

ORIGINAL 1

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number:

In the matter between:

**SOCIALIST AGENDA OF DISPOSSESSED AFRICANS**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

Respondent

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NOTICE OF MOTION

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**KINDLY TAKE NOTICE THAT** the Applicant intends to apply to the above Honourable Court on a date to be determined by the Chief Justice for an order in the following terms: –

1. The order of invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 of the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
2. Parliament must, within eighteen (18) months from the date of this order, amend section 42(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, pending which section 43(2)(c) shall read as follows:

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by the political party or political interest with the highest number of votes obtained during the elections”

3. The order in paragraph 2 operates with immediate effect.
4. The Respondent is ordered to pay the costs of the application in this Court, including the costs of two counsel.
5. Further and/or alternative relief.

**TAKE NOTICE THAT** the affidavit of **JOSEPH LETHABILE KGWEDI** together with the annexures thereto, will be used in support of this application.

**KINDLY TAKE NOTICE THAT** the Judgment and Order of the High Court of South Africa, Gauteng Division, Pretoria is attached and marked annexure “A”.

**KINDLY TAKE NOTICE FURTHER** that the applicant has appointed the address of **RJ PHAKOAGO ATTORNEYS** as the address at which it will accept notice and service of all process in these proceedings.

**TAKE NOTICE FURTHER** that if the Respondent wishes to oppose this application she is required to do:

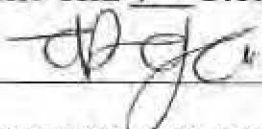
- (i) To file notice of intention to oppose and the answering affidavit within ten (10) days from the date of receipt of this application by way of email at [phakoagoattorneys@gmail.com](mailto:phakoagoattorneys@gmail.com) and [phakoagojoshua@gmail.com](mailto:phakoagojoshua@gmail.com) and [tebeiless@gmail.com](mailto:tebeiless@gmail.com) ; and appointing an address within 25 KM of the office of the Registrar of this Honourable Court at which you will accept notice and service of all process in these proceedings;

**KINDLY TAKE NOTICE FURTHER THAT** the applicant consents to and **prefers** services of all documents and processes in these proceedings via email to [phakoagoattorneys@gmail.com](mailto:phakoagoattorneys@gmail.com) and [phakoagojoshua@gmail.com](mailto:phakoagojoshua@gmail.com) and [tebeiless@gmail.com](mailto:tebeiless@gmail.com)

TAKE NOTICE FURTHER that if no intention to oppose is given, application will be made without further notice to the respondent and for the relief sought in this notice of motion.

KINDLY SET DOWN THE MATTER ACCORDINGLY.

DATED AT GA-NCHABELENG ON THIS THE 13<sup>TH</sup> DAY OF OCTOBER 2023.

  
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**RJ PHAKOAGO ATTORNEYS**

**Attorneys for Applicant**

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Limpopo Province

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**REF: RJP/CVL/SADA/180122**

**c/o SITSULA ATTORNEYS**

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JOHANNESBURG, 2001

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**NB: We prefer service by email**

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

1 Hospital Street

Braamfontein

AND TO THE STATE ATTORNEY: PRETORIA

Attorneys for the Respondent

SALU Building

316 Thabo Sehume Street

PRETORIA

Tel: 012 309 1690

Email: MashMatlala@justice.gov.za

matlalamj@webmail.co.za

REF: 00348/22/Z68

STATE ATTORNEY
RECEPTION
2023 -10- 16
(PRIVATE BAG/PRIVAATSAK, 981) (6)
STAATSPROKUREUR

09:30

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number:

In the matter between:

**SOCIALIST AGENDA OF DISPOSSESSED AFRICANS**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

Respondent

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APPLICANT'S FOUNDING AFFIDAVIT

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I,

the undersigned

**JOSEPH LETHABILE KGWEDI**

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do hereby declare under oath that:

1. I am an adult male South Africa currently serving as the Limpopo Provincial Chairperson of the Socialist Agenda of Dispossessed Africans ("the applicant") and currently residing at Tubatse Township, Limpopo Province.
2. The facts contained in this affidavit are both true and correct, and within my personal knowledge unless the context provides otherwise.
3. All legal submissions are made on the advice of the applicant's attorney and counsel, and which the advice I take and accept as correct.
4. I am authorised to depose to this affidavit, and I hereby do so.

#### **THE PURPOSE OF THIS AFFIDAVIT**

5. This affidavit is filed in support of an application for an order as follows:
  - 5.1. The order of invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 of the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
  - 5.2. Parliament must, within eighteen (18) months from the date of this order, amend section 42(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, pending which section 43(2)(c) shall read as follows:

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“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by the political party or political interest with the highest number of votes obtained during the elections”

5.3. The order in paragraph 2 operates with immediate effect.

5.4. The Respondent is ordered to pay the costs of the application in this Court, including the costs of two counsel.

5.5. Further and/or alternative relief.

**JURISDICTION**

6. The above Honourable Court has jurisdiction to hear this application in terms of sections 167(5) and 172(2)(d) of the Constitution.

**THE PARTIES**

7. The applicant is **SOCIALIST AGENDA OF DISPOSSESSED AFRICANS**, a political party registered as such in terms of the laws of the Republic of South Africa.

8. The respondent is the **MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS**, a Minister responsible for the

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administration of the Department of Cooperative Governance and Traditional Affairs in the Republic of South Africa, and the most senior political head within the Ministry.

- 9. The respondent is cited in this application in her official capacity and as an official responsible for the administration of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act).

**NATURE OF THE APPLICATION**

- 10. This is an application for confirmation of an order of invalidity made by the High Court of South Africa, Gauteng Division, Pretoria and which application is brought in terms of sections 167(5) and 172(2)(d) of the Constitution.

**FACTUAL BACKGROUND**

- 11. On 11 December 1998 the Local Government: Municipal Structures Act 117 of 1998 ("Municipal Structures Act") was enacted.
- 12. On 1 June 2021 the Local Government: Municipal Structures Amendment Act 3 of 2021 was enacted in order to amend certain provisions of the Municipal Structures Act.

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13. On or about 03 November 2021, the local government elections were held in South Africa and the applicant contested those elections at municipal and district levels in Sekhukhune District, Limpopo Province.
14. In Fetakgomo Tubatse Local Municipality, the applicant obtained 2.25 % with a total number of votes of about 3667 votes and it was followed by the Democratic Alliance ("DA") with 2.04%. The applicant obtained position 3 in the Fetakgomo Tubatse Local Municipality.
15. In the Fetakgomo Tubatse Local Municipality where the applicant contested elections, the seats won by the political parties or political interests were as follows:
- 15.1. ANC = 54
- 15.2. EFF = 14
- 15.3. SADA (applicant) = 2
- 15.4. DA = 2
- 15.5. PAWU = 1
- 15.6. AZAPO = 1

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15.7. PAC = 1

15.8. BPSA = 1

15.9. FF PLUS = 1

16. The total number of councillors in Fetakgomo Tubatse Local Municipality is seventy-seven (77).

17. During the council sitting held on or about 23 November 2021 it became apparent that the DA and the applicant obtained same number of seats, namely, two (2) seats, and therefore these two political parties created a situation where "there is an equality of the surpluses". The surpluses of DA and the applicant were calculated as follows:

**Number of seats won by a political party ÷ total number of councillors × number of seats on the executive committee**

$$2 \div 77 \times 10 = 0.2597 \text{ (SADA)}$$

$$2 \div 77 \times 10 = 0.2597 \text{ (DA)}$$

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18. In light of the above calculations, there was "an equality of the surpluses" between the applicant and the DA and therefore the provisions of section 43(2)(c) of the Municipal Structures Act were invoked and as a result, DA got a seat in the executive committee after winning by way of lot.
19. During the council sitting on or about 23 November 2021, the applicant objected to the application of section 43(2)(c) of the Municipal Structures Act on the basis that it is clear that the impugned provisions undermine the rights of the electorate in that their votes are disregarded.
20. The applicant requested that the remaining seat (seat no 10) in the executive committee be reserved until a legal opinion is sourced by the council from the municipality's legal advisors. However, the sitting proceeded without the matter being referred to the municipality's legal advisors for legal opinion, and as a result a 'lot' was applied and the DA won the remaining seat in the executive notwithstanding the fact that the DA obtained 2.04% as opposed to 2.25% obtained by the applicant.

### **PROCEEDINGS IN THE HIGH COURT**

21. The applicant launched an application for constitutional invalidity of section 43(2)(c) of the Municipal Structures Act in the High Court.

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22. On 10<sup>th</sup> October 2023 the High Court per Van der Schyff J handed down a judgment and order in terms of which section 43(2)(c) was declared unconstitutional and invalid. Copy of the judgment and order handed down by the High Court is attached and marked annexure "A".

23. In light of the judgment and order of constitutional invalidity of the High Court, the applicant brought the present application for confirmation of invalidity in terms of sections 167(5) and 172(2)(d) of the Constitution.

24. I wish to bring to the attention of this Court that during the proceedings before the High Court, the respondent filed notice to oppose and subsequently filed notice of withdrawal of such notice to oppose together with notice to abide.<sup>1</sup> This is correctly recorded in paragraph 2 of the High Court judgment.

### **SECTION 43(2)(c) IS INCONSISTENT WITH SECTION 19(3)(a) OF THE CONSTITUTION**

25. The applicant seeks an order confirming the invalidity of section 43(2)(c) made by the High Court.

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<sup>1</sup> See para 2 of the judgment of the High Court.

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26. Section 43(2)(c) of the Municipal Structures Act provides:

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by lot.” (Emphasis added)

27. It must be noted by this Court that two political parties may have equal seats (e.g. 2 seats) in the municipal council but do not obtain equal votes during the elections as in the following example:

27.1. SADA with 2 seats and obtained 2.25% (3667 votes).

27.2. DA with 2 seats and obtained 2.04% (3321 votes).

28. I wish to reiterate that two political parties may have equal seats but do not have equal number of votes in their favour and therefore the votes and which votes represent the wishes of the voters (electorate) cannot be disregarded by



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the use of lot to decide which political party should get a remaining seat where the two political parties or political interests have "an equality of the surpluses".

29. The wishes of the voters to have their political parties of choice represented in the executive committee through casting votes to their political parties cannot be replaced by 'lot'. To do so amounts to violation of the right to vote in that the voters' votes are not counted when determining which political party should get a seat in the executive committee.

30. The replacement of voters' votes by 'lot' constitutes violation of the right to vote enshrined in section 19(3)(a) of the Constitution because if you disregard the number of votes obtained by a political party or political interest, it means that you disregard the votes casted by the voters during elections and therefore it amounts to not counting legitimate votes of the voters.

31. The use of 'lot' obviously disregards the total number of casted votes to a political party and the percentage which that party has achieved during the elections.

32. To an extent that votes are replaced by 'lot' when determining seats with the executive committee, this constitutes disregard of votes casted during the elections and consequently constitutes violation of the right "to vote in elections for any legislative body".

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33. The purpose of the percentage is to reflect the number of votes casted to a political party or political interest and their achievements thereof. To disregard these percentages by using lot is tantamount to disregarding the number of votes casted and the interests and wishes of the electorate and which disregard of votes disadvantaged a political party with more votes achieved during the elections. This is so because two political parties with 2 seats each, may have obtained 2500 and 2000 votes respectively.

34. The applicant will submit that the High Court correctly found that:

“To have regard to the number of valid votes obtained by a political party as a mechanism to overcome what seems to be a tie, does not militate against the scheme of the Act”<sup>2</sup>

35. The High Court correctly held:

“As stated above, if all factors and variables were equal, the only logical manner to resolve a tie would be through the lot. Where all variables are, however, not equal, there is, strictly speaking, no tie. In these circumstances, the disregarding of the number of valid votes cast, amounts to disregarding the values for votes and the right to vote”<sup>3</sup> (Emphasis added)

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<sup>2</sup> See para 61 of the High Court judgment.

<sup>3</sup> *Id.*

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36. The applicant will submit that the use of 'lot' undermines the wishes of the electorate and their interests and intentions when they voted for a particular political party or political interest.

37. The High Court correctly found that "parties would be considered to be in all respects equal if there was no distinguishing factor".<sup>4</sup> The High Court further correctly found that "it would be wrong to find" that "the difference in electoral support no longer matters."<sup>5</sup>

38. In the circumstances, section 43(2)(c) violates the right to vote and therefore it is inconsistent with section 19(3)(a) of the Constitution.

**SECTION 43(2)(c) OF THE NEW ACT IS INCONSISTENT WITH SECTION 160(8) OF THE CONSTITUTION**

39. Section 160(8) of the Constitution provides:

"Members of a Municipal Council are entitled to participate in its proceedings and those of its sittings, or those of its committees in a manner that—

(a) allows parties and interests reflected within the Council to be fairly represented;

(b) is consistent with democracy; and

(c) may be regulated by national legislation."

<sup>4</sup> See para 57 of the High Court judgment.

<sup>5</sup> See para 60 of the High Court judgment.

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40. The applicant will submit that it cannot be fair to ignore the fact that a particular political party or political interest has achieved a higher number of votes during the elections and must enjoy that achievement by way of getting a seat into the executive committee if it qualifies for such a seat.
41. Where two political parties or political interests have obtained equal seats in the Municipal Council but did not obtain equal votes during the elections, it cannot be constitutionally compliant with section 160(8) of the Constitution to decide allocation of seats in the executive committee in terms of section 160(6) by using "lot" on the basis that the two political parties have 'equal surpluses' for the reasons to follow.
- 41.1. The use of 'lot' will not result in fair representation of political parties or political interests in that, for the purpose of allocation of seats in the executive committee, you cannot treat equally (to treat political parties as if they achieved equal votes) two political parties which did not obtain equal number of votes during the elections.
- 41.2. The use of 'lot' is inconsistent with democracy which requires consideration of votes to decide who won elections.
- 41.3. The use of 'lot' is inconsistent with democracy because it disregards the views and wishes of the electorate which were made through voting for a particular political party or political interest.

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41.4. A political party's interests cannot be fairly represented if such party's votes are not considered for the purpose of determining who should be allocated a seat in the executive committee where two political parties obtained equal number of seats but did not obtain equal number of votes during the elections.

41.5. To disregard number of votes obtained by a political party or political interest will result in not giving a political party or political interest with more/higher votes an opportunity to be represented in the executive.

41.6. The purpose of counting votes is nothing other than determining which political party or political interest must be represented in the council or executive committee and the use of 'lot' therefore defeat this purpose.

42. The High Court correctly held:

"Where the issue is not whether a minority voice will be heard, but which minority voice will be heard, I am of the view that regard must be had to the electoral voice before resorting to the lot. In these circumstances, fair representation will be consistent with democracy if the number of valid votes obtained acts as a tie-breaker."<sup>6</sup>

43. In the circumstances, the applicant will submit that an order of invalidity of the High Court must be confirmed for the reasons above.

<sup>6</sup> Id at para 62.

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**COSTS**

52. This application raises constitutional issues.

53. It will humbly be submitted that this application raises important constitutional issues and thus make it a constitutional litigation.

54. It is trite law that in constitutional litigation between a private party and the state, if a private party succeeds, the state must be ordered to pay the costs, and in the event the state succeeds against the private party, there must be no order as to costs.

55. In the event this application succeeds, the respondent must be ordered to pay the costs of this application, including the costs of two counsel.

56. In the event this application does not succeed, there must be no order as to costs, including the costs of two counsel.

**CONCLUSION**

57. The applicant has made out a case for the relief sought in the notice of motion.

58. The applicant, accordingly, prays for an order set out in the notice of motion.

  
JOSEPH LETHABILE KGWEDI



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Signed and sworn before me at POLOKWANE on this 13<sup>th</sup> day of **OCTOBER 2023** after the deponent acknowledged that he knows and understands the contents of this declaration and having taken the prescribed oath and regards the prescribed oath as binding on his conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the regulations contained in government gazette R1258, dated 21 July 1972(as amended).



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**COMMISSIONER OF OATHS**

FULL NAMES:

CAPACITY:

ADDRESS

TSHEGOFATSO RUNGWANE  
GIBSON MATHEBA  
COMMISSIONER OF OATH  
PRACTISING ATTORNEY R.S.A  
RUNGWANE MATHEBA ATTORNEYS  
NO:58 SCHOEMAN STREET,  
RENTMEESTER BUILDING,  
POLOKWANE

22  
"A"

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 4646/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
Date: 10 October 2023      E van der Schyff	

In the matter between:

SOCIALIST AGENDA OF DISPOSSESSED AFRICANS      APPLICANT

and

MINISTER OF COOPERATIVE GOVERNANCE AND  
TRADITIONAL AFFAIRS      RESPONDENT

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JUDGMENT

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Van der Schyff J

**Introduction**

[1] The Socialist Agenda of Dispossessed Africans (SADA), a registered political party, approached the court seeking an order declaring s 43(2)(c) of the Local Government Municipal Structures Act 117 of 1998 (the Municipal Structures Act) inconsistent with

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ss 19(3)(a) and 160(8) of the Constitution, and invalid. SADA impugns s 43(2)(c) on the basis that it undermines the rights of the electorate in that SADA's predominance of accumulated votes was disregarded by their exclusion from the executive committee of the Fetakgomo Tubatse Local Municipality Council in favour of another party after the casting of the lot.

- [2] The application was initially enrolled in the urgent court. SADA filed a Rule 16A notice, and the application was postponed for the respondent, the Minister of Cooperative Governance and Traditional Affairs<sup>1</sup> (the Minister), to file an answering affidavit. The Minister subsequently withdrew its notice of intention to oppose and filed a notice to abide by the court's decision.
- [3] After having considered the relief sought, I was of the view that all political parties in the country may have an interest in the relief sought. I also opined that the importance of the legal issue at hand justified obtaining an opinion by an *amicus curiae*. On 15 August 2022, I postponed the application *sine die*. I ordered that a copy of the application and the order be delivered by hand to the chairperson, secretary, or representative of each of the political parties represented in the Fetakgomo Tubatse Local Municipality. In addition, the notice of motion, duly amended where necessary, was to be published once in a national newspaper. Interested parties were to be afforded 15 days from the publication date of the order to serve a notice of intention to join the proceedings. In order to facilitate the speedy finalisation of the application, I retained the matter under case management. The Centre for Applied Legal Studies (CALS) was requested to join the proceedings as *amicus curiae*.
- [4] CALS did not accept the invitation to join the proceedings as *amicus curiae*. SADA filed a service affidavit wherein it was indicated that the amended notice of motion, the Rule 16A notice, and the judgment handed down by me were served on representatives, being either the secretary or chairperson, of the African National Congress, the Economic Freedom Fighters, the Democratic Alliance, the Bolshaviks

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<sup>1</sup> The national Minister responsible for local government.

Party of South Africa, the Azanian People's Organisation, the Freedom Front Plus, PAU, and the Pan Africanist Congress.

[5] A shortened version of the notice of motion was published in The Sowetan on 6 April 2023. Contrary to what is contained in the order handed down on 15 August 2022, the newspaper publication informed readers that 'if any interested party wishes to join the proceedings as *amicus curiae*' it is required to give notice 'within 5 (five) days of the publication'.

[6] Three issues that flow from the publication are: (i) parties are invited to join the proceedings as *amici* and not as parties, (ii) interested parties were afforded only five days to react to the notice, (iii) the status of The Sowetan as a national newspaper.

[7] As for the first issue, I am of the view that nothing turns on the fact that potential parties were invited to join as *amici* instead of parties. The purpose of the publication was to enhance public awareness of the application, and parties who wanted to join as parties were not precluded from approaching the court with joinder applications.

[8] SADA filed a substantive condonation application dealing with the second issue. SADA submits that interested parties would not be prejudiced by the short response period, in light of the fact that the matter would be heard long after the expiry of either 5 or 15 days. No interested party contacted SADA after the publication. I agree with SADA that the lapse of time between the publication and the matter being heard in court allowed sufficient time for any party who wanted to join and oppose the application to contact SADA and file a joinder application. The case number and the Division where the application was issued are reflected in the publication. If any party wanted to join the proceedings, nothing prevented them from contacting the registrar of the court, even 20 days after the publication. The condonation application stands to be granted.

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- [9] The Sowetan is a daily newspaper. It is gleaned from the website of Arena Holdings (Pty) Ltd that The Sowetan is a national newspaper.<sup>2</sup>
- [10] Since the application, the Rule 16A notice and the judgment handed down on 15 August 2022 were served on either the secretaries or chairpersons of all the political parties represented on the Fetakgomo Tubatse Local Municipality, with representatives of the three main political party role-players represented, the Rule 16A noticed duly stamped by the registrar placed on the relevant notice board, and the application served on the State Attorney and the respondent, I am satisfied that SADA's intention to approach the court for the relief sought was widely communicated. Interested and affected parties had sufficient opportunity to join the proceedings.

**The relief sought**

- [11] SADA seeks the following order:
  - i. That s 43(2)(c) of the Municipal Structures Act be declared inconsistent with s 19(3)(a) of the Constitution, and invalid;
  - ii. That s 43(2)(c) of the Municipal Structures Act be declared inconsistent with s 160(8) of the Constitution, and invalid;
  - iii. That the order of invalidity in paragraphs 1 and 2 above be referred to the Constitutional Court for confirmation in terms of s 172(2)(a) of the Constitution; and
  - iv. That the respondents be ordered to pay the costs of the application, including the costs of two counsel.
- [12] SADA initially sought the constitutional invalidity to be declared retrospectively with effect from 1 June 2021, but has amended its notice of motion since the issuance of the application. It no longer seeks the declaration, if granted, to be retrospective. During argument, counsel stated that, if the application succeeds, SADA seeks an

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<sup>2</sup> <http://adroom.arena.africa/advertise/readership/newspapers/sowetan/> accessed on 21 August 2023.

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order that the invalidity be suspended for a period of 12 months to enable Parliament to remedy the invalidity.

### The factual matrix

- [13] In order to fully understand SADA taking issue with s 43(2)(c), it is necessary to have regard to the factual matrix that gave rise to the issue that caused this application to be instituted.
- [14] Local Government elections were held in South Africa on or about 3 November 2021. SADA contested these elections on municipal and district levels in the Sekhukhune District, Limpopo Province. In the Fetakgomo Tubatse Local Municipality (FTLM), SADA obtained 2.25% of the votes with 3667 votes. It was followed by the Democratic Alliance (DA) with 2.04% of the votes (3321 votes).
- [15] In the FTLM, where SADA contested elections, the following seats were won by the political parties or political interests:
- i. ANC = 54
  - ii. EFF = 14
  - iii. SADA = 2
  - iv. DA = 2
  - v. PAWU, AZAPO, PAC, BPSA, FF PLUS = each 1
- [16] The number of seats in the municipal council amounts to seventy-seven (77). An executive committee stood to be composed. The executive committee would comprise ten seats. The surpluses were calculated in terms of s 43(2)(a) as follows:
- Number of seats won by a political party ÷ by total number of councillors  
x number of seats on the executive council.
- $2 \div 77 \times 10 = 0.2597$  (SADA)
- $2 \div 77 \times 10 = 0.2597$  (DA)

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- [17] With SADA and the DA having obtained the same number of seats, a situation arose where there was 'an equality of surpluses' between the DA and SADA. The provisions of s 43(2)(c) were invoked, and as a result, the DA won the seat in the executive committee after winning by way of lot.

#### **SADA's submissions**

- [18] SADA submits that the impugned s 43(2)(c) undermine the rights of the electorate in that their votes are disregarded. Section 43(2)(c) disregards the fact that although two political parties, in this instance, SADA and the DA, might have equal seats in the council, they did not get equal votes. SADA got 3667 votes or 2.25% of the votes and obtained two seats in the municipal council. The DA obtained 3321 votes, or 2.04% of the votes, and two seats in the municipal council.
- [19] Votes represent the 'wishes' of the electorate and should not be disregarded by the use of the lot to decide who should obtain the remaining seat in the executive committee where two political parties or political interests have 'an equality of surpluses'.
- [20] To violate the wishes of voters to have their political parties of choice represented in the executive committee of a municipal council by casting the lot is untenable in a constitutional dispensation. Using the 'lot' disregards the total number of casted votes a political party received. It undermines the electorate's wishes, interests, and intentions when they vote for a particular political party. In sum, SADA submits that it is not fair to ignore that a particular political party has achieved a higher number of votes during the election. If more than one party qualifies for the remaining seat in the executive committee, the party with the highest number of votes must be allocated the seat. Political parties who did not obtain equal votes during elections should not be treated equally. The use of the lot in such circumstances is inconsistent with democracy.

#### **Pertinent provisions of the Constitution**

- [21] Since the Municipal Structures Act must be interpreted and applied in a manner that gives effect to the declarations, guarantees, and responsibilities contained in the

Constitution, it is necessary to have regard to the provisions in the Constitution that are specifically relevant to the issue at hand.

[22] Section 1, as a founding provision of the Constitution, provides that:

'The Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality, and the advancement of human rights and freedoms,
- (b) Non-racialism and non-sexism,
- (c) Supremacy of the constitution and the rule of law,
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability responsiveness and openness.'

[23] Section 2 proclaims that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. The state is obliged to respect, protect, promote, and fulfill the rights in the Bill of Rights.<sup>3</sup>

[24] Section 19(3)(a) of the Constitution guarantees that:

'Every adult citizen has the right-

- (a) To vote in elections for any legislative body established in terms of the Constitution, and to do so in secret;'

[25] Section 157 of the Constitution provides for the composition and election of municipal councils. Section 157(2) prescribes that the election of members to a municipal council must be in accordance with national legislation, which must prescribe a system of proportional representation based on that municipality's segment of the national common voters roll, or of proportional representation

<sup>3</sup> S 2(2) of the Bill of Rights.

combined with a system of ward representation. Section 157(3) prescribes that an electoral system must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties.

[26] Section 160(8) of the Constitution prescribes that:

- Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that –
- (a) Allows parties and interests reflected within the Council to be fairly represented;
- (b) Is consistent with democracy; and
- (c) May be regulated by national legislation.

**Discussion**

*The electoral system for local government<sup>4</sup>*

[27] The Local Government: Municipal Structures Act 117 of 1998 (the Municipal Structures Act or the Act) was enacted to provide for the establishment of municipalities in accordance with the provisions contained in Chapter 7 of the Constitution.<sup>5</sup> Section 157(2) of the Constitution provides Parliament with the choice between an electoral system of proportional representation and a system that combines proportional representation (PR) with constituency (ward) representation. The Municipal Structures Act, together with the Local Government: Municipal Electoral Act,<sup>6</sup> provides the foundation for the electoral system of a local government. Steytler and De Visser explain that the electoral system for local and

<sup>4</sup> For this discussion I had extensively considered Steytler, N. and De Visser, J., *Local Government Law of South Africa*, LexisNexis, November 2022 – Issue 15.

<sup>5</sup> *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 18 (12 December 2002); 2003 (2) SA 413 (CC) at para [12]. See also, <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/archives/volume-8-issue-5-november-2006/vol-8-no-5-executive-committees-fair-or-proportional.pdf>

<sup>6</sup> Act 27 of 2000.

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metropolitan municipalities combines proportional and constituency elections. The results of the two elections are integrated.

- [28] The importance of the election of ward councillors was underscored by the Constitutional Court in *Kham and Others v Electoral Commission and Another*.<sup>7</sup>

'Instead of having to deal with an amorphous political party, citizens in a municipality have a local representative, who should be available to them, irrespective of political affiliation, to address their local problems ... If people lack, or have inadequate, water, electricity, housing, and sewage removal, or have roads with potholes and without sidewalks, it is to the municipality that they turn and to their councillors that they have resort. The process of election to public office of councillors is therefore of cardinal importance for the healthy operation of our democracy at local government level.'

- [29] The manner in which votes cast is converted into the awarding of seats to the parties and the candidates are dealt with in Schedules 1 and 2 of the Structures Act. Schedule 1 is relevant for local and metropolitan municipalities, and Schedule 2 for district municipalities. The relevance of these Schedules for this application is found therein that provision is made for (i) the determination of a quota of votes for seats, (ii) fractions, (iii) equal fractions, and (iv) surpluses.

- [30] Steytler and De Visser explain that ward votes for party-affiliated candidates are considered when the number of PR seats a political party is entitled to, is calculated. The calculation of PR seats for a local council commences with determining the quota of votes for a seat. The quota is determined in accordance with a prescribed formula, and fractions are to be disregarded.<sup>8</sup> The number of seats for a party is also

<sup>7</sup> [2015] ZACC 37 at para [62].

<sup>8</sup> Item 12(1) Sch 1 of the Structures Act -

determined in accordance with a prescribed formula.<sup>9</sup> This formula results therein that a party that loses a ward election by a few votes will still benefit from those votes, as they will be taken into consideration when its PR seats are allocated. No vote for a party is thus wasted.

- [31] If the calculation in terms of the formula provided for the allocation of seats in a metro or local council yields a surplus not absorbed by the seats awarded to a party, the surplus must compete with similar surpluses accruing to any other parties, and the undistributed seat or seats must be awarded to the party or parties concerned in sequence of the highest surplus.<sup>10</sup> If the surplus for two or more parties is equal, the seat is awarded to the party that received the most valid votes.<sup>11</sup>
- [32] For purposes of this discussion, it is also relevant to note that where a scenario of 'excessive seats' arises, a new quota of votes for a seat must be determined in accordance with a formula prescribed in Item 16(3) of Schedule 1. Fractions are, again, to be disregarded. If the calculation yields a surplus not absorbed by the seats awarded to a party, the surplus must compete with similar surpluses accruing to other parties, and any undistributed seat must be awarded to the party or parties concerned in sequence of the highest surplus.<sup>12</sup> If the surplus for two or more parties is equal, the seat must be awarded to the party that received the highest number of

$$\frac{\text{Total number of votes cast for parties, that is in both the PR election and the ward election} + 1}{\text{Number of seats in the council} - \text{Number of independent ward councillors elected}}$$

$$\frac{\text{Total number of votes cast for the party, that is in both the PR election and the ward election}}{\text{Quota}}$$

<sup>10</sup> Item 13(2)(a) Sch 1 Structures Act.

<sup>11</sup> Item 13(2)(b) Sch 1 of the Structures Act.

<sup>12</sup> Item 16(4)(b) Sch 1 of the Structures Act.

valid votes.<sup>13</sup> Items 13 and 16 of Schedule 1 of the Act indicate that the number of votes cast in the election ultimately remains relevant, even in a system that allows for proportional representation where fractions are disregarded.

- [33] Regarding district councils, Schedule 2 likewise provides a formula wherein fractions are to be disregarded, determining a quota of votes for a PR seat.<sup>14</sup> When the number of seats a party is entitled to is determined, it is likewise possible that not all seats available can be allocated to parties as a result of fractions in seats. Seats are allocated in sequence of the highest surplus.<sup>15</sup> If the surplus of two or more parties is equal, the seat must be awarded to the party that received the highest number of valid votes.<sup>16</sup>
- [34] The process allowing local representatives to be elected to the district council is similar to the processes described above with formulae prescribed in Schedule 2. Of relevance is that the party that received the highest number of valid votes will triumph if the surpluses of two or more lists are equal.<sup>17</sup> No votes are disregarded when councils are composed.

*Instances provided for in the Municipal Structures Act where results will be determined by lot*

- [35] Except for s 43(2)(c), the Municipal Structures Act provides for results to be determined by lot in the following circumstances:
- i. Section 8(2) provides that if two or more candidates in an election for ward councillor receive an equal number of votes, the result will be determined by lot;

<sup>13</sup> Item 16(4)(c) Sch 1 of the Structures Act.

<sup>14</sup> Item 6 Sch 2 of the Structures Act.

<sup>15</sup> Item 7(2)(a) Sch 2 of the Structures Act.

<sup>16</sup> Item 7(2)(b) Sch 2 of the Structures Act.

<sup>17</sup> Item 20(2)(b) Sch 2 of the Structures Act.

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- ii. Schedule 3 of the Act has the election of municipal office-bearers as its subject matter. Item 8(3) of Schedule 3 provides that if two candidates are nominated, and those two receive the same number of votes, the person presiding at such meeting must determine by lot who of the two candidates will hold the office for which the election has taken place.

### *Executive committees*

- [36] Chapter 4 of the Municipal Structures Act provides for municipalities' internal structures and functionaries. Part 1 deals specifically with executive committees. The Act was, amongst others, amended on 1 June 2021, which amendment introduced s 43 in its current form.
- [37] Only municipalities of certain types may establish executive committees.<sup>18</sup> An executive committee is the principal committee of the council of a municipality of a type that is entitled to establish an executive committee.<sup>19</sup> It is the committee that receives reports from the committees of councillors established to enhance the effective and efficient performance of any of its functions or the exercise of any of its powers.<sup>20</sup> The executive committee must forward these reports and its recommendations to the council when it cannot dispose of the matter in terms of its delegated powers.<sup>21</sup>
- [38] Executive committees fulfill an essential role within the municipal council. The executive committee must identify the needs of the municipality; review and evaluate

<sup>18</sup> S 42 of the Municipal Structures Act. It is explained in the 'Guideline Document on the Roles and Responsibilities of Councillors, Political Structures and Officials' published by SALGA that only municipalities with a collective executive system may establish an executive committee. A collective executive system is a system of local government with the exercise of the executive authority is through an executive committee in which the executive leadership of the municipality is collectively vested. See <https://www.salga.org.za/Documents/Knowledge-products-per-theme/Governance%20n%20Intergovernmental%20Relations/Guidelines%20on%20the%20Roles%20and%20responsibilities%20in%20Municipalities.pdf> accessed on 22 August 2023.

<sup>19</sup> S 44(1)(a) of the Municipal Structures Act.

<sup>20</sup> S 79 read with s 80 of the Municipal Structures Act.

<sup>21</sup> S 44(1)(b) of the Municipal Structures Act.

those needs in order of priority; recommend to the municipal council strategies, programs, and services to address priority needs through the integrated development plan and estimates of revenue and expenditure, taking into account any applicable national and provincial development plans; and recommend or determine the best methods, including partnership and other approaches, to deliver those strategies, programs and services to the maximum benefit of the community,<sup>22</sup>

[39] Section 43 of the Act deals with the composition of executive committees. For purposes of this application, it is necessary to have regard to the entire section:

(1)(a) If the council of a municipality establishes an executive committee, it must determine a number of councillors necessary for effective and efficient government, provided that no more than 20 percent of the councillors (fractions to be disregarded) or 10 councillors, whichever is the least, are determined

(b) An executive committee may not have less than three members.

(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner

(a) the number of seats won by a political party or political interest divided by the total number of councillors determined for that municipality in terms of section 20 and multiplied by the number of seats on the executive committee;

(b) if the calculation in paragraph (a) gives a surplus, that surplus must compete with the other surpluses, and be awarded to the highest surplus;

(c) if there is an equality of the surpluses, the result must be determined by lot;

<sup>22</sup> S 44(2) of the Municipal Structures Act.

- (d) the political party or political interest to which seats are allocated to on the executive committee must, through an authorized representative, appoint their representatives to occupy such seats;
- (e) In the event of a vacancy arising on the executive committee, the political party or political interest to which the seat was allocated to will, through an authorised representative, appoint a councillor to fill that vacancy;
- (f) nothing precludes a political party or political interest from nominating a councillor from another political party or political interest to one or more of its allocated seats.

[40] In determining whether s 43(2)(c) of the Municipal Structures Act musters constitutional scrutiny, it is, amongst others, necessary to determine its purpose. The Minister's decision to abide by the court's decision without filing any papers in this application unnecessarily complicates the court's task. It is now necessary to engage in a process to determine the purpose for which s 43 was included in the Municipal Structures Act, without the insight and views of the Minister who is responsible for local government.

[41] The first and obvious purpose for the inclusion of s 43 is to provide for the composition of executive committees. That much can be deduced from the heading of the section. Steytler and De Visser<sup>23</sup> explain that the formula provided for in s 43 in terms whereof seats are awarded on the executive committee, establishes a system of proportionality in terms of which the composition of the executive committee mirrors the composition of the municipal council.

[42] It is, however, important to have regard to the fact that s 43(2) in its current form was introduced with effect from 1 November 2021. Before its introduction, s 43(2) only provided that an executive committee must be composed so that parties and interests represented in the municipal council are represented in the executive

<sup>23</sup> Steytler, N. and De Visser, J., *Local Government Law of South Africa*, LexisNexis, November 2022 – Issue 15.

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committee in substantially the same proportion that they are represented in the council. The now-deleted section 43(3) also provided that a council could adopt an alternative mechanism for the election of an executive committee. Section 45, in turn, initially provided that a municipal council must 'elect' the members of its executive committee from among its members. In contrast, the amended s 45, with effect from 1 November 2021, provides that a municipal council must 'determine' the members of its executive committee from among its members.

- [43] While it could be assumed that s 43 in its pre-amended form meant that an executive committee had to be composed based on proportional representation, with seats automatically assigned according to the representation of each party in the municipal council,<sup>24</sup> courts have held that this method of composing an executive committee is 'merely' an option open to the municipal council but not an imperative.<sup>25</sup>
- [44] With the amendment of the Municipal Structures Act that came into effect on 1 November 2021, the legislator discarded the possibility of executive committees being composed by way of a majority vote. The legislator provided for the composition of executive committees of municipal councils to be composed only through a system of proportional representation. In addition to prescribing the formula to be used in awarding the seats on the executive committee to political parties or political interests, the legislator removed s 43(3), which provided for an alternative mechanism for composing an executive committee. The legislature replaced the word 'elect' as it appeared in s 45 with the word 'determine', prescribing that a municipal council must determine the members of its executive committee from amongst its members within 14 days after the council's election.
- [45] In this statutory context, s 43(2), in its current form, provides for an executive committee to be composed in such a way that parties and interests represented in

<sup>24</sup> Akintan, O and De Visser, J 'Executive Committees: Proportional or 'fair' representation?' <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-8-issue-5-november-2006/vol-8-no-5-executive-committees-fair-or-proportional.pdf> accessed on 21 August 2023.

<sup>25</sup> *MEC KZN for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others* [2011] 1 All SA 401 (SCA). See *Democratic Alliance v AND & Others* [2002] JOL 10389.

the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.

- [46] The proportionality requirement also featured in the Local Government Transition Act 209 of 1993 (LGTA). Section 16(6) of the LGTA provided that an executive committee had to be elected 'according to a system of proportional representation'. In *Democratic Party and Others v Brakpan Transitional Local Council and Others*,<sup>26</sup> Cloete J explained that the object and purpose of s 160(8) of the Constitution is to ensure, as far as it is practically possible, that members representing political parties in a council participate fairly in the committees of the council.<sup>27</sup> Such fairness, Cloete J held, is to be determined according to the representation on the council and not according to political support amongst the electorate.<sup>28</sup>
- [47] In order to understand the impact of Cloete J's finding, it is necessary to have regard to the context within which the finding was made. Cloete J, explained:

' ... I do not believe that it can be argued that although the National Party and Democratic Party have the same number of representatives and are therefore equally reflected in the council, fairness dictates that because the former may have a greater support amongst the electorate, it should have a representative on the executive committee and the Democratic Party should not. It may be that the approach in the two cases on which I rely, and which I propose applying, has the effect in the present matter that the choice of system of proportional representation given to the first respondent by the Local Government Transition Act is apparent, not real. But application of the national legislation cannot legitimately produce a result in conflict with the Constitution.'

<sup>26</sup> 1999 (6) BCLR 657 (W).

<sup>27</sup> *Supra*, at 662.

<sup>28</sup> *Ibid.*

- [48] Cloete J's reliance on, and the principle explained in both *Nasionale Party in die Oos-Kaap en 'n Ander v Port Elizabeth Oorgangsraad en Andere*,<sup>29</sup> and *Crowther en Andere v Plaaslike Oorgangsraad vir Betlehem en Andere*,<sup>30</sup> confirms that in a system based on proportional representation, the majority vote is not the be-all and end-all of determining the composition of the executive committee of a municipal council. It does not, in my view, by implication or otherwise, support a view that the 'political support among the electorate' is rendered irrelevant.
- [49] The Constitutional Court reaffirmed that one of the objects and purposes of local government is the development and promotion of democracy. This involves, the Constitutional Court explained, ensuring that the will of the majority prevails and also that the views of the minority are considered.<sup>31</sup> The Constitutional Court stated that the purpose of s 160(8) of the Constitution is to ensure that minority parties can participate meaningfully in the deliberative process of, amongst others, municipal councils.<sup>32</sup>
- [50] In *Masondo*, Sachs J explained that:<sup>33</sup>

'The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principles basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied

<sup>29</sup> 1998 (2) BCLR 141 (SE) at 145G-146E.

<sup>30</sup> [1997] 1 All SA 230 (O) at 238g-h.

<sup>31</sup> *Masondo*, *supra*, at para [17].

<sup>32</sup> *Masondo*, *supra*, at para [18].

<sup>33</sup> *Masondo*, *supra*, at para [42].

or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.'

[51] O'Regan J, in turn, stated that:<sup>34</sup>

'Unlike the structures of national and provincial government, section 151 of the Constitution provides that the executive and legislative authority of municipalities is vested in its municipal council. The objects of local government, too, are different to those of national and provincial government and are narrowly focussed on local communities, their development, environment and the quality of life of their inhabitants.'

[52] O'Regan J continued to explain that local government is concerned with the provision of services to members of its community, and in a variety of ways, seeks to ensure that the citizens affected by the decisions of the local council will be those who make the decisions.<sup>35</sup>

[53] The learned judge reiterated that in the sphere of local government, s 160(8) of the Constitution serves the purpose of ensuring that where deliberative decisions are made by committees of council to exercise the executive and legislative authority of the council, the deliberation preceding the decision-making involves the fair representation of different parties and different interests.

### *Evaluation*

[54] A fundamental prerequisite of modern democracy is that all citizens have an equal right to choose the government, *in casu*, local government, in a competitive election.

<sup>34</sup> *Masondo, supra*, at para [53].

<sup>35</sup> *Masondo, supra*, at paras [54] and [55].

The phrase 'by lot' means to make a determination through a random selection,<sup>36</sup> or to use an object as a counter in determining a question by chance.<sup>37</sup>

- [55] In an interesting article titled 'Election-by-Lot as a Judicial Selection Mechanism',<sup>38</sup> William Bunting states that there are not many instances of social decision-making by means of an 'election-by-lot' in contemporary Western societies. He informs readers that the best-known cases are the choice of political representatives by lot in Greek and Italian city-states:<sup>39</sup>

'There is no institution of ancient history which is so difficult of comprehension as that of electing officials by lot. We have ourselves no experience of the working of such a system; any proposal to introduce it now would appear so ludicrous that it requires some effort for us to believe it ever did prevail in a civilized community.'

- [56] When a number of candidates, or political parties, vying for the same position or seat obtain the exact same number of valid votes, drawing lots seems the only fair and sensible way to finally determine representation. The question that needs to be determined *in casu*, however, is whether the allocation of a seat on the executive committee of a municipality, where there is an equality of the surpluses but an inequality of votes obtained in the election, is consistent with sections 19(3) and 160(8) of the Constitution.
- [57] Much can be said for determination by lot in case of a tie. *In casu*, however, the issue is to be considered in circumstances where the prescribed system for determining seats on the executive committee on the basis of proportional representation, leads to a 'tie', although the parties competing for a seat are not in all respects equal. In the context of the current factual matrix, parties would be considered to be in all respects equal if there was no distinguishing factor, and if

<sup>36</sup> Lawinsider.com/dictionary. Accessed on 2 October 2023.

<sup>37</sup> Merriam-webster.com/dictionary/lot. Accessed on 2 October 2023.

<sup>38</sup> (2006) *NYU Journal of Law & Liberty* 166 – 207, at 166.

<sup>39</sup> Headlam, J.W. *Elections by lot at Athens* 1 (2d ed. 1933) as reference by Bunting, *supra*.

both parties obtained the exact same numbers of valid votes in the election, which resulted in them being awarded the same number of seats on the council, which ultimately resulted in the tie as far as representation on the executive committee is concerned.

- [58] Can it be said, in the circumstances where parties are not in all respects equal but there is an equality of surpluses, that appointment by lot values and respects every adult citizen's right to vote in elections, and ensures that members in a municipal council participate in its proceedings and those of its committees in a manner that allows parties and interests reflected within the Council to be fairly represented. It cannot be emphasised enough that the question only arises because there is an equality of surpluses but inequality in votes obtained in the election.
- [59] In the absence of any explanation by the respondent as to the rational and logical basis for the provision, the court has no option but to play devil's advocate in an attempt to determine whether a rational reason underpins the statutory provision. I thus considered a few questions: (i) Does the disregarding of fractions as provided for in s 42(1)(a) inevitably lead to the conclusion that the determination of seats on the executive committee is only about participation by councillors and that the difference in electoral support no longer matters; (ii) Does it matter which minority party gets to participate in the deliberative processes of the executive committee of a municipal council?
- [60] I am of the view that it would be wrong to find that the disregarding of fractions as provided for in s 42(1)(a) inevitably leads to the conclusion that the determination of seats on the executive committee is only about participation by councillors and that the difference in electoral support no longer matters. It has been indicated above that the electoral process provided for in the Municipal Structures Act, amidst providing for proportional representation, values every vote cast.<sup>40</sup> It was, likewise, indicated that even where formulae provided for fractions to be disregarded when seats are allocated, if the surplus of two or more parties is equal, the seat must be awarded to the party that received the highest number of valid votes. To have regard

<sup>40</sup> See para [30], *supra*.

to the number of valid votes obtained by a political party as a mechanism to overcome what seems to be a tie, does not militate against the scheme of the Act.

- [61] If one considers that the issue *in casu* arose because the Act provides for proportional representation of minority parties in the executive committee, the next question to be asked is whether it matters which minority party is represented on the executive committee. It is this context that distinguishes the current matter from *Democratic Party and Others v Brakpan Transitional Local Council and Others*, and the cases referred to therein. We are not concerned with the question of whether the minority voice will be heard, but with the question of which minority voice will be heard. As stated above, if all factors and variables were equal, the only logical manner to resolve a tie would be through the lot. Where all variables are, however, not equal, there is, strictly speaking, no tie. In these circumstances, the disregarding of the number of valid votes cast, amounts to disregarding the value of votes and the right to vote.
- [62] If regard is had to the function and powers of the executive committee, one can understand the desire of all political parties to have their voice heard during the deliberations, even though their participation might not have a practical effect as far as voting is concerned. Where the issue is not whether a minority voice will be heard, but which minority voice will be heard, I am of the view that regard must be had to the electoral voice before resorting to the lot. In these circumstances, fair representation will be consistent with democracy if the number of valid votes obtained acts as a tie-breaker.
- [63] Since its 2021-amendment, the Municipal Structures Act does not provide for the establishment of an executive committee through an election process. The Act now provides that if the council establishes an executive committee, it must *determine* a number of councillors necessary for effective and efficient government, in accordance with a prescribed maximum quota. Section 43(2) then prescribes how the award of seats on the executive committee to political parties or interests must be *determined*. Thus, no subsequent election amongst councillors can be said to replace, substitute, or supersede the electoral vote.



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- [64] It is a principle of constitutional law that national legislation should not produce a result that is in conflict with the requirements of the Constitution. Democratic principles underpin the system of proportional representation. Effective and efficient governance and service delivery will not be prejudiced if the valid number of votes obtained by political parties is considered when an equality of surpluses arises, before resorting to the lot. In regard to the functions and powers of a municipal council's executive committee, it is evident that the executive committee, other than for instance, a mayoral committee, is concerned with deliberative processes and section 160(8) of the Constitution applies.
- [65] I agree with counsel for the applicant that any order of invalidity be suspended for a period to enable the respondent to address the issue. I am, however, of the view that the process for amending legislation is a cumbersome process and that 18 months is a more realistic period.

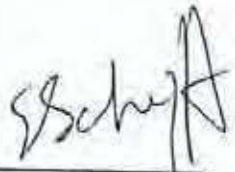
#### Costs

- [66] In adherence to the *Biowatch* principle, I am of the view that costs should follow success, even though the respondent did not oppose the application.

#### ORDER

In the result, the following order is granted:

1. Section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, is declared inconsistent with sections 19(3) and 160(8) of the Constitution, and invalid;
2. The order of invalidity is suspended for a period of 18 months from the date of this order;
3. The aforementioned orders, in so far as they declare provisions of an Act of Parliament invalid, are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution, 1996, and the Registrar of this Court is directed to comply with Rule 16(1) of the Rules of the Constitutional Court in this regard.
4. The respondent is to pay the applicant's costs, inclusive of the costs of two counsel where so employed.



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E van der Schyff  
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:

Adv. S.S. Tebeile

With:

Adv. T.A. Makola

Instructed by:

RJ Phakoago Attorneys

Date of the hearing:

21 August 2023

Date of judgment:

10 October 2023



J.L