

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

CASE NO: 4351/2022

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED
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In the matter between

ENOCH MGIJIMA MUNICIPALITY

Applicant

10 **And**

MINISTER OF FINANCE & OTHERS

Respondent

JUDGMENT

BROOKS J:

THE PARTIES AND THE RELIEF SOUGHT

20 [1] The applicant in these proceedings is Enoch Mgiijima Municipality, a local authority established in terms of the provisions of the Municipal Structure's Act 117 of 1988, with its address at Komani within the area of jurisdiction of this court.

[2] The 1st respondent is the Minister of Finance of the Republic of South Africa, a public office bearer appointed by the 3rd respondent and responsible for the administration of the National Treasury and National Revenue Fund from which all allocations to local government are made in terms of the Constitution of the Republic of South Africa, 1996 and the Public Finance Management Act,
30 1999.

[3] The 2nd respondent is the Minister of Cooperative Governance and Traditional Affairs, a public office bearer appointed by the 3rd respondent and responsible for the local government affairs in the Republic of South Africa.

[4] The 3rd respondent is the President of the Republic of South Africa.

[5] The 4th respondent is the Director General at the National Treasury and is its accounting officer.

[6] The 5th respondent is the Deputy Director General Intergovernmental
10 Relations at the National Treasury.

[7] The 6th respondent is the National Cabinet Representative, a public functionary appointed by the National Executive consequent upon the placement of the applicant's affairs under national intervention in terms of section 139(7) of the Constitution of the Republic of South Africa, 1996 (the Constitution) in circumstances which will become apparent hereunder.

[8] The application before the court was divided into two parts, in Part A of the Notice of Motion the applicant seeks an interim order pending a review
20 contemplated and set out in Part B of the Notice of Motion. The nature of the initial relief sought in Part A of the Notice of Motion is that of an interim or interlocutory interdict. This is a remedy that is granted *pendente lite* and is designed to protect the rights of the complaining party, in this case the applicant, pending the finalisation of an action or application launched to establish the respective rights of the parties, in this case the relief contemplated in Part B of the Notice of Motion. A determination of the interlocutory relief does not involve the final determination of the rights of the parties, and does not affect such determination. If granted, the effect thereof is to freeze the position only until the court determines what the final rights are. *Jordan and Another v*
30 *Penmill Investments CC and Another* 1991(2) SA 430 (E).

[9] In the interim relief the applicant seeks an order interdicting and restraining the 1st respondent from withholding and compelling him to pay funding referred to as "the equitable share allocation to the applicant made in terms of section 214 of the Constitution and the Public Finance Management Act, 1999." These being motion proceedings the approach towards the assessment of the entitlement of the applicant to the relief that it seeks in Part A

of the Notice of Motion is that set out in *Spur Steak Ranches Limited v Saddles Steak Ranch* 1996(3) SA 706 (C) at 714A-F as follows:

“The well-known requirements for the grant of an interdict are-

1. A clear right or a right *prima facie* established, though open to some doubt;
2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and ultimate relief is granted;
3. A balance of convenience in favour of the granting of interim relief; and
- 10 4. The absence of any other satisfactory remedy.

Save that the requirement of a *prima facie* right established, though open to some doubt, is the threshold test, the factors are not considered separately or in isolation, but in conjunction with one another in the determination of whether the court should exercise its overriding discretion in favour of the grant of interim relief. I refer here to *Olympic Passenger Services (Pty) Limited v Ramlagan* 1957(2) SA 382 (D), *Eriksen Motors, Welkom Limited v Protea Motors, Warrenton & Another*, 1973(3) SA 685 (A) and *Beechem Group Limited v B-M Group (Pty) Limited* 1977(1) SA 50 (T).

20 In determining whether the applicant crossed the threshold the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough, if it is *prima facie* established, though open to some doubt. The proper approach is to take the facts set out by the applicant together with any facts set out by the respondents, which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities the applicant should, not could, on those facts obtain a final relief at the trial.”

30 OPPOSITION TO THE APPLICATION

[10] The application was opposed by the 1st respondent, the 4th respondent, the 5th respondent and the 6th respondent. In argument the basis of the opposition was confined to technical issues, namely –

1. The validity of the claim made by the applicant that it had approached the court in terms of a valid resolution taken by its council.

- 2 The issues relating to the claim made by the applicant that the matter is urgent.
3. An assertion that the applicant should be non-suited for non-compliance with the provisions of section 40 of the Intergovernmental Relations Framework Act, 13 of 2005 before the launch of proceedings.

[11] The time periods set out in the Notice of Motion were authorised by Lowe J in a directive issued on 15th December 2022. On the morning of 20th December 2022, the date targeted by the applicant in Part A of the Notice of Motion, the applicant was faced with a logistical difficulty. Its local attorneys of record were
10 closed for the recess period and had failed to ensure that the court file was furnished with at least a copy of the founding affidavit and the Notice of Motion. The answering affidavit deposed to on behalf of the participating respondents had been filed of record. The court postponed the matter until 29th December 2022 and reserved the question of wasted costs. This was not only to enable the applicant to place the court file in proper order, it was also to provide the parties with an opportunity to resolve the issues between them extracurially. Although not successful such opportunity was utilised by the parties who reported having held a meeting on the 23rd of December 2022. On resumption of proceedings on 29th December 2022 the applicant had filed a replying affidavit.
20 The participating respondents moved an interlocutory application for leave to file two further affidavits. That application was not opposed; the applicant had had the foresight to deal with the allegations made in the affidavits sought to be introduced in its replying affidavit. In the circumstances the court granted the respondents leave to file the further affidavits. The costs of the interlocutory application were ordered to be costs in the cause.

URGENCY

[12] [In the founding affidavit the applicant set out the urgency claimed in the
30 following manner –

“The equitable share that the 1st respondent has decided to withhold from the applicant was payable on the 7th of December 2022, that date has recently passed and the 1st respondent has not paid same. Instead of paying the equitable share the 1st respondent came with a condition and proposal that was manifestly unlawful, namely that certain individuals be employed. The applicant considered that condition and proposal and could not agree for reason that it was unlawful. As a Minister the 1st respondent does

not have powers to appoint nor to recommend to the applicant who to appoint. I have mentioned above that the applicant responded to the 1st respondent on 13 December 2022, since then the 1st respondent has not communicated with the applicant. At least at the time of signature of this affidavit I was not aware of any correspondence from the 1st respondent subsequent to the 13 of December 2022. The matter is urgent because operations of the applicant depend on the expenditure sourced from equitable share, it is a life and blood of the applicant. Non-payment thereof will prejudice the applicant since it will not be able to pay service providers, as required, by the very norms and standards set and monitored by the 1st respondent under the Local Government Municipal Finance Management Act, 2003. The non-payment of service providers may result to the applicant being taken to court and having to pay interest and legal costs, the amount due which the 1st respondent will regard as wasteful expenditure and yet another indication of lacking financial controls. The applicant uses the equitable share to pay salaries for its staff. Its non-payment by the 1st respondent will result in these workers not being paid despite the applicant being contractually bound to them. This may result to these workers engaging in strikes and impeding the ability of the applicant to provide services to the communities that it is legally and constitutionally bound to serve, such as providing water and other services which are essential with the exercise and enjoyment of the constitutional rights by these communities. The salaries need to be paid by the 20th of December 2022. In the event the applicant experiences labour instability this will dent its image to the potential investors that the applicant is working so hard to attract, it will also prejudice the communities that are so desperately in need of the basic municipal services. The applicant is without any other remedy except approaching this Honourable Court on an urgent basis, so as to obviate a crisis that may ensue as a result of the non-payment of its staff and service providers. In terms of the contractual terms and conditions between the applicant and its workers' salaries are paid on the 25th of every month, but due to the fact that the 25th of December falls on Christmas day the applicant normally pays salaries on the 20th which is basically 5 days away. If payment of the salaries does not happen as per norm chaos will arise and labour unrest is reality. An ordinary form of application is likely to defeat the purpose of the application since by the time the matter is argued the decision of the 1st respondent shall run its course, since such decisions endure for a period of 4 months.

I would like to indicate that at the end of that period the applicant shall have suffered untold damage. Inasmuch as the 1st respondent communicated its intention to withhold the applicant's equitable share on the 23rd of November 2022 the applicant could not have proceeded to court on the basis of that intention, this is because the 1st respondent also invited the applicant to make representations within 7 days from that date. Any application to this court would have been premature. The applicant made representations on the 28th of November 2022, still as at that date there would have been no basis for the applicant to initiate these proceedings since the applicant had to wait for the 1st respondent to consider its representations. At the council meeting of the 8th of December 2022 still it was not clear whether the 1st respondent would withhold the equitable share, but in anticipation of that eventuality the applicant's counsel resolved in that event an urgent application would have to be initiated. It has since become clear that the 1st respondent has taken a decision to withhold the equitable share. The need to approach court only arose once this became evident, it now is. The applicant could not have approached court at any time other than now.

Moreover, applicant will not obtain any adequate relief at any time in any other proceedings instituted in the ordinary course, if this Honourable Court does not indulge the applicant that will be the end of the matter, and all the anticipated damage shall occur with persistent consequences. In that eventuality the applicant shall have been denied a right of access to court, as enshrined in the Constitution, this court can neither countenance nor justify such a contravention."

[13] The participating respondents who opposed the application rely heavily on the content of the two affidavits introduced into the matter on 29th December 2022, in support of the argument that any urgency there may have been in the matter was dispelled by the applicant's own act. In the additional affidavits it is alleged that in fact the salaries due to be paid by the applicant were paid on the 15th of December 2022. No attack is made in the supplementary affidavits on the allegations pertaining to the requirement claimed by the applicant that it has to pay service providers. In the replying affidavit the applicant explains that only the monetary element of the salaries due had been paid into the bank accounts of the applicant's councillors and employees. This had been done in

order to avoid protests. The portion of the salaries normally paid to the South African Revenue Service, to the relevant medical aid and pension funds could not be, and were not, in fact paid.

[14] On the facts alleged by the applicant and those alleged by the respondents that the applicant cannot dispute I am satisfied that the applicant was justified in bringing the application as a matter of urgency.

[15] Given the occurrence of the various public holidays, although the time table envisaged by the applicant was tight, it provided the only mechanism whereby the applicant could address its liquidity issues effectively before its situation worsened. It is convenient to refer to the judgment in this Division of *Oliver Reginald Tambo District Municipality v Independent Electoral Commission and Others* 1995/2021, 2021 ZAECHMHC 31, 24 August 2021 where the following is stated at para [11]:

“The court has a wide discretion. It is incumbent upon it to ensure that its Constitutional role in providing access to justice is not vetted by placing an emphasis on form regulated by the Uniform Rules of Court over substance in circumstances where the need for speedy intervention is clearly demonstrated on the facts set out in the founding affidavit. The present matter contains allegations which reveal a significant failure on the part of an executive mayor to perform with due diligence certain basic duties required of him. There are also allegations that demonstrate that the electoral commission has failed to deal effectively with communications from the applicant addressing the need to ignore a communication from its acting Municipal Manager relating to the replacement of councillors. At the end of the day the application reveals that the electoral commission in any event failed to promulgate the names of some of the respondents who are intended by the relevant local municipalities to replace others as their councillors within a district municipality. The prejudice to them is self-evident. These allegations are largely unchallenged. It is plain that viewed from the prospective of constitutionality and public policy such circumstances require speedy attention. The urgency too is self-evident. The applicant should not be penalised for its failure to address the issue of urgency more directly in the founding affidavit. Indeed, had it done so, many of the same factual allegations and legal conclusion as are set out in the founding

affidavit already would merely have been repeated under an appropriate subheading relating to urgency. The matter is entirely distinguishable from one which addresses a purely commercial dispute such as *Caledon Street Restaurants cc v Monica d'Aviera* 1998 JOL 183(2) SE.”

THE RESOLUTION

[16] The applicant relies on a precautionary resolution taken in respect of these proceedings on 8th December 2022. A copy of the extract of the Minutes of a special council meeting of the applicant is annexed to the founding affidavit. It is evident from the foot of the annexure that on 13 December 2022 the speaker certified the correctness of the extract of the Minutes. Section 110 of the Local Government Municipal System's Act 32 of 2000 reads as follows:

“Certain certificates to be evidence in legal proceedings against a municipality.

A certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or the only, or the most practicable and available methods in exercising any of its powers or performing any of its functions, must on its mere production by any person be accepted by the court as evidence of that fact.”

[17] Counsel for the respondents referred to an Agenda that had been produced for the relevant council meeting and highlighted the fact that nowhere on the agenda was there a reference to any such resolution. Various other arguments were advanced on behalf of the respondents to address the probabilities surrounding this issue. Motion proceedings are not designed to assess the probabilities in any set of facts placed before the court in affidavits filed of record in such proceedings. *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) para [26].

[18] Moreover, the fact of the existence of the resolution was clearly stated by the applicant in its founding affidavit. This allegation is supported by the production of the extract of the Minutes from the relevant council meeting. Upon the applicable test the allegation falls to be accepted. The provisions of section 110 of the Local Government Municipal System's Act 32 of 2000 provide a further basis upon which that fact should be accepted by the court for the purposes of the present application.

THE INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005

[19] What remains of the respondents' technical points is that relating to the obligations created by the Intergovernmental Relations Framework Act 13 of 2005. In the applicant's founding affidavit extensive allegations are made about the history of the matter. It is apparent therefrom that in 2018 in an attempt to deal with the financial crisis then evident in the administration of the applicant the Provincial Executive intervened in the affairs of the applicant utilising the provisions of section 139 of the Constitution. Eventually this was followed by a decision on the part of National Government to intervene in the affairs of the applicant under section 139(7) of the Constitution. Of this and of subsequent events the applicant states the following in the founding affidavit:

“Since the applicant was of the view that any processes intended to genuinely put its affairs in order, that is within the law, is acceptable, the applicant did not see a need to resist the intervention of the National Government which took place a top and already existing financial recovery plan imposed by the Provincial Executive Council and which had already been made an order of court as Annexure EMM2 attests. This intervention brought about the appointment of the 6th respondent as the National Cabinet Representative to facilitate the intervention and which new terms of reference. I attach hereto the letter received from the National Government advising the applicant of the intervention under section 139(7), I mark Annexure EMM4. I refer the court to the terms of reference of the 6th respondent more shall be said about them in due course. In need to digress and state that at the time of imposing the national intervention the applicant had gone through elections and a new council was then in place as from the 1st of November 2021. The council welcomed the responsibilities of the 6th respondent and largely agreed with his diagnosis of the problems besetting the applicant which related to revenue enhanced measures which could give the applicant financial stability.

From the above it is clear that the national intervention took place in the face of an existing financial recovery plan which the applicant was busy implementing and had made significant progress. That financial recovery plan had been prepared by the financial recovery services located within the office of the 3rd respondent. It was my expectation and that of the applicant that the national intervention process would take over the implementation of the existing financial recovery plan since the applicant had already made significant progress in its implementation. Ironically the 6th respondent criticised the financial recovery plan already in existence and promised to prepare, or cause to be prepared, a new one. There has been of late attendance on the part of the 6th respondent to embrace the recovery plan as a matter of convenience and insist on the applicant implementing it, and later object to actions taken by the applicant's functionaries to implement the financial recovery plan. This has caused confusion within the applicant; it has also left applicant suspecting that the 6th respondent is not genuine about taking the applicant to financial health. It is also clear that the applicant has been, and still remains under intervention albeit under a national dispensation as opposed to the previous one which came from Provincial Government. In the course of the national intervention through the National Cabinet Representative there were certain differences which arose making the applicant doubt the effectiveness of the intervention. Chief amongst these was the failure of the National Cabinet Representative to produce a financial recovery plan, none has come forth to date. These differences resulted in the applicant invoking the dispute resolution mechanism under the Intergovernmental Relations Framework Act 2005 raising the dispute with regard to the effectiveness of the intervention and readiness of the 6th respondent to live up to his terms of reference. I attach hereto the letter sent to the 1st respondent under marked Annexure EMM5. It will be evident from the content of the letter that the applicant had genuine concerns about the 6th respondent and the efficacy of the entire intervention. The above course of action was initiated by the applicant since the relations with the 6th respondent were mounting and compromising the ability of the applicant to move away from its financial instability, as an example during May 2022 the applicant prepared a budget for adoption by council, the 6th respondent wrote to the applicant through my offices and that of the speaker commenting on the budget. The council of the applicant adopted the budget subject to the comments made by the 6th respondent, a

later communication from the 5th respondent suggested that the council ought to have sought concurrence of the 6th respondent as opposed to mere consultation. This requirement does not appear in the terms of the reference, nor is it part of the extent statutory provisions, this issue was dealt with in Annexure EMM5 referred to above.”

[20] A reading of Annexure EMM5 to the founding affidavit being a letter dated the 22nd November 2022 addressed to the 1st respondent and headed “Notice in terms of section 40(1)(a) of the Intergovernmental Relations Framework Act 13 of 2005” indeed reveals an intention on the part of the applicant to declare a dispute in respect of co-operative assistance. A response to this letter is also attached to the founding affidavit. The response is a letter written on a letterhead of the 4th respondent and dated 23rd November 2022. This letter indicates the 4th respondent’s intention to invoke the provisions of section 216(2) of the Constitution read together with section 38 of the Local Government Municipal Finance Management Act 56 of 2003 with the effect of stopping payment of the funding due to the applicant. The applicant was therein afforded a mere 7 working days within which to submit written representations about the proposed stopping of funds.

[21] On these facts, in my view, there is no room to argue successfully that the applicant was expected to invoke the provisions of section 41 of the Intergovernmental Relations Framework Act 13 of 2005 once again before approaching this court. The following statement again drawn from *Oliver Reginald Tambo District Municipality v Independent Electoral Commission and Others supra* at para [16] is apposite to the circumstances of this matter.

“In such circumstances it is difficult to imagine what else the applicant could have done in an attempt to settle the dispute that had arisen. There was also an obligation on the part of the 1st respondent as an Organ of State to make every reasonable effort to resolve the dispute, what was required was a response to the applicant’s letter followed by a genuine attempt to resolve the dispute.”

In my view the extract from the *Oliver Reginald Tambo District Municipality v Independent Electoral Commission and Others* judgment is pertinent to the conduct of the 1st respondent in this matter. It is further apposite to note that the Supreme Court of Appeal has extended the duty to exhaust

intergovernmental dispute resolution processes under the Intergovernmental Relations Framework Act 13 of 2005 even to those decisions that do not ultimately result in litigation, but also to those that entail the taking of an adverse decision against another Organ of State such as the decision taken by the 1st respondent which forms the subject of the contemplated review. *Eskom Holdings SOC Limited v Resilient Properties* 2021(1) All SA 668 (SCA) para [84].

[22] Consequently, in my view there is no merit in any of the technical points adopted for argument on behalf of the respondents. It is to be noted that no argument was advanced by counsel appearing on behalf of the respondents against that placed before the court on behalf of the applicant to address the requirements of an interlocutory interdict and the sufficiency of the applicant's case in this regard. Such an approach adopted by or on behalf of the participating respondents appears to constitute a deliberate step away from the spirit and provisions of the Intergovernmental Relations Framework Act 13 of 2005. Such a step is regrettable particularly where the resultant arguments adopted are devoid of merit and invite the undesirable prospect of an adverse costs order being made against the respondents.

20 THE INTERLOCUTORY INTERDICT

[23] The requirements for the establishment of an entitlement to an interlocutory interdict have been reaffirmed recently by the Constitutional Court in *Eskom Holdings SAC Limited v Vaal River Development Association (Pty) Limited and Others* CCT 44/2022 ZACC 44 23 December 2022, para [253]. It is convenient to deal with these requirements as they are addressed by the applicant *seriatim* and as follows.

[24] Prima facie right:

The proceedings which support Part A of the Notice of Motion are about the protection of the rights of the applicant to receive or to be paid funding in the form of the equitable share. The right to be paid the equitable share arises from section 214 of the Constitution which provides as follows:

“Equitable shares and allocations of revenue:

1. An Act of Parliament must provide for –

(a) The equitable division of revenue raised nationally among the National Provincial and Local spheres of Government;

(b) The determination of each province's equitable share of the Provincial share of that revenue; and

(c) Any other allocations to provinces, local government of municipalities from the National Government share of that revenue and any conditions on which those allocations may be made.”

10 The Division of Revenue Act 5 of 2022 [DORA] is the Act of Parliament that has been promulgated as contemplated in section 214 of the Constitution. Section 5 of DORA provides as follows:

“Equitable division of local government share among municipalities –

1. Each municipality's equitable share of local government share of revenue raised Nationally in respect of the 2022/23 financial year is set out in column A of schedule 3.

20 2. The envisaged equitable share for each municipality of revenue anticipated to be raised Nationally in respect of the 2023/24 financial year and the 2024/25 financial year and which is subject to the Division of Revenue Act for those financial years is set out in column B of schedule 3.

3. The National department responsible for local government must transfer a municipality's equitable share referred to in subsection (1) to the primary bank account of the municipality in three transfers on 6 July 2022, 7 December 2022 and 15 March 2023 in the amounts determined in terms of section 22(2).”

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In *National Treasury v Opposition to Urban Tolling Alliance* 2012(6) SA 223 (CC) at para [51] the Constitutional Court stated:

“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.”

In my view the applicant has established a *prima facie* right to be paid funding in the form of the equitable share that is targeted by Part A of the Notice of Motion.

[25] A reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted:

It is clear that the 1st respondent has withheld the payment of the December 2022 equitable share that was due to be paid to the applicant. The decision to withhold the equitable share materially and adversely impacts upon the applicant's right to payment of the equitable share. The applicant has an obligation to provide basic municipal services to members of the community who live within its area of jurisdiction. Section 152 of the Constitution provides:

“Objects of local municipality-

1. The objects of local government are –
 - (a) To provide democratic and accountable government for local communities;
 - (b) To ensure the provision of services to communities in a sustainable manner;
 - (c) To promote social and economic development;
 - (d) To promote a safe and healthy environment; and
 - (e) To encourage the involvement of communities and community organisations in the matters of local government.

2. A municipality must strive within its financial and administrative capacity to achieve the objects set out in subsection (1).”

It is clear that in providing basic municipal services the applicant does so in fulfilment of its Constitutional obligation. In *Joseph and Others v City of Johannesburg and Others* 2010(4) SA 55 (CC) the Constitutional Court held as follows in para [47]:

“In my view therefore when city power supplied electricity to Enondale Mansions it did so in fulfilment of the Constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by

virtue of their corresponding public law right to receive this basic municipal service.”

In my view it is clear that the decision to withhold payment of the equitable share frustrates the constitutional obligations imposed upon the applicant. It is by the institution of these proceedings and particularly by seeking the relief that it does in Part A of the Notice of Motion that the applicant seeks to protect that right to provide basic municipal services. The protection of the right in the nature of the relief sought will be pending the review of that decision as contemplated in Part B of the Notice of Motion.

[26] The balance of convenience

In *Economic Freedom Fighters v Gordon* 2020(6) SA 325 (CC) the Constitutional Court held the following at para [42]:

“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 peak 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.”

A number of bases are raised in the applicant’s founding affidavit upon which the applicant places reliance for the contemplated review proceedings pertaining to the 1st respondent’s decision to withhold the funding provided by the equitable share. I do not consider it to be desirable to analyse each of these in order to reach a conclusion on this aspect. Indeed, to do so would be to trespass into the realm of the review itself unnecessarily. It suffices to state that in my view on the facts set out in the application papers it is apparent that the decision to withhold the equitable share has no rational connection to the purpose that is sought to be achieved. It is clear from the intervention by National Government that the applicant is in some measure of financial distress. The decision to withhold the equitable share does not solve such a problem. In my view such a decision can only have the outcome of exacerbating the circumstance of financial distress. It has long been held that for the exercise of public power to

be valid a decision such as that taken by the 1st respondent in this matter must be rationally connected to the purpose for which the power was confirmed. *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC) para [85]. Such an enquiry entails determining whether there is a rational link between that decision and the purpose sought to be achieved. *Law Society of South Africa v Minister of Transport* 2011(1) SA 400 (CC) para [32].

10 [27] Taking a peek into the allegations with which the court will be concerned in considering the relief in Part B of the application, in my view it is apparent that the applicant's case in the review is a strong one. Moreover, in my view the decision to withhold the equitable share is irrational in itself. In other correspondence attached to the application papers the 1st respondent raises the question of the debt due by the applicant to both the Auditor General and Eskom. To withhold payment of the equitable share to the applicant will not achieve the payment by the applicant of those debts. In my view there is a strong case to be made out for the argument that the decision within itself is irrational.

20 [28] It follows that I am of the view that the applicant has established that on the facts placed before the court it should obtain final relief under Part B of the Notice of Motion. In such circumstances the balance of convenience favours the ground of the interim relief provided by the interlocutory interdict.

[29] Absence of alternative satisfactory remedy

30 The requirement that the applicant has is for the protection of a right. Only a court can protect the right to the funding provided by the equitable share. In the circumstances where the 1st respondent has decided to withhold that funding the appropriate relief is an interlocutory interdict pending the finalisation of review proceedings. There is no alternative satisfactory remedy available to the applicant.

It follows that I am of the view that the applicant has placed sufficient material before the court to demonstrate an entitlement to the interlocutory interdict that it seeks.

COSTS

[30] What remains for determination is the issue of the costs of the application. As indicated earlier in this judgment the focus of the act of opposition to these proceedings was a trio of technical points largely unrelated to the main issues with which the application in both Part A and Part B is concerned. Within the context of a dispute between two Organs of State that has a history of the dimensions and complexity demonstrated in this matter such an approach is at best unhelpful. Both the response to the applicant's plea for co-operative assistance set out in its letter dated 22nd November 2022 namely the communication of the following day of a decision to suspend vital funding within a mere 7 working days, and the nature of the opposition to the consequential urgent approach to this court, demonstrate an apparent unwillingness or failure on the part of the participating respondents to apply themselves diligently and creatively to the difficult task of finding a viable solution to the applicant's predicament. What is required in such circumstances is a solution that enables the applicant to discharge its public functions under carefully managed, diligent, proficient and efficient guidance in a manner that also maintains the applicant's liquidity and ability to honour its financial obligations. What the applicant has received in place thereof, in my view, falls markedly short of the desired standard of co-operative intergovernmental governance envisaged in both the Constitution and the provisions of the Intergovernmental Relations Framework Act 13 of 2005.

[31] In such circumstances it would be appropriate for the participating respondents to be directed to pay the costs of the application. The intricacies involved therein and the need for the applicant to move swiftly in the face of a barrage of public holidays to protect its interests and concomitantly the interests of those fall under its municipal governance, both required and justified the use of two counsel in the drafting and presentation of this urgent application.

[32] In the circumstances the following order will issue:

1. The applicant's non-compliance with the time periods in relation to the service and filing of papers is condoned and the applicant's application is treated as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. The 1st respondent is hereby interdicted and restrained from withholding any equitable share due to the applicant in terms of section 214(1) of the Constitution of the Republic of South Africa 1996 read with section 8 of the Intergovernmental Fiscal Relations Act, 97 of 1997 and the applicable Division of Revenue Act 2022 for the financial year 2022/2023 forthwith and pending the finalisation of the review of the decision to withhold the applicant's equitable share for the financial year 2022/2023 as set out in Part B of the Notice of Motion.

3. The 1st respondent is hereby ordered to pay to the applicant's bank account the equitable share due to the applicant for the month of December 2022 in terms of the applicable Division of Revenue Act 2022 and all remaining amounts due in respect of equitable shares payable to the applicant for the remainder of the financial year 2022/2023 pending the finalisation of the review of the decision to withhold payment of the applicant's equitable share for the financial year 2022/2023 as set out in Part B of the Notice of Motion.

4. The 1st, 4th, 5th and 6th respondents are hereby directed to pay the costs of this application jointly and severally the one paying the others to be absolved, such costs to include the reserved costs occasioned by the postponement of the application on 20 December 2022 and the costs occasioned by the employment by the applicant of two counsel.

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RWN BROOKS
JUDGE OF THE HIGH COURT

Appearances

For the applicant:

10 Instructed by:

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Date of hearing:

29 December 2022

Date delivered:

30 December 2022