THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 394/2020

In the matter between:

THE PREMIER FOR THE PROVINCE OF GAUTENG	**First Appellant**
THE EXECUTIVE COUNCIL FOR THE PROVINCE OF GAUTENG	**Second Appellant**
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Third Appellant**

and

DEMOCRATIC ALLIANCE	**First Respondent**
RANDALL MERVYN WILLIAMS	**Second Respondent**
CHRISTO MAURITZ VAN DER HEEVER	**Third Respondent**
ZWELIBANZI CHARLES KHUMALO	**Fourth Respondent**
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Fifth Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**Sixth Respondent**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**Seventh Respondent**
AFRICAN NATIONAL CONGRESS	**Eighth Respondent**

ECONOMIC FREEDOM FIGHTERS	**Ninth Respondent**
CONGRESS OF THE PEOPLE	**Tenth Respondent**
AFRICAN CHRISTIAN DEMOCRATIC PARTY	**Eleventh Respondent**
PAN AFRICANIST CONGRESS OF AZANIA	**Twelfth Respondent**
FREEDOM FRONT PLUS	**Thirteenth Respondent**
ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ANC	**Fourteenth Respondent**
ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE EFF	**Fifteenth Respondent**
THE REMAINING TSHWANE COUNCILLORS	**Sixteenth Respondent**
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	**Seventeenth Respondent**
ELECTORAL COMMISSION	**Eighteenth Respondent**
MPHO NAWA N.O.	**Nineteenth Respondent**
SOUTH AFRICAN MUNICIPAL AND ALLIED WORKERS UNION	**Twentieth Respondent**

Neutral citation: *The Premier for the Province of Gauteng and Others v Democratic Alliance and Others* (Case no 394/2020) [2020] ZASCA 136 (27 October 2020)

Coram: ZONDI, VAN DER MERWE and SCHIPPERS JJA and MATOJANE and GOOSEN AJJA

Heard: 17 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the

Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 27 October 2020.

Summary: Appeal in terms of s 18(4) of the Superior Courts Act 10 of 2013 (the Act) – against implementation of order reviewing and setting aside the dissolution of a municipal council pending application for leave to appeal – requirements for an order under s 18 of the Act restated – s 159 read with s 139(1)*(c)* of the Constitution requires election to be held within 90 days of dissolution of municipal council – exceptionality and irreparable harm requirements established – administrator would be in office for a period in excess of the constitutionally prescribed 90-day period.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mlambo JP with Potterill ADJP and Ranchod J concurring) sitting as court of first instance:
The appeal is dismissed with costs including costs of two counsel.

JUDGMENT

Zondi JA (Schippers JA and Goosen AJA concurring)

[1] This is an urgent appeal against an order in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act). It arises from a decision (the dissolution decision) of the second appellant, the Executive Council for the Province of Gauteng (the Gauteng EC) to dissolve the Council of the City of Tshwane Metropolitan Municipality (the Tshwane Council) and appoint an administrator in terms of s 139(1)*(c)* of the Constitution on 4 March 2020 to run its affairs. The first respondent, the Democratic Alliance (the DA), a political party approached the Gauteng Division of the High Court, Pretoria (the high court), on an urgent basis seeking that the dissolution decision be reviewed, declared invalid and set aside.

[2] The full court of that Division (Mlambo JP, Potterill ADJP and Ranchod J) on 29 April 2020 found in favour of the DA and made the following order:

'2. The decision of the Gauteng Executive Council to dissolve the City of Tshwane Metropolitan Municipality, taken on 4 March 2020 and communicated to the applicants on 10 March 2020 ("the dissolution decision"), is reviewed, declared invalid and set aside.

3. The thirteenth and fourteenth respondents are ordered, in terms of the Code of Good Conduct of Councillors, to attend and remain in attendance at all meetings of the City of Tshwane Metropolitan Municipality Council unless they have a lawful reason to be absent.

4. The orders in paragraphs 2 and 3 are suspended until five days after the level 5 nationwide lockdown, enforced by the National Coronavirus Command Council and announced by the President of the Republic of South Africa on 23 March 2020, has been lifted.

5. During the period of suspension:

5.1 The administrator appointed by the second respondent in respect of the City of Tshwane Metropolitan Municipality shall be entitled to exercise the powers conferred by such appointment; and

5.2 The dissolution decision shall have no impact on the entitlement of the Councillors of the Municipal Council of Tshwane to continue to receive their salaries and benefits.'

[3] Subsequently, the first appellant, the Premier for the Province of Gauteng, the Gauteng EC and the third appellant, the MEC for Co-Operative Governance and Traditional Affairs, Gauteng (the MEC) and the Economic Freedom Fighters (the EFF) launched a conditional application for leave to appeal to this Court, pending the application for direct access to the Constitutional Court. As a result, the DA launched an application in terms of s 18(3) of the Act in the high court, to implement the full court's decision pending the appeal process. On 20 June 2020 the high court found that there were exceptional circumstances justifying the grant of the relief sought by the DA; that it would suffer irreparable harm if the order was not granted; and that the Gauteng EC would not suffer irreparable harm. The court issued the following order:

'3. Pending the outcome of the application for leave to appeal or appeals by the first, second, fifth, eighth and fourteenth respondents (or any future application for leave to appeal or appeal by any other respondent), paragraphs 2 to 5 of the order made by this Court on 29 April 2020 remain in operation and are to be given effect.

4. The first, second, fifth, eighth, fourteenth and nineteenth respondents are ordered to pay the costs of this application jointly and severally. The one paying the other to be absolved.'

[4] The issue before this Court is whether the DA satisfied the requirements of s 18 of the Act for interim enforcement of a judgment pending an appeal. It is important to emphasise that what is before us is an appeal against the order putting into operation the judgment and orders made by the full court, pending an application for direct appeal to the Constitutional Court and the conditional appeal to this Court, not the appeal against the main judgment delivered on 29 April 2020.

[5] The events that led to the dissolution decision, the lawfulness of which was successfully challenged by the DA, are dealt with in the full court judgment delivered on 29 April 2020 and need not be detailed in this judgment. For the sake of convenience, however, and to facilitate understanding of the issues arising on appeal, a resume of certain relevant facts is necessary.

[6] The full court in the main judgment made the following factual findings:

'[7] The Municipal Council has reached a dead-lock; no parties therein can win an argument or gain an advantage and no action can be taken by the Municipal Council. The Municipal Council has no Mayor, Mayoral Committee and no Municipal Manager. Simply put, it is unable to conduct its business and cannot serve its residents.

[8] The reason for the dead-lock can be located in the Municipal Council's inability to convene and run council meetings to transact and take necessary decisions in line with its responsibilities. This situation exists as a direct consequence of the disruption of its meetings due to the walkout from council meetings by ANC and EFF councillors thus depriving the Municipal Council of the necessary quorum. Whether done for good or bad reasons does not alter the fact that the walkouts have rendered the City powerless.'

[7] On 5 March 2020, the Premier for the Province of Gauteng issued a press statement announcing a resolution of the Gauteng EC to dissolve the Tshwane Council and to appoint an administrator under s 139(1)*(c)* of the Constitution until a newly elected Municipal Council has been declared elected. The reasons for the dissolution notice were set out under the heading 'Key Observations' which, according to the Premier, were concerning with regard to the state of affairs in the

City of Tshwane. The Premier gave nine reasons for the decision. Pursuant to the dissolution notice on 23 March 2020, the Premier appointed the nineteenth respondent, Mr Mpho Nawa, as an administrator. It is clear from the dissolution notice that the decision to dissolve the Council was based entirely on s 139 (1)*(c)* of the Constitution.

[8] Aggrieved by this decision, the DA launched an application in the high court to review and set aside the dissolution decision. As stated above, a full court was constituted to hear the matter. On 29 April 2020 the court made an order, inter alia, reviewing and setting aside the dissolution decision, and directing the ANC and EFF councillors to attend and remain in attendance at all meetings of the Tshwane Council unless they have a lawful reason to be absent, in terms of the Code of Good Conduct of Councillors.[1] The Gauteng EC and the EFF approached the Constitutional Court for direct access and simultaneously therewith, conditionally sought leave to appeal to this Court. These processes invoked by the Gauteng EC and the EFF prompted the DA to approach the same Division of the high court in terms of s 18 of the Act, for an order implementing its order of 29 April 2020, pending the finalisation of the appeal processes, which was granted.

[9] Section 18 of the Act reads as follows:

'18 **Suspension of decision pending appeal**

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

[1] Contained in Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) ─

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[10] The history of s 18 was comprehensively dealt with by this Court both in *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93 ; 2017 (5) SA 402 (SCA), paras 19-22 and *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA), paras 5-6 and need not be repeated in this judgment, save to emphasise that in *University of the Free State* this Court held that it was clear on a proper construction of s 18 that it does not merely purport to codify the common-law principle, but rather to introduce more onerous requirements. That common-law principle stipulates that in general, the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. The Court reached this conclusion after a thorough analysis of the provisions of s 18 and the extent to which the legislature has interfered with the common-law principles articulated in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 544H-545G.

[11] In this regard this Court in *University of Free State* held:

'[9] What is immediately discernible upon perusing ss 18(1) and (3), is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted "under exceptional circumstances". The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons: that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of "exceptional circumstances" in s 18(1), s 18(3) requires the applicant "in addition" to prove on a balance of probabilities that he or she "will" suffer irreparable harm if the order is not made, and that the other party "will not" suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.'

[12] It is clear from the provisions of s 18(1) read with s 18(5) of the Act that the noting of an appeal suspends the operation and execution of the order pending the decision of the appeal or application for leave to appeal. The judgment or order is also suspended whilst an application for leave to appeal is pending before this Court or the Constitutional Court. This is the norm or a default position.[2] Section 18(3) is an exception to this general rule. Under s 18(1) a court may order

[2] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) para 25; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* [2013] ZAGPJHC 274; 2014 (3) SA 189 (GJ) para 24.

otherwise ‘under exceptional circumstances’. A party who requires the court to ‘order otherwise’ is in terms of s 18(3) required to prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[13] In other words, the test in terms of s 18 requires that ‘exceptional circumstances’ must exist, and this involves two factual findings. A party seeking leave to execute the order must show firstly, that the applicant for leave to appeal would not suffer irreparable harm if the order is put into operation, and secondly, that he or she would suffer irreparable harm if the order remains suspended and the absence of irreparable harm to the respondent who seeks leave to appeal. The circumstances must be such as to justify the deviation from the norm.

[14] The concept of ‘exceptional circumstances’ is not defined in the Act. In my view the concept is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as ‘ordinary’ in one case, may be treated as ‘exceptional’ in another. This may explain the reason for the reluctance by the courts to lay down a general rule. In *Liesching and Others v The State* [2018] ZACC 25 ; 2019 (4) SA 219 (CC) the Constitutional Court in considering the concept of ‘exceptional circumstances’ within the context of s 17(2)*(f)* of the Act referred to *MV Ais Mamas Seatrans Maritime v Owners*, *MV Ais Mamas and Another* 2002 (6) SA 150 (C) in which Thring J distilled the principles that emerged from the survey of case law relating to the meaning of the concept of ‘exceptional circumstances’ at 156E-157C:

‘1. What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is exceptional in the sense that the general rule does not apply to it; something uncommon, rare or different: “besonder”, “seldsaam”, “uisonderlik”, or “in hoë mate ongewoon”.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[15] In *Ntlemeza*[3] this Court held that s 18 sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s 18(3). It emphasised that the Legislature has set the bar fairly high. It went on to hold as follows at para 38:

'In *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016), para 9, this court stated that it was immediately discernible from ss 18(1) and (3) that the Legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by the requirement of s 18(4)(i); that the court making such an order "must immediately record its reasons for doing so". I interpose to state that the reasons contemplated in s 18(4)(i) must relate to the court's entire reasoning for deciding "otherwise" and must therefore also include its findings on irreparable harm as contemplated in s 18(3).'

[16] With this background, it remains to consider whether the high court in granting the order to execute had due regard to the relevant provisions of s 18 and applied them correctly. This requires a closer examination of the factual averments on which the DA's case was anchored.

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[3] *Ibid* para 28.

[17] As regards exceptional circumstances, the DA's case is based on two pillars. First, that the effect of the dissolution decision is to undo the votes of the residents of Tshwane and to force fresh elections, and from a constitutional standpoint the dissolution decision is extraordinary. It contends that local government is one of the three spheres of government created by the Constitution. This contention was based on s 41*(g)* of the Constitution which sets out the general rule that neither the national, nor provincial sphere of government may encroach on the functional integrity or institutional integrity of a local government. Section 139(1)*(c)* of the Constitution, the DA contends, provides an exception to this. It allows a provincial government to dissolve a municipality where the municipality has failed to fulfil an executive obligation in terms of the Constitution or legislation and where there are exceptional circumstances justifying the dissolution.

[18] The second pillar of the DA's case was the contention that the administrator who is appointed under s 35(1) of the Local Government: Municipal Structures Act 117 of 1998 (the Municipal Structures Act) has extraordinary powers. The DA accordingly contends that as a result of the dissolution decision, the Tshwane Council is governed by the administrator, who wields extraordinary power to control every aspect of the municipality's function including its constitutionally original legislative and executive functions, and who does so in circumstances in which there is no accountability or oversight over his conduct whatsoever. It also contends that as a result of the convoluted appeal procedures prosecuted by the Gauteng EC and the EEF and its councillors, together with the effects of the coronavirus, the administrator would be in total control of every function of the municipality for an indeterminate period of time which will extend far beyond the 90-day period contemplated by the Constitution. It may, the DA argues, result in an unelected administrator remaining in power for the majority of the remainder of the term of the Tshwane Council. If that is permitted, the judgment which the DA and its councillors obtained from the full court would become meaningless and be rendered moot.

[19] As regards an irreparable harm requirement, it is argued by the DA that, if the order is not put into operation pending the appeals, it would suffer the following irreparable harm during the interim:

(a) there would be a severe harm to the separation of powers and the autonomy of local government;

(b) allowing the dissolution decision to remain in force pending the appeal has potentially devastating consequences for the city's finances;

(c) the administrator is currently in a position to take decisions and make commitments that will bind the Tshwane Council for all future purposes, even after his departure when the appeal fails. This form of harm was said to be irreparable and that it was particularly unacceptable given that the administrator has never been elected – he was appointed by the Gauteng EC; and

(d) under the administrator, the Council has effectively ceased to function and respond to its residents and it is clear that the administrator has failed to put in place any plan to do so.

[20] On the question of harm to the Gauteng EC, it was contended by the DA in the high court that the Gauteng EC would not suffer irreparable harm if the judgment was implemented, for the simple reason that a municipality must be governed by its elected municipal council. Moreover, the root cause of the difficulties encountered by the Tshwane Council was the failure of ANC and EFF councillors to attend and remain in attendance at Council meetings, as they were obliged to do under the Code of Conduct for Councillors. These councillors likewise would not suffer irreparable harm.

[21] The high court upheld the contentions of the DA, which relied on *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC) that the term of office of an administrator, like that of municipal councils, should not be extended beyond the 90-day period stipulated by the Constitution. It held that the extension would be unlawful and would constitute irreparable harm. The high court reasoned that the extension of the administrator's term arises from the postponement of the local

government elections to September 2020, as well as the period it would take to finalize the direct appeals to the Constitutional Court. It stated that, keeping the administrator in office for longer than the mandatory 90-day period, goes against the constitutional scheme of preventing one sphere of government from interfering longer than it should in the affairs of another, which would be the case if the administrator remains in control of the City of Tshwane for longer than 90 days allowed by the Constitution. It held that this amounts to exceptional circumstances in that the effect thereof is to keep duly elected councillors, the majority of whom are from the DA, from doing what the Constitution envisages, to run the affairs of the City of Tshwane in keeping with the wishes of Tshwane voters.

[22] As regards the requirement of irreparable harm, the high court found that the DA had established that it and the residents of Tshwane would suffer irreparable harm if the interim enforcement was not granted pending the appeal. The basis for this finding was that the citizens of Tshwane have a fundamental constitutional right to be governed by those they elected and the denial of this right for longer than the constitutionally permitted 90-day period would, in its view, constitute irreparable harm. The grant of the interim enforcement order would ensure that the duly elected councillors are allowed to resume their constitutional function, thereby preserving the rights of the voters and the autonomy of local government.

[23] Thereafter, the high court as required by s 18(3) of the Act, proceeded to determine whether the grant of interim enforcement order would cause the Gauteng EC irreparable harm. It found that none was established.

[24] Before us, it was submitted by counsel for the Gauteng EC, that the DA failed to establish all three elements of s 18, which he argued, are required by the Act to be simultaneously present and that failure to establish one of them, should have resulted in the DA being non-suited. He argued that the high court misdirected itself in two ways. First, by finding that the interim enforcement order

would not cause the Gauteng EC irreparable harm; and secondly, by collapsing the requirement of exceptionality with that of irreparable harm. In developing this argument, counsel pointed out that it was clear from the judgment of the high court that the elected representatives of Tshwane would lose out on their elected terms of office as a consequence of a combination of Covid-19 (which rendered it impossible for the Independent Electoral Commission (IEC) to hold the elections within the period prescribed by the Constitution following the dissolution of the Tshwane Council) and the delays of the appeal processes. That rationale, counsel argued, was used by the high court to establish both the exceptionality and irreparable harm requirements.

[25] In my view, the criticism that the high court collapsed both the exceptionality and irreparable harm requirements of s 18, is unfounded. Granted, they are two separate requirements, but there is nothing that says the same set of facts cannot give rise to irreparable harm and exceptional circumstances. In fact, the same approach was adopted by Sutherland J in *Incubeta*, paras 27-29 where he used the same facts to make a finding on exceptional circumstances and irreparable harm. The same approach was also adopted by this Court in *Ntlemeza*, paras 45-47, where the adverse prior crucial judicial pronouncements about Mr Ntlemeza and the place that the South African Police Service maintains in the constitutional scheme, as well as the vital role of the National Head of the Directorate for Priority Crime Investigation (DPCI) and the public interests at play, were facts that were recognised in the assessment of both the exceptionality and irreparable harm requirements.

[26] It was contended by the Gauteng EC that the irreparable harm it relied upon, covered the interests of the Provincial Government, the residents of Tshwane and the interests of the Tshwane Council. What gave rise to the irreparable harm in this case, it was argued, was a combination of four elements. Firstly, a leadership void. In this regard, it was argued that the City of Tshwane had been without a mayor, a municipal manager and senior positions at management level had not

been filled for a long time. Secondly, the Council was unable to hold meetings in order to transact business. Thirdly, there was a failure of service delivery such as the provision of water to the residents of Hammanskraal and a crisis at Wonderboom Airport, which implicated the Municipality in maladministration, negligence and corruption.

[27] It was further contended that, at the heart of a dissolution based in part on disruption of service delivery, the interests of residents affected by the lack of service delivery, not those of councillors, are of paramount concern. For this proposition counsel relied on *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31; 2015 (1) BCLR 72 (CC) in which the Constitutional Court held at para 9:

'This reveals a fundamental flaw in the Municipality's application for leave to appeal against the refusal by the High Court of the temporary interdict application. It needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councillors, but in the continued disruption of basic essential services to the people and communities the Municipality is supposed to serve. The people who may suffer the real harm are not party to these proceedings. It is because of the alleged failure in its executive obligation to them that the Municipality was dissolved.'

[28] I am not satisfied that the Municipal Council's failure to supply water to the residents of Hammanskraal and the crisis at Wonderboom Airport constitute irreparable harm to the Gauteng EC. As regards the water crisis in Hammanskraal, the full court in the main judgment accepted that provision of water was an executive obligation which the Council had failed to fulfil. This however, was due to failure to achieve a quorum in the Council which is addressed by the full court's order directing compliance with the Code of Conduct for Councillors. Aside from this, the Gauteng EC was not without a remedy. It could have assumed the responsibility for the obligations in relation to Hammanskraal in terms of s 139(1)*(b)* of the Constitution.

[29] In relation to the Wonderboom Airport complaint, the full court in the main judgment found that it did not amount to an unfulfilled executive obligation as the Council had taken steps to remedy the situation. This complaint, in my view, does not provide sufficient factual support for the claim of irreparable harm on the part of the Gauteng EC. The full court's conclusion that the Gauteng EC had failed to show that it would suffer irreparable harm if the operation of the order in the main judgment was put into effect pending the appeal, was therefore correct.

[30] It is correct that prior to the dissolution decision the Tshwane Council was dysfunctional. The full court in the main judgment found that the situation existed as a direct consequence of the disruption of its meetings due to the walkout from council meetings by the ANC and EFF councillors, thus depriving the Council of the necessary quorum. The mandamus issued by the full court was designed to remove that obstacle. There is no suggestion that upon the reinstatement of the Council, the problems which led to the Council being unable to do what it is mandated to do, will be experienced again, in particular having regard to the fact an Acting Municipal Manager was appointed to perform the functions of the Municipality. It is not suggested that the work that he has done thus far will be undone should the Council be reinstated.

[31] In addressing the irreparable harm requirement, the high court had regard to secs 1*(d)* and 152(1)*(a)* of the Constitution and concluded that it was clear from these provisions, that allowing the administrator to continue running the affairs beyond the 90-day prescribed by the Constitution, was anathema to the values upon which a democratic state is founded. It accordingly held that the citizens of Tshwane have a fundamental constitutional right to be governed by those they had elected and the fact that they were denied this right constituted irreparable harm on their part. I cannot find fault with the high court's reasoning.

[32] As regards exceptionality, it was submitted by counsel for the Gauteng EC that the high court's reliance on the 90-day constitutional requirement, as a basis

for its finding on exceptionality was misplaced. Two reasons were advanced for this submission. The first was that the 90-day period requirement stipulated in s 159(2) of the Constitution does not apply when a provincial government invokes its original constitutional power to dissolve a municipal council under s 139(1)*(c)*. The second reason, which is an alternative to the first, is that even if the 90-day period requirement does apply, the Electoral Court has, in effect, made it irrelevant by granting the IEC an extension to hold elections.

[33] Counsel submitted that there is nothing unconstitutional about the dissolution of a municipal council by the province. The intervention by the province in the affairs of local government is mandated by the Constitution itself and its source is the failure of the Council to fulfil its executive obligations. In developing this argument, he submitted that the Constitution does not envisage that a Council will hold office for the entire five years, no matter what the circumstances are. He stated that secs 139(1)*(c)*[4] and 159[5] of the Constitution contain provisions that deal with the term of office of a Municipal Council. Section 159 stipulates that the term of a Municipal Council may be no more than five years, as determined by national legislation. If the Municipal Council is dissolved in terms of a national legislation, or when its term expires, an election must be held within 90 days of the date that council was dissolved or its term expired. It is important, he argued, to read s 159 with s 139 of the Constitution, which also envisages that the terms of office of a Municipal Council may not be completed.

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[4] '139 **Provincial intervention in local government**
(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
. . .
(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.'

[5] '159 **Terms of Municipal Councils**
(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.'

[34] Counsel argued that, on the textual reading of s 159 of the Constitution, the requirement that the election must be held within 90 days of the date of dissolution decision, does not apply if Council is dissolved under s 139(1)*(c)* of the Constitution. This was so, the argument proceeded, because in terms of the section, an administrator must continue to run the affairs of the Municipal Council until a newly elected Municipal Council has been declared elected. He maintained that where there has been an intervention under the national legislation, the period of 90 day stipulated in s 159(2) of the Constitution will then apply. He submitted that this requirement does not apply when the dissolution takes place under s 139(1)*(c)* of the Constitution because the dissolution does not take place under the national legislation. It takes place directly under the Constitution.

[35] This was so, counsel argued, because the text of s 159(2) of the Constitution uses the term 'national legislation'. He submitted that the construction of s 159(2) of the Constitution, contended for by the DA, that the dissolution was effected in terms of both the national legislation and the Constitution, was incorrect. He argued that s 159(2) does not say if there was a dissolution in terms of 'the Constitution and the national legislation' then the 90-day period would apply. He said it was logical that s 159(2) of the Constitution does not make a reference to a dissolution in terms of the Constitution itself, because 139(1)*(c)* already governs the dissolution directly under the Constitution and there would be no point in regulating the same subject matter twice.

[36] Counsel further submitted that there is no national legislation that gives effect to s 139. Section 34 of the Municipal Structures Act is not the national legislation that is contemplated in s 139(8) of the Constitution. He argued that s 34 of the Municipal Structures Act does not give effect to s 139 of the Constitution, because it makes no provision for the dissolution of a municipal council by a province. It specifically deals with the dissolution of a municipal council by the MEC, he submitted. The dissolution of a municipal council by a province is regulated entirely by s 139 of the Constitution, so he argued. He maintained that s

34(1) of the Municipal Structures Act creates a different category of dissolutions, not the dissolution under s 139.

[37] Section 34 of the Municipal Structures Act deals with dissolution of municipal councils. It reads:

'(1) A municipal council may dissolve itself at a meeting called specifically for this purpose, by adopting a resolution dissolving the council with a supporting vote of at least two thirds of the councillors.

(2) A municipal council may dissolve itself only when two years have passed since the council was last elected.

(3) The MEC for local government in a province, by notice in the *Provincial Gazette*, may dissolve a municipal council in the province if the Electoral Commission in terms of section 23 (2) *(a)* of the Demarcation Act is of the view that a boundary determination affects the representation of voters in that council, and the remaining part of the existing term of municipal councils is more than one year.

(4) The MEC for local government in a province may dissolve a municipal council in a province in accordance with the provisions of section 139 of the Constitution of the Republic of South Africa, 1996.'

[38] The argument that the Municipal Structures Act does not apply to the dissolution decision is untenable. There is no distinction between the dissolution of a municipal council in terms of the Constitution, and a dissolution under national legislation. There is only one source of power to dissolve a municipal council – s 139(1)*(c)* of the Constitution. Section 139(8) of the Constitution expressly provides that national legislation may regulate the implementation of s 139(1). Sections 25, 34 and 35 of the Municipal Structures Act are legislative provisions that regulate s 139(1)*(c)* of the Constitution. Thus, a decision to dissolve a municipal council is taken in terms of both s 139(1)*(c)* of the Constitution and national legislation, namely s 34(4) of the Municipal Structures Act. It is therefore not surprising that the decision to appoint the administrator in this case was

published in the Provincial Gazette, as required by s 34(4) and s 35(2) of the Municipal Structures Act.[6]

[39] Furthermore, it is inconceivable that the Constitution would prescribe a 90-day time limit for the holding of by-elections where the term of a municipal council expires or where a council is dissolved in terms of national legislation, but would then allow an administrator an unlimited term of office where a municipal council is dissolved in terms of s 139(1)*(c)* of the Constitution. I conclude, therefore, that on a proper construction of secs 139(1)*(c)* and 159(2) of the Constitution, an election must be held within 90 days of the date of the dissolution of a municipal council.

[40] The second leg of the Gauteng EC's argument was that, in any event, the answer to the question whether or not the 90-day period applies to the dissolution under s 139(1)*(c)* of the Constitution is not dispositive of the s 18(3) question, because ultimately, but for the effects of Covid-19, an election would have been held within 90 days of the date of dissolution of the Tshwane Council.

[41] The Constitution, however, contemplates a limited period during which citizens may be deprived of governance by those whom they have democratically elected. It envisages only a 90-day period, which in this case has been breached considerably. In *Mhlope* the Constitutional Court held that our Constitution limits the terms of municipal councils to no more than five years and does not provide for any extension of this term. Similarly, the Constitution allows an administrator appointed following the dissolution of Council to remain in office for no longer than 90 days of the date of dissolution. The administrator is not democratically elected and therefore is not accountable to the voters though he is accountable to the MEC. The time period with which we are concerned here, is designed to give effect

[6] Section 35(2) of the Municipal Structures Act provides:
'When appointing one or more administrators the MEC for local government, by notice in the Provincial Gazette, must determine the functions and powers of the administrator or administrators.'

to our constitutional scheme. This scheme was described by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC) as follows:

'42. Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and "not assume any power or function except those conferred on [it] in terms of the Constitution".

43. The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.'

[42] Thus, the power granted by the Constitution to one sphere of government to intervene and assume control of the affairs of another sphere, is highly circumscribed. If this Court were to uphold the appeal, an unelected administrator would remain in place, accountable only to a different sphere of government that appointed him, and for far beyond the period envisaged in the Constitution. The choices of voters at the municipal level would then be disregarded,[7] and the autonomy of local government, undermined.[8] And this, when the provincial government is controlled by a party that did not win the Tshwane municipal

[7] *Mogalakwena Municipality v Provincial Executive Council, Limpopo* 2016 (4) SA 99 (GP) para 29.
[8] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) para 60.

elections in 2016, and where the dissolution decision itself has been declared unconstitutional and unlawful.

[43] The high court, by contrast, rightly held that the circumstances of the case were exceptional, given that they involved the infringement of peremptory provisions of the Constitution; and that the DA had made out a proper case under s 18(3) of the Act – the running of the City of Tshwane by an unelected administrator is the very antithesis of democratic and accountable government for local communities, enshrined in s 152(1)*(a)* of the Constitution. The court's order properly ensures that the councillors, duly elected by the citizens of Tshwane in 2016, are allowed to resume their rightful constitutional role, powers and responsibilities. The order gives effect to the rights of voters and preserves the autonomy of local government. It cannot be faulted.

[44] In the result, the appeal is dismissed with costs, including costs of two counsel.

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ZONDI JA

JUDGE OF APPEAL

Van der Merwe JA (Matojane AJA concurring)

[45] I have had the benefit of reading the comprehensive judgment of my brother Zondi JA. However, I find myself in respectful disagreement with its reasoning and conclusion. In my view, for the reasons that follow, the appeal should succeed.

[46] To recapitulate, on 4 March 2020 the second appellant took a decision to dissolve the council of the Tshwane Metropolitan Municipality (the Tshwane Council) in terms of s 139(1)*(c)* of the Constitution (the decision). Consequently an administrator was appointed on 23 March 2020 to undertake the functions of the

Tshwane Council. The first to fourth respondents (collectively the DA) challenged the decision in the Gauteng Division of the High Court, Pretoria. A full court of that division (the court a quo) made an order reviewing and setting aside the decision (the main order). The appellants launched a conditional application for leave to appeal against the main order to this court, as well as an application for leave to appeal directly to the Constitutional Court. The effect was to suspend the main order pending the determination of the proposed appeal. The DA, in turn, approached the court a quo under s 18 of the Superior Courts Act 10 of 2013 for enforcement of the main order pending the determination of the appeal proceedings. On 10 June 2020 the court a quo granted the order sought (the interim order) and the appellants brought it on automatic appeal to this court under s 18(4)(ii) of the Superior Courts Act.

[47] The issue on appeal is whether the court a quo correctly held that the DA had established each of the three requirements for interim enforcement of an order under s 18 of the Superior Courts Act. Applied to this matter they were: (a) that exceptional circumstances justified the interim order; (b) proof on a balance of probabilities that the DA would suffer irreparable harm in the absence of the interim order; and (c) proof on a balance of probabilities that the appellants would not suffer irreparable harm as a result of the interim order.

[48] The court a quo held that s 159(2) of the Constitution was applicable to the matter. It provides:

‘If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.’

The court a quo reasoned that ‘the term of office of the administrator cannot be elongated beyond the 90 days where the Constitution does not provide for such extension’. A by-election in respect of the Tshwane Council was initially scheduled for 10 June 2020. In the meantime, on 4 May 2020, the Electoral Court gave an order authorising the extension of the period within which this and other municipal

by-elections were to be held, to 3 September 2020. In the circumstances the court a quo held that the administrator would unlawfully hold office for much more than 90 days following on the dissolution of the Tshwane Council. This factor, so the court a quo held, constituted both exceptional circumstances and irreparable harm to the DA. It also concluded that the appellants would not suffer irreparable harm as a result of the interim order. These conclusions are, in essence, endorsed in the judgment of Zondi JA and I need not elaborate thereon.

[49] I am prepared to accept, without deciding, that s 159(2) of the Constitution is applicable to the dissolution of a municipal council under s 139(1)*(c)*. It seems to me that this conclusion may be reached along the following lines. Section 34 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) provides for the dissolution of municipal councils. Section 34(4) provides:

'The MEC for local government in a province may dissolve a municipal council in a province in accordance with the provisions of section 139 of the Constitution of the Republic of South Africa, 1996.'

However, s 139(1)*(c)* of the Constitution clearly provides that the power to dissolve a municipal council vests in the relevant provincial executive, that is the Premier together with the other members of the Executive Council. On the face of it, therefore, s 34(4) directly contradicts s 139(1)*(c)* and is unconstitutional. It is trite, however, that if the language permits it, preference should be given to an interpretation that renders a statutory provision constitutional. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 paras 22-24.

[50] Section 139(8) of the Constitution provides:

'National legislation may regulate the implementation of this section, including the processes established by this section.'

In the circumstances I can see an argument that the phrase 'in accordance with the provisions of section 139 of the Constitution' in s 34(4) of the Structures Act, should be interpreted to mean 'in accordance with a decision of a provincial

executive in terms of the provisions of s 139'. Put differently, s 34(4) and the provisions of s 35 that deal with the mechanics of the appointment of an administrator, do not provide an independent power to the MEC to dissolve a municipal council, but provide for the implementation of a decision of a provincial executive under s 139(1)*(c)*. This construction would avoid an inconsistency that would otherwise exist, namely that no time limit is set for holding a by-election after the dissolution of a municipal council under s 139(1)*(c)*. It would also have the result that a municipal council is in such a case (actually) dissolved in terms of national legislation, within the meaning of s 159(2).

[51] But does it follow from the acceptance that s 159(2) was applicable that the appointment of the administrator had terminated or become unlawful upon the expiry of a period of 90 days after the dissolution of the Tshwane Council? I do not think so. First and foremost, that is not what s 139(1)*(c)* says. It provides that the administrator is appointed 'until a newly elected Municipal Council has been declared elected'.

[52] Second, the drafters of the Constitution must have realised that unforeseen circumstances might lawfully cause either the holding of an election or the declaration of its results to take place more than 90 days from the dissolution of the municipal council. An obvious example of the first instance is the lawful prevention of a by-election as a result of a declaration of a national state of disaster under s 27(1) of the Disaster Management Act 57 of 2002, coupled with regulations under s 27(2) that, for example, severely restrict movement and gathering of persons.

[53] The provisions of s 64 of the Local Government: Municipal Electoral Act 27 of 2000 illustrate the second instance. In terms of s 64(1) the Electoral Commission must determine the result of a municipal election and declare the result in public. Section 64(2) provides that if the Electoral Commission is unable to determine and

declare the result of an election within seven days of the election, it may apply to the Electoral Court for an extension of that period. Section 64(3) reads:

'Despite the provisions of any law, the Electoral Court may, on good cause shown, grant or refuse an application referred to in subsection (2).'

The exercise of this wide discretion may clearly result in the lawful declaration of the result of an election after expiry of the 90-day period. The declaration of the result may be even further postponed by an appeal against the refusal of an application for extension under s 64(2). (The papers do not reveal the power in terms of which the Electoral Court authorised the extension that I have referred to and I express no opinion thereon.)

[54] Third, s 152 of the Constitution sets out the objects of local government. These include to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. In the light of what I have said there would, on the court a quo's reasoning, in many cases be a vacuum, that is, where neither a municipal council nor an administrator is in place to fulfil these objects. This could not have been intended.

[55] For these reasons I hold that the appointment of an administrator endures until a newly elected municipal council is declared elected, irrespective of the expiry of a period of 90 days after the dissolution. In my opinion, therefore, the mainstay of the interim order was legally untenable. For this reason alone, the appeal should succeed.

[56] The appellants argued that even if it was accepted that for the administrator to remain in office for more than 90 days would infringe rights, the DA did not show the requirement of irreparable harm. I agree and, for the benefit of the parties, I briefly state my reasons for this conclusion.

[57] Whilst I accept that it is generally offensive to democratic values for unelected persons to hold office for longer than necessary, the matter is governed

by clear principle. The starting point is the common law principle that, in order to prevent irreparable damage to the party intending to appeal, the execution of an order is automatically suspended by the noting of an appeal, unless the court orders otherwise. In terms of the common law, therefore, the party that seeks enforcement of an order pending an appeal, has to justify the exception to the general rule. As Fourie AJA demonstrated in *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA) paras 9-11, the requirements of s 18 are more onerous than those of the common law.

[58] I accept that the question of harm could not be limited to the position of the DA itself, as a political party. I therefore accept that it had to be considered whether the DA's constituency in Tshwane would suffer irreparable harm. And as I have said, for present purposes I assume that the rights of the DA's constituency would be infringed if the unelected administrator holds office for more than 90 days. But as this court emphasised in *UFS v Afriforum* para 22, infringement of a right per se does not constitute proof of irreparable harm. The DA had to prove on a balance of probabilities that the infringement would cause irreparable harm to it or its constituency.

[59] The ordinary meaning of harm is injury, damage or ill effect. And for harm to be irreparable, the effects or consequences must be irreversible or permanent. See *Tshwane City v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC) para 59.

[60] It is common cause that the Tshwane Council was dysfunctional. The court a quo succinctly described this position and the reasons therefor:

'[7] The Municipal Council has reached a dead-lock; no parties therein can win an argument or gain an advantage and no action can be taken by the Municipal Council. The Municipal Council has no Mayor, Mayoral Committee and no Municipal Manager. Simply put, it is unable to conduct its business and cannot serve its residents.

[8] The reason for the dead-lock can be located in the Municipal Council's inability to convene and run council meetings to transact and take necessary decisions in line with its responsibilities. This situation exists as a direct consequence of the disruption of its meetings due to the walkout from council meetings by ANC and EFF councillors thus depriving the Municipal Council of the necessary quorum. Whether done for good or bad reasons does not alter the fact that the walkouts have rendered the City powerless.'

[61] On the evidence of the appellants and of the administrator, which in terms of well-known principles had to be accepted for purposes of determination of the application, the administrator and his team have been doing a good job in running the municipality. It is lamentable that the obstructive conduct of councillors caused the paralysis of the Tshwane Council. However, it is difficult to comprehend how the interim enforcement of the order requiring the Tshwane councillors to attend council meetings and to remain in attendance, would remove the underlying acrimony, strife and political machinations that caused the Tshwane Council to become a lame duck. Even if it is accepted that there may be some improvement of its performance, there is no reason to believe that during the period pending the appeal against the main order, the Tshwane Council would do better than the administrator and his team. In the result the DA did not show irreparable harm. On this basis too, the appeal should be upheld.

[62] Finally I point out that neither the court a quo nor Zondi JA held that irreparable harm lay in a wasteful by-election. This must be right. This court may take judicial notice thereof that the Constitutional Court heard the application for leave to appeal against the main order on 10 September 2020, but reserved judgment and that the Electoral Court on 7 July 2020 further extended the aforesaid period to 30 December 2020, with leave to the Electoral Commission to apply for a further extension. In the circumstances it is not a realistic possibility that the Tshwane by-election would take place prior to the determination of the application for leave to appeal against the main order.

[63] I do not think that the employment of more than two counsel was justified in the s 18 application. For these reasons I would make the following order:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo dated 10 June 2020 is set aside and replaced with the following:

‘The application is dismissed with costs, including the costs of two counsel.’

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C H G VAN DER MERWE

JUDGE OF APPEAL

Appearances:

For appellants:	T Ngcukaitobi SC (with him J Mitchell, C Tabata and T Ramogale)
Instructed by:	The State Attorney, Johannesburg The State Attorney, Bloemfontein
For 1st to 4th respondents:	S Budlender SC (with him N Ferreira, M Musandiwa and I Learmonth)
Instructed by:	Minde Schapiro & Smith Inc, Bellville Symington & De Kok, Bloemfontein