



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 279/23

In the matter between:

SOCIALIST AGENDA OF DISPOSSESSED AFRICANS

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Respondent

Neutral citation: *Socialist Agenda of Dispossessed Africans v Minister of Cooperative Governance and Traditional Affairs* [2025] ZACC 26

Coram: Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J

Judgment: Majiedt J (unanimous)

Heard on: 11 September 2025

Decided on: 20 November 2025

Summary: Local Government: Municipal Structures Act 117 of 1998 — section 43(2)(c) — confirmation of constitutional invalidity — executive committee of a municipal council

Constitution — sections 19(3)(a) and 160(8) — statutory interpretation — order not confirmed

ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. The order by the High Court of South Africa, Gauteng Division, Pretoria, declaring section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 to be inconsistent with sections 19(3)(a) and 160(8) of the Constitution, is not confirmed.

JUDGMENT

MAJIEDT J (Mlambo DCJ, Kollapen J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J concurring):

[1] Is the practice of sortition by casting lots as a deadlock-breaking mechanism for the establishment of an executive committee of a municipal council constitutionally offensive? That is the crisp question that arises in these confirmation proceedings. The High Court of South Africa, Gauteng Division, Pretoria (High Court), declared section 43(2)(c) of the Local Government: Municipal Structures Act¹ (Act) inconsistent with sections 19(3) and 160(8) of the Constitution, and thus invalid and unconstitutional.² The order of invalidity was suspended for a period of 18 months and the order was referred to this Court for confirmation. It did so in terms of section 167(5) read with section 172(2)(d) of the Constitution.

¹ 117 of 1998.

² *Socialist Agenda of Dispossessed Africans v Minister of Cooperative Governance and Traditional Affairs*, unreported judgment of the Gauteng High Court, Pretoria, Case No 4646/2022 (10 October 2023) (High Court judgment).

[2] If satisfied that it is proper to do so, this Court must confirm declarations of invalidity by the High Court and the Supreme Court of Appeal.³ This is not a mere rubberstamping exercise.⁴

[3] The applicant, the Socialist Agenda for Dispossessed Africans (SADA), is a registered political party. At the outset, it is important to record that the respondent, the Minister of Cooperative Governance and Traditional Affairs (Minister), took no part in these proceedings, despite being urged to do so by this Court more than once. The Minister withdrew his initial notice to oppose the application and, instead, filed a notice to abide the High Court's decision. At the Court's request, the Pan African Bar Association (PABASA) appeared and argued the case for the respondent. We are indebted to PABASA, and to Mr Mpofo SC and Ms Matlhape in particular, for their assistance in this matter. More will be said about the Minister's inaction later.

[4] During the local government elections held on or about 1 November 2021, SADA contested the elections at the local and district municipality levels in the Sekhukhune District in the Limpopo Province. SADA won a total number of 3 667 votes (2.25%) in the Fetakgomo Tubatse Local Municipality (Municipality). SADA was followed by the Democratic Alliance (DA) which obtained 3 321 votes (2.04%). The lion's share of the votes went to the African National Congress (ANC) and the Economic Freedom Fighters (EFF).

[5] The manner of the conversion of votes cast in an election into the awarding of seats to parties and candidates is dealt with in Schedules 1 and 2 of the Act. Schedule 1

³ Section 167(5) of the Constitution.

⁴ See *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) and *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); 2021 (2) SA 54 (CC); (2021) 42 ILJ 269 (CC).

relates to local and metropolitan municipalities and Schedule 2 to district municipalities. Schedule 1, which applies here, makes provision in item 12 for the determination of a quota of votes for a seat on the municipal council.

[6] The Municipality has a total of 77 seats in its municipal council. The ANC was allocated 54 seats, and the EFF was allocated 14 seats. The DA and SADA won the same number of seats – two – in the council. The remaining seats went to five other smaller parties which received one seat each. Because the DA and SADA won the same number of seats in the council, there was an “equality of the surpluses” between them in terms of section 43(2)(c) of the Act, insofar as the allocation of seats in the executive committee of the council was concerned. Item 12(1) of Schedule 1 sets out the formula for the determination of the quota of votes for a seat on the council, with fractions to be disregarded.⁵ The Schedule also provides in items 13(2)(a) and (b), and item 16(4)(b) for how surpluses are to be dealt with.⁶

[7] Section 43 reads:

“(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 per cent of the

⁵ Item 16(3) of Schedule 1.

⁶ Item 13(2) of Schedule 1 reads:

“(a) If the calculation in sub-item (1) yields a surplus not absorbed by the seats awarded to a party, that surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed seat or seats must be awarded to the party or parties concerned in sequence of the highest surplus.

(b) If the surplus for two or more parties is equal the seat must be awarded to the party that obtained the highest number of valid votes.”

Item 16(4)(b) reads:

“If the calculation in paragraph (a) yields a surplus not absorbed by the seats awarded to a party, that surplus must compete with similar surpluses accruing to any other party or parties and any undistributed seat or seats must be awarded to the party or parties concerned in sequence of the highest surplus.”

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 similar surpluses, and be awarded to the highest surplus;
 - (c) if there is an equality of the surpluses, the result must be determined by lot.

...”

[8] On or about 23 November 2021, at the newly elected council’s first meeting, an executive committee was established, consisting of ten members. The ANC and the EFF were, understandably, given the majority of the seats in the executive committee. In respect of the remaining seat, the equality of surpluses between the DA and SADA resulted in the deadlock being broken by the casting of a lot in terms of section 43(2)(c), which the DA won. The sortition was applied, notwithstanding SADA’s objection and its request that the awarding of the disputed seat in the executive committee be held in abeyance while an opinion was obtained from the council’s legal advisors regarding the application of the impugned provision.

[9] The legislative scheme is clear – the number of seats on the executive committee is determined by the formula set out in section 43(2)(a). In instances where there is a surplus, the seat will be awarded to the highest surplus. To the extent that there is an equality of surpluses after applying the formula, the result will be determined by sortition, which is the basis of the challenge in this Court.

[10] Aggrieved, SADA approached the High Court, challenging the constitutionality of section 43(2)(c). SADA impugned section 43(2)(c) largely on the basis that it undermined the rights of the electorate. SADA contended that its predominance of accumulated votes was disregarded by its exclusion from the executive committee in favour of another party with fewer votes, after the casting of the lot. As stated, the Minister filed a notice to abide the High Court's decision. Interested and affected parties were invited by the High Court to join the proceedings, either as parties or as amici curiae (friends of the court), but there was no response. That Court expressed its disappointment at this state of affairs, having to itself grapple with the possible counterarguments to the one postulated by SADA, an aspect to be revisited presently.

[11] The High Court upheld the challenge and declared section 43(2)(c) inconsistent with sections 19(3)(a) and 160(8) of the Constitution. It reasoned that section 43 established a system of proportionality for the awarding of seats so that the composition of the executive committee mirrored the composition of the municipal council.⁷ According to that Court, the central question was whether it mattered which minority party was represented on the executive committee. In this regard, the High Court found that if all factors and variables were equal, the only logical manner to resolve a tie would be through a lot. Where all variables were, however, not equal, there was, strictly speaking, no tie. In these circumstances, held the High Court, disregarding the number of valid votes cast amounted to disregarding the value of the votes, and the right to vote.⁸

[12] The High Court held that, because the issue was not whether a minority voice would be heard, but which minority voice would be heard, regard had to be had to the electoral voice before resorting to the lot. In these circumstances, fair representation would be consistent with democracy if the number of valid votes obtained acted as a tie-breaker.⁹ It held, further, that it would not militate against the scheme of the Act to

⁷ High Court judgment above n 2 at para 41.

⁸ Id at para 61.

⁹ Id at para 62.

have regard to the number of valid votes obtained by a political party as a mechanism to overcome what seems to be a tie.¹⁰ Consequently, the impugned provision was declared unconstitutional, the declaration was suspended for 18 months, and the matter was referred to this Court for the confirmation of the declaration. The High Court awarded costs against the Minister even though the application was not opposed.

[13] In this Court, SADA's counsel have largely repeated the submissions advanced in the High Court. In summary, they contend that the impugned section undermined the rights of the electorate as their votes were disregarded in the casting of a lot to allocate the seat in the executive committee to the DA. According to SADA, using the lot disregards the total number of votes received by a political party. This undermines the electorate's wishes, interests, and intentions when they vote for a particular political party. SADA submits, further, that it was not fair to ignore the fact that a particular political party had 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 ought to be allocated that seat. Finally, SADA submits that treating political parties who did not obtain equal votes during elections equally, and making use of the lot, is inconsistent with democracy.

[14] Counsel who appeared at our request to argue the Minister's case attacks the High Court's findings on a range of grounds, and submits that the impugned provision passes constitutional muster. In sum, they contend that our point of departure should be the well-known general principle of statutory interpretation, which is that, where it is reasonably possible to do so, a statutory provision should be interpreted so as to preserve its constitutionality.¹¹ They submit, further, that, applying that principle, the impugned provision is constitutionally valid and does not infringe the right in section 19(3)(a) of the Constitution, as an executive committee is not a "legislative body" envisaged in that section.

¹⁰ Id at para 60.

¹¹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 26.

[15] A further contention advanced by counsel for the Minister is that this Court is precluded from interfering with the section 43 process. This is because those powers have been conferred on the legislature by section 157(2) of the Constitution, which prescribes that such matters “must be in accordance with national legislation”. The Act is the aforementioned national legislation. It is argued that this Court’s interference would breach the principle of the separation of powers, with reliance placed on *Brakpan Transitional Local Council*.¹²

[16] As SADA places heavy reliance on sections 19(3)(a) and 160(8) of the Constitution, and since the impugned provision was found to be unconstitutional by reason of its inconsistency with those two constitutional provisions, it is appropriate to start with them. Section 19(3) provides:

“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.”

[17] Section 160(8) of the Constitution reads:

“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.”

[18] As its name reflects, the Act explicates how a municipal government is structured. It was enacted to give effect to the provisions of Chapter 7 of the Constitution.¹³ It fleshes out the functional modalities of municipal government as

¹² *Democratic Party v Brakpan Transitional Local Council* 1999 (4) SA 339 (W).

¹³ *Democratic Alliance v Masondo N.O.* [2002] ZACC 28; 2003 (2) BCLR 128 (CC); 2003 (2) SA 413 (CC) (*Masondo*) at para 12.

broadly outlined in Chapter 7 of the Constitution. The long title of the Act explains that, amongst others, it provides for “the internal systems, structures and office-bearers of municipalities”. The Act underwent wide-ranging amendments with effect from 1 June 2021 including, of relevance to the central issue in this case, to section 43.

[19] Chapter 1 of the Act lists the categories and types of municipalities. This is important, because not all municipalities function in the same way, an aspect that bears some relevance in this case. Chapter 2 deals with the establishment of municipalities and Chapter 3 with municipal councils. The executive and legislative power of a municipality is vested in its municipal council.¹⁴ Section 18 of the Act encapsulates the requirement that municipalities must have municipal councils to exercise these constitutional executive and legislative powers.

[20] Section 19 of the Act outlines the objectives of municipalities. It reads:

- “(1) A municipal council must strive within its capacity to achieve the objectives set out in section 152 of the Constitution.
- (2) A municipal council must annually review—
 - (a) the needs of the community;
 - (b) its priorities to meet those needs;
 - (c) its processes for involving the community;
 - (d) its organisational and delivery mechanisms for meeting the needs of the community; and
 - (e) its overall performance in achieving the objectives referred to in subsection (1).
- (3) A municipal council must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers.”

[21] As stated, Schedules 1 and 2 of the Act regulate the manner of converting votes cast in a local government election into the allocation of seats in the municipal council

¹⁴ Section 151(2) of the Constitution.

to political parties and to candidates. Schedule 1 applies to local and metropolitan municipalities and Schedule 2 to district municipalities. We are concerned here with Schedule 1, set out earlier.

[22] Chapter 4 of the Act provides for the internal structures and functionaries of municipalities, and Part 1 thereof has specific provisions for executive committees. The Fetakgomo Tubatse Local Municipality is a type of municipality which may establish executive committees.¹⁵ In the event that such a municipality elects to establish an executive committee, as has happened here, then the provisions in Part 1 find application.¹⁶ An executive committee is *established* in terms of section 43(1) of the Act, as opposed to a municipal council, which is *elected* in terms of section 22(1) of the Act. “Executive committee” is defined thus in section 1 of the Act: “an executive committee established in terms of section 43”. A “councillor” is defined there as “a member of a municipal council” and a “local council” means “the municipal council of a local municipality”.

[23] Executive committees, as the principal committee in municipal councils, fulfil an important role. Section 44, which deals with the functions and powers of executive committees, provides:

- “(1) An executive committee is—
- (a) the principal committee of the council of a municipality of a type that is entitled to establish an executive committee; and
 - (b) the committee of a municipal council which receives reports from the other committees of the council . . . and which must forward these reports together with its recommendations to the council when it cannot dispose of the matter in terms of its delegated powers.
- (2) The executive committee must—
- (a) identify the needs of the municipality;
 - (b) review and evaluate those needs in order of priority;

¹⁵ Section 42(1) of the Act.

¹⁶ Section 42(2) of the Act.

- (c) recommend to the municipal council strategies, programmes 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
 - (d) recommend or determine the best methods, including partnership and other approaches, to deliver those strategies, programmes and services to the maximum benefit of the community.
- (3) The executive committee in performing its duties must—
- (a) identify and develop criteria in terms of which progress in the implementation of the strategies, programmes and services referred to in subsection (2)(c) can be evaluated, including key performance indicators which are specific to the municipality and common to local government in general;
 - (b) evaluate progress against the key performance indicators;
 - (c) review the performance of the municipality in order to improve—
 - (i) the economy, efficiency and effectiveness of the municipality;
 - (ii) the efficiency of credit control and revenue and debt collection services; and
 - (iii) the implementation of the municipality’s by-laws;
 - (d) monitor the management of the municipality’s administration in accordance with the policy directions of the municipal council;
 - (e) oversee the provision of services to communities in the municipality in a sustainable manner;
 - (f) perform such duties and exercise such powers as the council may delegate to it in terms of section 32;
 - (g) annually report on the involvement of communities and community organisations in the affairs of the municipality; and
 - (h) ensure that regard is given to public views and report on the effect of consultation on the decisions of the council.
- (4) An executive committee must report to the municipal council on all decisions taken by the committee.”

[24] In terms of section 80(4), the executive committee receives reports from the committees of councillors established by a municipal council under section 79(1) for the effective and efficient performance of any of the council’s functions or the exercise of any of its powers. Importantly, where an executive committee cannot dispose of a

matter in terms of the powers delegated to it by the council, it must forward to the council the reports it received from the other committees, and its recommendations. Plainly, then, an executive committee only exercises powers delegated to it by a municipal council and has no original plenary powers. Absent such delegated power to take a decision regarding a matter, it must send that matter to the council for decision-making. This point is crucial in resolving the central issue before us and I will return to it presently.

[25] The central issue in this case is, as stated, the use of a lot to break the deadlock in respect of the equality of surpluses as provided for in the impugned provision. The casting of lots is a random selection method by lottery used to determine which candidate or party should receive the contested seat. The Act does not specify the exact procedure for casting lots. Similar processes typically involve random draws conducted openly and transparently, e.g. physical lot-drawing, such as the drawing of numbers or names from a container.

[26] Having a closer look then at section 43 of the Act, the following salient features emerge. An executive committee consists of the number of councillors which, in the opinion of the council, are necessary for effective and efficient government, but the number may not exceed 20% of the total number of councillors, or 10 councillors, whichever is the lesser, with a minimum of three councillors.¹⁷ The determination of the award of seats on the executive committee to political parties or political interests as provided for in section 43(2) has been set out above.¹⁸

[27] The political party or political interest to which seats are allocated on the executive committee must, through an authorised representative, appoint its representatives to occupy those seats and, in the event of a vacancy arising on the executive committee, the political party or political interest to which the seat was

¹⁷ Section 43(1).

¹⁸ See [7] above.

allocated will, through an authorised representative, appoint a councillor to fill that vacancy.¹⁹

[28] The 2021 amendment of the Act by the Local Government: Municipal Structures Amendment Act²⁰ brought about significant changes to section 43 which are important in deciding the central issue here. The previous iteration of section 43(1) provided for the *election* of executive committee members, while the present iteration speaks of a *determination*.

[29] Section 43(2), outlined above, is almost completely new. The previous version of section 43 read:

- “(1) If the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.
- (2) An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in *substantially the same proportion they are represented in the council*.
- (3) A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution.” (Emphasis added.)

[30] The previous section 43(3) has been deleted in its entirety in the amended version. These changes are striking. They signify:

- (a) a move away from election to the determination of executive committee councillors;

¹⁹ Section 43(2)(d)-(e).

²⁰ 3 of 2021.

- (b) the jettisoning of proportional representation so as to mirror in the executive committee the proportional representation in the council; and
- (c) a detailed statutory mechanism for the election of an executive committee, replacing the discretionary alternative mechanism outlined in the now repealed section 43(3), which had as its only proviso that the alternative mechanism had to comply with section 160(8) of the Constitution.

All of this indicates a deliberate enactment of a formulaic establishment of the composition of the executive committee.

[31] It bears repetition that the committees of a municipal council have no original legislative or executive powers. Section 59 of the Local Government: Municipal Systems Act²¹ (Systems Act) vests in the council the power to delegate certain functions to its executive committee:

- “(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may—
 - (a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality’s integrated development plan, to any of the municipality’s other political structures, political office bearers, councillors, or staff members;
 - (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality’s duties; and
 - (c) withdraw any delegation or instruction.
- (2) A delegation or instruction in terms of subsection (1)—
 - (a) must not conflict with the Constitution, this Act or the Municipal Structures Act;
 - (b) must be in writing;

²¹ 32 of 2000.

- (c) is subject to any limitations, conditions and directions the municipal council may impose;
 - (d) may include the power to sub-delegate a delegated power;
 - (e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and
 - (f) must be reviewed when a new council is elected or, if it is a district council, elected and appointed.
- (3) The municipal council—
- (a) in accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must, review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and
 - (b) may require its executive committee or executive mayor to review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction.
- (4) Any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation referred to in subsection (1).”

[32] Section 60 of the Systems Act makes provision for the delegation of certain powers to be delegated only to the executive committee or executive mayor:

- “(1) The following powers may, within a policy framework determined by the municipal council, be delegated to an executive committee or executive mayor only:
- (a) decisions to expropriate immovable property or rights in or to immovable property; and
 - (b) the determination or alteration of the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager.
- (2) The council may only delegate to the municipal manager the power to make decisions on investments on behalf of the municipality within the municipality’s investment policy contemplated in section 13(2) of the Local

Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003).”

[33] These delegated powers may be withdrawn by the council²² and are subject to stringent controls under section 59(2). Apart from the general legal principles applicable to delegations,²³ the council is, in terms of section 59(2)(f), required to exercise oversight over its delegates through reviews. All recommendations of committees (including the executive committee) flow back to the council for consideration and approval, and it is there that all members, represented proportionally by the political parties as elected by the voters, participate in the final decision-making processes, regardless of whether they were on the committees or not. Importantly, some key functions may not be delegated by a municipal council.²⁴ Plainly then, participation in an executive committee is secondary and derived from the principal source, which is being a member of the local municipal council.

[34] It is important to bear in mind that what is being challenged here is the determination of *seats* in the executive committee, not *votes* for the elective council in the original election. For that reason, section 19(3)(a) of the Constitution finds no application in the present challenge. That section simply guarantees to every adult citizen the right to vote in secret in elections for any legislative body established in terms of the Constitution. The right to vote in elections for the Municipality on 3 November 2021 is not in issue here – the votes were cast, counted and proportionally applied to constitute a municipal council.

²² Section 59(1)(c) of the Act.

²³ Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, 2021) at 365-7 and 369.

²⁴ Section 160(2) of the Constitution provides:

“The following functions may not be delegated by a Municipal Council:

- (a) the passing of by-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.”

[35] The establishment of executive committees does not have to meet the section 19(3)(a) requisites. What is constitutionally required in terms of section 160(8) of the Constitution bears on the *participation* of members of the council. They are entitled to participate in the council's proceedings and the council's committees in a manner that allows parties and interests reflected within the council to be fairly represented, in a fashion that is consistent with democracy. That section does not require that members of political parties be proportionally represented on executive committees as *elected* to the council. Rather it entitles members of a council to participate in proceedings of committees in a fairly representative manner and consonant with democratic principles.

[36] In *Masondo*,²⁵ a case which concerned the question whether a mayoral committee contemplated in section 60 of the Act is a committee of council as envisaged in section 160(8) of the Constitution, Sachs J concurring with the majority, made plain what fair representation in the latter section entails:

“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 principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.”

[37] Determining representation by way of a lot may, on the face of it, appear to be out of line with democratic principles, and SADA forcefully contends that it is, but for the reasons set out here, that is not so. The contention by SADA that the sortition deadlock-breaking mechanism infringes these two constitutional provisions is fallacious. Neither the section 19(3)(a) right to vote, nor the command in section 160(8)

²⁵ *Masondo* above n 13 at para 42.

for fair representation and democratic participation in committees of a council, is breached by the use of a lot to resolve the equality of the surpluses in the executive committee. It bears repetition that an executive committee is an internal functional and organisational structure functioning within a municipal council. It can only make recommendations to the council and, in certain limited circumscribed instances permitted by the Act, make decisions in terms of delegated powers in respect of those matters.

[38] The fact that, in terms of section 44, an executive committee is a municipality's main committee, handling reports from other committees and making recommendations to the council, does not detract from this point. The executive committee identifies and prioritises municipal needs, recommends strategies and services through the integrated development plan, and suggests optimal delivery methods.

[39] The flaw in the submission by SADA – that the impugned provision is unconstitutional because it disregards the will of the voters (the implication being that it ignores proportional representation) – can be illustrated with reference to section 43(2)(f) of the Act. The section provides that “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”. This means that a political party may choose to nominate a representative from another political party to fill a seat, instead of themselves. If this appointment is made, it would be done without any mandate from the voters who had cast their ballots in favour of that party. It would not advance direct proportional representation based on the votes council members received. This plainly thwarts SADA's argument which, if it were sound, would mean that section 43(2)(f) must, like the impugned provision, be ruled unconstitutional.

[40] Lastly, on this point regarding the alleged unconstitutionality of the impugned provision, it is significant that this is not the only provision in the Act that applies lot to the determination of results. Item 8(2) of Schedule 1 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. Schedule 3 of the Act concerns the election of municipal office-bearers. It provides that if two nominated candidates receive the same number of votes, the presiding officer must determine by lot who of the two candidates will hold the office for which elections were held. Of course, in these two instances we are dealing with votes and a challenge to the sortition would arguably be more meritorious. But here we are dealing with *seats*, not *votes*.

[41] That brings me to the separation of powers argument. Absent a clear infringement of voters' ability to exercise their section 19 rights due to a defective process, courts maintain judicial deference in allowing Parliament to regulate voting and electoral processes. That principle must be applied in this case. Votes cast are taken into account to determine the number of seats in the municipal council. That allocation of seats occurs by way of proportional representation. There is no guarantee of representation in the executive committee, although the formula in section 43(2)(a) regarding the composition of the executive committee does reflect Parliament's commitment to ensure fair representation of the members of council, as far as possible. The votes cast for the municipal council do not carry over to impact the respective influence a party holds in the executive committee.

[42] In *Brakpan Transitional Local Council*,²⁶ the High Court was also called upon to decide a dispute concerning the composition of an executive committee, albeit in a different context. The principles enunciated there are, however, sound and find application in this case. The Court held that it was not its function to prescribe to the Brakpan Transitional Local Council either the number of members which must comprise its executive committee or the system of proportional representation it should adopt in electing those members.²⁷ The Court held that those are functions the legislature had entrusted to the Brakpan Transitional Local Council in terms of

²⁶ *Brakpan Transitional Local Council* above n 12.

²⁷ *Id* at 342. The references to "election" and to "proportional representation" are to section 43 before its amendment.

section 16(6) of the, now repealed, Local Government Transition Act 209 of 1993.²⁸ But, said the Court, it would be obliged to intervene if the exercise of those powers negates the right explicitly conferred on members of the transitional council by section 160(8)(a) of the Constitution.²⁹

[43] The Court held further that the object and purpose of section 160(8)(a) of the Constitution is to ensure, so far as is practically possible, that members representing political parties in a council participate fairly in the committees of the council.³⁰ Such fairness is to be determined according to the representation on the council and not according to political support amongst the electorate.³¹ The section expressly provides that members of the council are entitled to participate in the proceedings of its committees in a manner that allows parties and interests reflected *within the council, not in the composition of the electorate, to be fairly represented.*³²

[44] For the reasons articulated in that case, interference by this Court in the mechanism legislated by Parliament in the impugned provision to resolve the equality of surpluses would breach the separation of powers. As stated, the impugned provision does not infringe sections 19(3)(a) and 160(8) of the Constitution. Parliament's choice of the deadlock-breaking procedure in the impugned provision must be respected.

[45] While casting a lot to break the deadlock is a robust and seemingly peculiar mechanism chosen by Parliament, it does not violate the Constitution. Votes cast may be a better and fairer method than this rough and ready mechanism of sortition. There may be a good reason for that choice. But, absent an explanation from the Minister, I prefer not to engage in conjecture.

²⁸ Id.

²⁹ Id.

³⁰ Id at 344.

³¹ Id.

³² Id.

[46] It is significant that the Legislature clearly contemplated the possibility of breaking deadlocks by having regard to votes cast and that this was the method chosen for elective (legislative) bodies.³³ So, the use of a different method, sortition, for the non-elective executive committee could not have been an oversight, it must have been a deliberate legislative choice by the Legislature, a choice that we must respect.

[47] What remains is to deal briefly with the judgment of the High Court. Throughout its reasoning the Court laid much emphasis on the requirement that proportional representation is required in the executive committee. That is, as stated, a misconceived approach – what is required is fair representation. The High Court reasoned that sortition is an equitable deadlock-breaking mechanism, and “the only fair and sensible way to finally determine representation”, where candidates or political parties vying for the same seats obtain the exact same number of valid votes. Because of SADA’s numerical vote superiority over the DA, the parties should not be treated equally and resorting to a lot to resolve the equality of surpluses undermined the will of the people reflected in the votes cast, thus reasoned the High Court.³⁴

[48] In reaching its conclusion, that the impugned provision is unconstitutional to the extent of its inconsistency with sections 19(3)(a) and 160(8) of the Constitution, the High Court reasoned that the crucial question is not whether the minority voice will be heard in the executive committee, but which minority voice will be heard. According to the Court, “where all variables are not . . . equal, there is, strictly speaking, no tie”. Consequently, in the present instance “the disregarding of the number of valid votes cast, amounts to disregarding the value of votes and the right to vote”.³⁵

[49] Despite its rigorous evaluation of the law in traversing the issues in this case, the High Court regrettably took a few wrong turns in reaching the outcome. Of course, the absence of counter argument by the Minister did not help. The High Court made the

³³ Schedule 1 items 13(2), 16(4) and 17(5) and Schedule 2 items 7(2), 10(5) and 20(2).

³⁴ High Court judgment above n 2 at para 61.

³⁵ *Id.*

exact mistake that Sachs J cautioned against in *Masondo* – applying a strictly mathematical approach to the section 160(8) fair representation requirement. Crucially, the High Court failed to distinguish between the *election* of a municipal council, which is a legislative body with original plenary executive and legislative powers under the Constitution, and the *establishment* of an executive committee, which has no original executive or legislative powers and is not a legislative body. Had this important difference been understood, the outcome may well have been different.

[50] For these reasons, the impugned provision passes constitutional muster and the High Court’s declaration of invalidity cannot be confirmed. One last troubling aspect remains – the Minister’s lamentable inaction in the proceedings in both courts. The High Court rightly bemoaned this inaction. It said that the Minister’s decision to abide the Court’s decision without filing any papers “unnecessarily complicates the court’s task”.³⁶ Later in the course of its reasoning, the Court felt obliged to “play devil’s advocate”, given the dearth of an explanation by the Minister as to a rational basis for the impugned provision.³⁷

[51] In this Court, the Chief Justice twice issued directions to have the Minister and his attorneys file written submissions to assist this Court, all to no avail.³⁸ In the end, this Court had to resort to asking PABASA for assistance and, as stated, Mr Mpofu SC and Ms Matlhape of PABASA appeared to argue the case for the Minister. They have been of considerable help, for which we have already expressed our indebtedness.

[52] The Minister’s inertia is unacceptable and deserving of strong deprecation. The importance of local government has been underscored by this Court.³⁹ And it has been

³⁶ Id at para 40.

³⁷ Id at para 59.

³⁸ Directions were issued on 29 August 2024 and on 6 August 2025.

³⁹ See, amongst others, *Masondo* above n 13; *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2000 (4) BCLR 347 (CC); 2001 (1) SA 500 (CC) and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC).

emphasised by this Court that the Minister responsible for legislation is duty bound to assist a court which has to determine the constitutionality of that legislation.⁴⁰ The outcome in the High Court in this instance bears testimony to how invaluable such assistance is – that Court was driven to advance and consider its own counter-arguments to those of SADA to test its submissions. The Minister failed dismally in his duties towards the courts to assist.

[53] As far as costs are concerned, SADA is protected by the principles in *Biowatch*,⁴¹ since its constitutional challenge was not frivolous.

[54] The following order is made:

1. The order by the High Court of South Africa, Gauteng Division, Pretoria, declaring section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 to be inconsistent with sections 19(3)(a) and 160(8) of the Constitution, is not confirmed.

⁴⁰ *J v National Director of Public Prosecutions* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at paras 16- 19.

⁴¹ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

For the Applicant:

S S Tebeile, T A Makola, K M Ntjana
L V Makofane, P K Matsepane
P F Semanya and K S Thutja instructed
by ML Shoba Attorneys

For the Respondent:

D C Mpofu SC and BH Matlhape
instructed by PABASA (Pan African
Bar Association of South Africa)