventually succeeds. It was argued that the existence of these constitutional rights cannot be denied.

[76] This issue has, however, been overtaken by recent developments at the Metro. It is a notorious fact that the political control of the Council has shifted during May 2023 to an ANC led coalition that is currently governing the Metro. The first applicant has been removed from the office of Executive Mayor pursuant to a vote of no-confidence in him.

[77] The members of his mayoral executive committee have likewise been replaced by representatives of the new dominant coalition. The claimed rights (assuming that they have been established) have accordingly ceased to exist and consequently any potential violation thereof by the impugned decision has fallen away. The issue concerning the section 19 rights of the first applicant and the former executive committee members not to have been removed from office, has therefore become academic and does not require any further attention. The same applies to the applicants' contention concerning the residents' right to have lawfully appointed political office bearers govern the municipality. Nothing further needs to be said with regard to this issue. I proceed to consider the remaining requirements for an interim interdict.

2. Irreparable harm

[78] The applicants contend that they will not be able to obtain effective relief in the review if the MEC's decision is implemented in the interim. This undermines the right of the applicants to review the impugned decision. It will take a considerable period of time to finalise the review application, potentially years if there are appeals. The Metro would have operated with a collective executive committee in the interim if an interdict *pendente lite* is not granted. The reviewing court will be unable to reverse the consequences of having had such system operating for months or even years. It would cause chaos in the Metro should all decisions taken under this system be set aside. No court would or could do so. The review will therefore be cold comfort. The Metro would be saddled with various unlawful decisions. The harm suffered will be irreparable as there is no way of repairing the effects of governance by unlawfully appointed officials.

For example, it is not feasible to obtain a damages award to compensate residents for having been governed by unlawfully appointed officials.

[79] *GOOD* submitted that it suffered the irreparable harm of having lost the political power vested in it as a member of the governing coalition occupying a seat on the executive committee.

[80] It was submitted on behalf of the MEC that neither of the applicants could suffer any irreparable harm if the impugned decision is implemented pending the review. First applicant has no right to be elected as the mayor. This is dependent on him obtaining support from a majority of councillors. He is not being removed as a councillor and can still compete for the mayoral position under a collective executive system. He may or may not succeed, but that risk obtains as long as the DA is not the majority party in the Metro. If the review succeeds, he could be reinstated as mayor. The DA will suffer no harm. It will continue to be represented, albeit proportionally, in the new executive as it was in the old executive, although it held a dominant position in the latter. If the review succeeds, the previous system will be reinstated. Moreover, there is no evidence of any decisions that will be taken in the meantime that will be harmful to the interests of the residents. The decisions that are taken in the meantime will not automatically be unlawful. The applicants base their contention in respect of irreparable harm on this misconception. The correct legal position is that each decision by an unlawful structure would have to be scrutinised on its own merits to determine its lawfulness. The applicants have accordingly failed to establish irreparable harm which is a pivotal requirement for an interim interdict restraining executive action as applies in this case.

[81] Having considered the matter, I am persuaded that it is likely that in view of the anticipated delay in finalising the pending review that, in the event of the review succeeding, there would potentially be a number of affected decisions taken by the new executive that would be susceptible to challenge. While I accept that such decisions would not automatically be invalid, it would in all likelihood lead to chaos if such decisions are individually challenged necessarily over a period of time. The matters affected by such challenge would effectively be in flux pending finalisation of the

relevant litigation. Such a situation would be untenable. The potential harm that could result, particularly to the Metro and its residents, from such a scenario, is manifest and would ultimately be irreparable. However, I agree with the submission on behalf of the MEC that neither of the applicants would themselves suffer comparable harm. *GOOD* similarly still enjoys the prospect of regaining a seat on a collective executive committee should it form part of a governing coalition. As indicated, the first applicant has in any event been removed from the position of Executive Mayor and *GOOD* from the seat it held on the previous executive committee.

[82] I am nonetheless satisfied for the stated reasons that this requirement has been established.

3. *Balance of convenience*

[83] It is trite that this requirement entails a balancing exercise involving various factors. This includes the harm to the applicants if interim relief is not granted and the review ultimately succeeds; the harm to the respondent if interim relief is granted; the relative prospects of success of the review in that where the prospects are weak the balance of convenience should favour the applicants more; where the exercise of public power is being restrained, as in this case, the separation of powers principle should be considered on a sliding scale in the sense that the more policy laden or polycentric the decision, the bigger the role that this factor must play.

[84] The applicants relied on the harm referred to above which they, the councillors and the residents of the Metro would apparently suffer, while indicating that the MEC will suffer no harm and nowhere alleges that he will suffer any harm. He instead invokes the harm to the ANC as a result of being out of power and argues erroneously that the current executive system prevents majority rule while his decision to change the executive system ensures majority rule in the Metro. Furthermore, the impugned decision is not at the extreme end of polycentricity where the applicant must make out

'the clearest of cases'. It is rather a classic case of an MEC implementing legislation, where at best the degree of polycentricity is on the lower end of the sliding scale. Thus, according to the applicants, the nature of the rights at stake together with the balance of harm, mandate that separation of powers considerations cannot militate against granting interim relief.

[85] The MEC submitted that given the *'separation of powers harm'* which he is exposed to, the applicants must demonstrate that this matter resorts under *'the clearest of cases'* for interim relief. This they failed to do. The grounds of review are both contested and contestable. Any harm at issue is merely a temporary, minor inconvenience. The first applicant and the members of the executive committee have not been removed from their positions as councillors. They remain eligible to sit in the executive committee, although no longer on terms dictated by the mayor through the mayoral committee. The first applicant can still contest the position of mayor as a DA candidate and be elected if the DA musters the requisite majority vote as was the case previously. The Constitutional Court authority is clear that the court should exercise caution and engage in deeper reflection and not act unreflectingly and overzealously in cases such as the present. It cannot be suggested on the present facts that the balance of convenience favours the granting of an interim interdict. The correct outcome is to dismiss the application.

[86] Bearing in mind in particular the above findings in respect of harm, I am persuaded that the balance of convenience favours the granting of interim relief in this matter. There is no conceivable harm that could eventuate should the current mayoral executive system continue to apply (as it had done up to now) pending finalisation of the review. This system has applied for a considerable period of time, albeit not always with the best possible results arguably due to the precarious balance of political power in the Metro. It cannot, however, be concluded that that system was simply an outright calamity for the Metro and that the consequences of its continuation in the interim would be ruinous. I accordingly find that the balance of convenience favours that the *status quo ante* be maintained pending finalisation of the review. Even accepting that the

impugned decision does entail a measure of polycentricity, I am not persuaded that any potential *'separation of powers harm'* outweighs the balance of convenience in favour of granting interim relief.

4. *Absence of an alternative remedy*

[87] It is not in issue that there is no alternative satisfactory remedy available to the applicants.

E. CONCLUSION

[88] It follows that the applicants have made out a case for the relief being sought herein. In my view, there are no factors justifying the exercise of the court's discretion against the granting of an interim interdict.

F. COSTS

[89] It would not be appropriate in my view to decide the issue of costs in respect of the interdict at this stage. The court hearing the review will be better placed to decide the issue of costs having had the benefit of the case being ventilated in a complete set of papers and of having heard full argument on the merits of the matter. Presently, the review record is still to be filed and the case of the applicants supplemented. It would be premature to decide the issue of costs of the interdict under these circumstances and on a piecemeal basis. Such costs ought to be reserved.

G. ORDER

[90] In the result the following order shall issue:

(a) The ordinary rules in respect of time limits and service as provided for in the Uniform Rules of Court are dispensed with and this matter is allowed to be heard as one of urgency in terms of rule 6(12);

(b) The answering affidavits filed by the 5th, 8th, 11th and 14th Respondents, as well as the affidavit filed by the 13th Respondent on 10 February 2023, are struck out;

(c) Good (the former 13th Respondent) is joined as the Third Applicant and its answering affidavit filed on 23 December 2022 shall stand as its founding affidavit;

(d) It is declared that pending the resolution of the application and the relief sought in Part B of this matter, including all appeals, the Nelson Mandela Bay Metropolitan Municipality ("the Municipality") shall continue to have a mayoral executive system as defined in section 7(b) of the Local Government: Municipal Structures Act, 117 of 1998 ("Municipal Structures Act");

(e) Pending the resolution of the application and the relief sought in Part B of this matter, including all appeals, the First Respondent and the Municipality are interdicted and restrained from taking any steps to implement a collective executive system as defined in section 7(a) of the Municipal Structures Act;

(f) Good (the former 13th Respondent) is ordered to pay the costs of the First Respondent in respect of the striking-out application;

(g) Save as aforesaid, the costs of this application stand over for later determination.

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D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES-

For the Applicants:	Adv N Mullins with Adv M Bishop, instructed by Minde Shapiro & Smith Inc, Ascot Office Park, Building 7, Conyngham Road, Greenacres Gqeberha
For the First Respondent:	Adv T Ngcukaitobi SC with Adv S Sephton, instructed by State Attorney, 29 Western Road, Central Gqeberha
For the Thirteenth Respondent:	Adv D van Reenen, instructed by LMSL Attorneys
Date of hearing:	16 March 2023
Date of delivery of judgment:	15 June 2023