IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO.: M311/2021

RECORDS OFFICE
NORTH WEST HIGH COURT
PRIVATE BAG X2010 MMABATHO 2735
2022 -10- 10
COUNTER NO.6
REPUBLIC OF SOUTH AFRICA

In the application between:

SAKELIGA NPC Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS 1st Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE 2nd Respondent

THE MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS 3rd Respondent

THE MINISTER OF FINANCE 4th Respondent

DITSOBOTLA LOCAL MUNICIPALITY 5th Respondent

NALEDI LOCAL MUNICIPALITY 6th Respondent

THE PREMIER: NORTH WEST PROVINCE 7th Respondent

ESKOM SOC LIMITED 8th Respondent

MAGALIES WATER BOARD 9th Respondent

SEDIBENG WATER BOARD 10th Respondent

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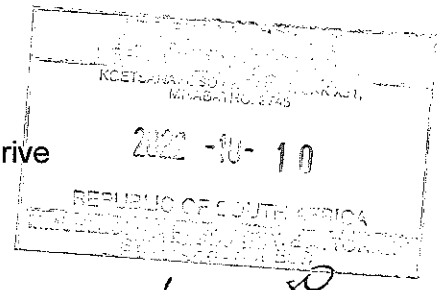
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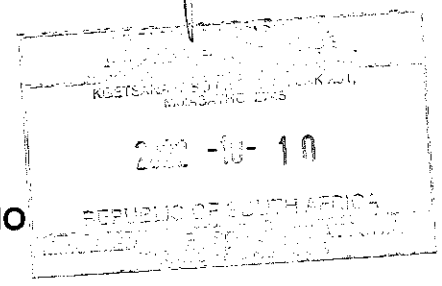
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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case no: M311/2021

In the matter between:

SAKELIGA NPC **Applicant**

and

MEC, NORTH WEST PROVINCE:
COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS **First respondent**

MEC, NORTH WEST PROVINCE:
FINANCE **Second respondent**

THE MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **Third respondent**

THE MINISTER OF FINANCE **Fourth respondent**

DITSOBOTLA LOCAL MUNICIPALITY **Fifth respondent**

NALEDI LOCAL MUNICIPALITY	**Sixth respondent**
THE PREMIER OF THE NORTH WEST PROVINCE	**Seventh respondent**
ESKOM SOC LTD	**Eighth respondent**
MAGALIES WATER BOARD	**Ninth respondent**
SEDIBENG WATER BOARD	**Tenth respondent**

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This application has one goal in mind and that is to ensure effective and functional governance within local government in the North West Province[1].

2 The applicant brings this application as a structured interdict with the intention that this Court, for as long as it may be necessary, retains a constitutional oversight role to ensure that the relevant role players comply with their constitutional duties[2].

3 Over the past 10 years, the two respondent municipalities, Ditsobotla Local Municipality ("*Ditsobotla*") and Naledi Local Municipality ("*Naledi*"), have:

3.1 been plagued by corruption and a collapse of governance;

3.2 neglected their constitutional duties towards their residents;

3.3 lost all fiscal control;

3.4 become debt-ridden and factually insolvent; and

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1 FA, Paragraph [27], Paginated Page 20.

2 FA, Paragraph [27], Paginated Page 20.

3.5 thereby caused a direct negative impact on the social and economic rights of every citizen, which includes businesses, residing and situated within their jurisdiction[3].

4 The aforesaid collapse of governance in Ditsobotla and Naledi negates the affected municipalities' ability to provide services to residents within their constitutional and statutory obligations.

5 The Eskom debt-crisis plays a significant role in this application.

6 In the prevailing circumstances, Ditsobotla and Naledi no longer effectively:

6.1 maintain their electricity reticulation networks;

6.2 collect, allocate and account for monies for electricity so distributed; or

6.3 settle their Eskom liabilities as they become due and payable[4].

7 As will be elaborated on below, the affected municipalities' failure to pay Eskom has a direct impact on the livelihoods of their residents[5].

8 Similar failures exist in respect of the provision of water supply to residents[6].

9 Sakeliga will show that the crisis permeates the affected municipalities from failures at all levels of government[7] and requires the formulation of a structured

---

3 FA, Paragraphs [29]-[32], Paginated Page 20-21.

4 FA, Paragraph [33], Paginated Page 22.

5 FA, Paragraph [34], Paginated Page 22.

6 FA, Paragraph [35], Paginated Page 23.

7 FA, Paragraph [36], Paginated Page 23.

approach by all spheres of government which, to date, the respondents have shown themselves incapable of formulating and implementing effectively[8].

NOMENCLATURE

10 For ease of reference in what follows:

10.1 "Sakeliga" is a reference to the applicant;

10.2 "the COGTA MEC" is a reference to the first respondent;

10.3 "the Finance MEC" is a reference to the second respondent;

10.4 "the COGTA Minister" is a reference to the third respondent;

10.5 "the Minister of Finance" is a reference to the fourth respondent;

10.6 "Ditsobotla" is a reference to the fifth respondent;

10.7 "Naledi" is a reference to the sixth respondent;

10.8 "Premier" is a reference to the seventh respondent and incorporates a reference to the seventh respondent in his capacity as the head of the executive council of the North West Province;

10.9 "Eskom" is a reference to the eighth respondent;

10.10 "affected municipality" is a reference to either Ditsobotla or Naledi or, in plural, both Ditsobotla and Naledi, as the case may be;

---

8 FA, Paragraphs [37]-[38], Paginated Page 24-25.

10.11 "the Constitution" is a reference to the Constitution of the Republic of South Africa, 1996;

10.12 "MFMA" is a reference to the Local Government: Municipal Finance Management Act 56 of 2003;

10.13 "Systems Act" is a reference to the Local Government: Municipal Systems Act 32 of 2000;

10.14 "MPRA" is a reference to the Local Government: Municipal Property Rates Act 6 of 2004;

10.15 "PAA" is a reference to the Public Audit Act 25 of 2004;

10.16 "IRFA" is a reference to the Intergovernmental Relations Framework Act 13 of 2005;

10.17 "PAIA" is a reference to the Promotion of Access to Information Act 2 of 2000;

10.18 "the COGTA report", is a reference to the document attached to the founding affidavit as "X3", prepared / signed off by the COGTA MEC, titled "REPORT ON THE STATE OF LOCAL GOVERNMENT IN THE NORTH WEST PROVINCE" and dated 24 August 2020;

THE RELIEF SOUGHT

11 In summary, Sakeliga seeks substantive relief to the effect that:

11.1 Ditsobotla and Naledi be found to be in serious and persistent material breach of their constitutional obligations to provide basic services and to meet their financial commitments[9].

11.2 The Premier and the MECs' failure to implement mandatory interventions in respect of Ditsobotla and Naledi be found to be inconsistent with the Constitution[10].

11.3 The Premier, representing the provincial executive, be ordered to implement mandatory interventions in both Ditsobotla and Naledi forthwith[11].

11.4 The Premier, in the same capacity, be ordered, in the event that Ditsobotla, Naledi, their respective administrations or municipal councils resist the intervention the intervention provided for in prayer 3, to dissolve the resistant municipality's council and appoint administrators to take over control of the affected municipality[12].

11.5 The COGTA Minister and Minister of Finance be ordered to:

11.5.1 determine the reasons for the crisis in the financial affairs of each affected municipality[13];

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9 Prayer 1, Paginated Page 2193.

10 Prayer 2, Paginated Page 2193.

11 Prayer 3 read with prayer 4, Paginated Page 2193.

12 Prayer 4, Paginated Page 2194.

13 Prayer 5.1, Paginated Page 2194.

11.5.2 assess the financial status of each affected municipality[14];

11.5.3 instruct the Municipal Finance Recovery Service to prepare recovery plans for each affected municipality[15];

11.5.4 recommend appropriate changes to the budget and revenue raising measures of each affected municipality that will give effect to the recovery plan developed for the affected municipality[16];

submit the determination, assessment, recovery plan and recommendations referred to *supra* in respect of each affected municipality to the Finance MEC[17].

11.6 The COGTA MEC be ordered to prepare and file a report every 2 calendar months / 60 days in respect of each affected municipality, providing updates on the implementation on the recovery plans for each affected municipality[18].

11.7 The MECS, the COGTA Minister and the Minister of Finance be ordered to provide Sakeliga with copies of all reports and recovery plans prepared in respect of Ditsobotla and Naledi[19].

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14 Prayer 5.2, Paginated Page 2194.

15 Prayer 5.3, Paginated Page 2194.

16 Prayer 5.4, Paginated Page 2194.

17 Prayer 5.5, Paginated Page 2194.

18 Prayer 6, Paginated Page 2195.

19 Prayer 7, Paginated Page 2195.

11.8 Pending the proper implementation of a financial recovery plan, a Special Master be appointed to each of the affected municipalities with powers, *inter alia*, to:

11.8.1 collect municipal income;

11.8.2 ringfence municipal income; and

11.8.3 pay municipal service providers on a monthly basis[20].

11.9 The Special Master appointed to each of the affected municipalities prepare and file a report on each affected municipality's compliance with and enforcement of section 32 of the MFMA for the financial years 2017 to 2022[21].

11.10 The Special Master appointed to each of the affected municipalities prepare and file a report in respect of the accounting systems, practices and failures of each affected municipality, insofar as it relates to the prevention, management and recovery of unauthorised, irregular or fruitless and wasteful expenditure by the affected municipality concerned and the affected municipality's failure to address the issues raised by the Auditor-General as required by section 131(1) of the MFMA[22];

---

20 Prayers 8 and 9, Paginated Page 2195-6.

21 Prayer 10, Paginated Page 2197.

22 Prayer 11, Paginated Page 2197.

11.11 The respondents be ordered to co-operate with the Special Master appointed to each of the affected municipalities in the execution of that Special Master's duties in terms of the order[23].

11.12 The Court determine the remuneration of the Special Master appointed to each of the affected municipalities and gives any further directions as to the execution of that Special Master's duties in terms of the order as the Court may deem necessary[24].

11.13 Should the Court find that any of the conduct of Ditsobotla and/or Naledi is inconsistent with the Constitution, as sought in prayer 2, but that the further relief sought by Sakeliga is inappropriate in the circumstances, that the Court then make an order which is just and equitable under section 172 of the Constitution and which will have the remedial effect of alleviating or correcting the constitutional infringements complained of[25].

12 The aforesaid represents a summary of the substantive relief sought by Sakeliga in order to define the issues to be considered by the Court.

13 Full and further reference will be made to the precise terms of the relief sought as per Sakeliga's amended notice of motion[26] in what follows and during the hearing of the matter.

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23 Prayer 12, Paginated Page 2198.

24 Prayer 13, Paginated Page 2198.

25 Prayer 15, Paginated Page 2198-9.

26 Paginated page 2188 – 2203.

Issues arising for determination from the relief sought.

14 First, whether the *mandamus* relief sought is legally competent.

This issue will be addressed through an examination of:

14.1 The legislative framework; and

14.2 The jurisdictional requirements for mandatory intervention;

14.3 The factual satisfaction of the jurisdictional requirements.

15 Secondly, whether the relief seeking the appointment of a Special Master is legally competent.

16 In Thirdly, the issue of costs.

THE LEGISLATIVE FRAMEWORK

17 The Constitution is the supreme law of the Republic. The obligations imposed by it must be fulfilled and any law or conduct inconsistent with it is invalid[27].

18 This is a first principle by which everything that follows must be measured.

19 While section 40 of the Constitution vests governance of the Republic in the three distinctive, interdependent and interrelated national, provincial and local spheres, section 41 requires that all spheres of government and all organs of state *inter alia* to:

19.1 secure the well-being of the people of the Republic[28];

---

27 Section 2 of the Constitution.

28 Section 41(1)(b) of the Constitution.

19.2 provide effective, transparent, accountable and coherent government for the Republic as a whole[29];

19.3 be loyal to the Constitution, the Republic and its people[30];

19.4 respect the constitutional status, institutions, powers and functions of government in the other spheres[31].

20 Section 152(1) of the Constitution provides for the following objects of local government, as a sphere of government:

20.1 to provide democratic and accountable government for local communities[32];

20.2 to ensure the provision of services to communities in a sustainable manner[33];

20.3 to promote social and economic development[34];

20.4 to promote a safe and healthy environment[35]; and

20.5 to encourage the involvement of communities and community organisations in the matters of local government[36].

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29 Section 41(1)(c) of the Constitution.

30 Section 41(1)(d) of the Constitution.

31 Section 41(1)(e) of the Constitution.

32 Section 152(1)(a) of the Constitution.

33 Section 152(1)(b) of the Constitution.

34 Section 152(1)(c) of the Constitution.

35 Section 152(1)(d) of the Constitution.

36 Section 152(1)(e) of the Constitution.

21 Section 152(2) requires a municipality to strive for the achievement of these objects.

22 Section 154 requires the provincial and national spheres of government to support *and strengthen* the capacity of municipalities to manage their affairs, exercise their powers and perform their functions.

23 Within the context of the aforesaid provisions, section 139 of the Constitution "permits and requires provincial governments to supervise the affairs of local governments and to intervene when things go awry"[37]

24 The Constitution thereby provides that provincial governments must not only support but also monitor municipalities and see to the effective performance of their functions. A provincial executive is fully entitled, if not obliged, to ensure that the Constitution and applicable legislation are adhered to by municipalities[38].

25 To this end section 139(1) provides:

> *"When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive* ***may*** *intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—*
>
> *(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;*

---

37 *Premier, Western Cape and Others v Overberg District Municipality and Others* 2011 (4) SA 441 (SCA), [1].

38 *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* 2016 (4) SA 99 (GP), [30].

(b) *assuming responsibility for the relevant obligation in that municipality to the extent necessary to —*

(i) *maintain essential national standards or meet established minimum standards for the rendering of a service;*

(ii) *prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or*

(iii) *maintain economic unity; or*

(c) *dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step."*

26 Section 139(1) creates a mechanism of *discretionary* intervention.

27 Section 139(5) provides:

"If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive ***must***—

(a) *impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—*

(i) *is to be prepared in accordance with national legislation; and*

(ii) *binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and*

(b) *dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any*

revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan."

28 The peremptory language of section 139(5) therefore creates a mechanism of *mandatory* intervention[39].

29 We are concerned in this matter with mandatory interventions.

30 The jurisdictional requirements for a mandatory intervention under section 139(5) are:

30.1 evidence or admission by the affected municipality of

30.2 a crisis in its financial affairs,

30.3 resulting in:

30.3.1 either a serious or persistent material breach of its obligations to provide basic services; or

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39 *Unemployed People's Movement v Eastern Cape Premier and Others* 2020 (3) SA 562 (ECG), [25].

30.3.2 a serious or persistent material breach of its obligations to meet its financial commitments.

31 Section 139(7) provides that:

> If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

32 Section 139(8) provides that:

> *"National legislation may regulate the implementation of this section, including the processes established by this section."*

33 The national legislation which regulates the implementation of section 139 of the Constitution is the MFMA.

34 Section 139(1) of the MFMA provides that:

> *"If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its financial obligations or financial commitments, the provincial executive must promptly-*
>
> *(a) request the Municipal Financial Recovery Service-*
>
> *(i) to determine the reasons for the crisis in its financial affairs;*
>
> *(ii) to assess the municipality's financial State;*
>
> *(iii) to prepare an appropriate recovery plan for the municipality:*
>
> *(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan: and*
>
> *(v) to submit to the MEG for finance in the province-*

(aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEG for finance: and

(b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan."

35 The *Municipal Financial Recovery Service* referred to in section 139(1)(a) of the MFMA is defined in section 1 of the MFMA as the body established by section 157 of the same act, and functioning, in terms of section 157(2), *within the National Treasury.*

36 Section 139(3) of the MFMA provides that:

> *"An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention"*

JURISDICTIONAL REQUIREMENTS FOR MANDATORY INTERVENTION

37 As demonstrated above, the jurisdictional requirements for mandatory intervention under section 139(5) are:

37.1 <u>evidence or admission</u> by the affected municipality of

37.2 a crisis in its financial affairs,

37.3 resulting in a serious or persistent material breach of, either:

37.3.1 its obligations to provide basic services; or

37.3.2 its obligations to meet its financial commitments.

38 This is an objective inquiry.

39 We submit that Sakeliga has demonstrated in its founding affidavit that the jurisdictional requirements for a mandatory intervention in terms of section 139(5) of the Constitution are present in respect of both Ditsobotla and Naledi.

40 In the following section, the objective evidence of facts satisfying the jurisdictional requirements for a mandatory intervention for shall be examined.

FACTUAL SATISFACTION OF THE JURISDICTIONAL REQUIREMENTS

41 The COGTA MEC prepared a report titled "REPORT ON THE STATE OF LOCAL GOVERNMENT IN THE NORTH WEST PROVINCE", which is dated 24 August 2020[40] ("*the COGTA report*").

42 The COGTA report confirms that Ditsobotla and Naledi are, as a result of financial crisis, in serious and persistent material breach of their obligations to provide basic services and to meet their financial commitments[41].

43 We submit that the COGTA report essentially concedes, alternatively contains sufficient evidentiary findings, to activate a mandatory intervention.

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40 FA, Paragraph [28], Paginated Page 20; report is annexure X3 at Paginated Page 83.

41 FA, Paragraph [51], Paginated Page 35.

44 In addition to the COGTA report, the Minister of Finance, through National Treasury, periodically publishes "*National Treasury: The state of local government finances and the financial management report*" ("*the Treasury report*"), which details the financial health of South Africa's municipalities[42].

45 The annual Treasury reports published between 2009 and 2019[43] reveal that:

45.1 Ditsobotla has been identified as a municipality in financial distress since 2013[44] and has been under some form of intervention in terms of section 139 of the Constitution in 2013, 2014, 2016 and 2017[45];

45.2 Naledi has been identified as a municipality in financial distress since 2011[46] and has been under some form of intervention in terms of section 139 of the Constitution in 2017[47].

46 As far as Sakeliga is aware, and this seems to be undisputed, the interventions in both Ditsobotla and Naledi referred to above were *discretionary* interventions, not *mandatory* interventions as sought in this application[48].

47 In December 2020, Sakeliga's attorneys addressed a request for access to information in terms of PAIA to the COGTA MEC and the Finance MEC, for access to various documents aimed at determining whether the North West

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42 FA, Paragraph [94], Paginated Page 65; read with extracts attached as X21 at Paginated Page 376.

43 2019 is the most recently available at date of founding affidavit. Summaries of the Treasury reports and relevant extracts are attached for as X22 – X29 at Paginated Page 377-395.

44 FA, Paragraph [96.1.1], Paginated Page 66.

45 FA, Paragraph [96.1.2], Paginated Page 66.

46 FA, Paragraph [96.2.1], Paginated Page 66.

47 FA, Paragraph [96.2.2], Paginated Page 66.

48 FA, Paragraph [97], Paginated Page 67.

provincial government had conducted interventions in *inter alia* Ditsobotla and Naledi over the preceding five year period[49].

48 On 12 February 2021 it was confirmed by the Finance MEC that no mandatory interventions have been undertaken in either Ditsobotla or Naledi[50]. Conspicuous by their absence at this time, past *discretionary* interventions by the North West Provincial Government have proven entirely ineffective[51].

49 In addition to the concession made in the COGTA report and the general dire financial position of each municipality over a period of seven years per the Treasury reports, we shall detail the further evidence substantiating the jurisdictional requirements for mandatory intervention under section 139(5).

Ditsobotla Local Municipality (Fifth Respondent)

50 In respect of Ditsobotla, the COGTA report highlights the following concerns:

50.1 The appointment of the Municipal Manager and other Senior Managers had controversies and irregularities[52];

50.2 Reference is made to an "Administrator", suggesting Ditsobotla has been under prior intervention / administration[53];

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49 FA, Paragraph [99], Paginated Page 67; read with annexures X30 at Paginated Page 396 and X31 at Paginated Page 430.

50 FA, Paragraph [101-102], Paginated Page 68; read with X32 at Paginated Page 464.

51 FA, Paragraph [106], Paginated Page 69.

52 FA, Paragraph [56], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 129.

53 FA, Paragraph [56], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 129.

50.3 Municipal employees, predominantly SAMWU shop stewards, have been dismissed without disciplinary processes, creating tension between the Municipality and the Local Labour Forum[54];

50.4 Only two of six senior management positions are filled, being the Municipal Manager and Chief Financial Officer[55];

50.5 The work of the Municipal Public Accounts Committee ("MPAC") is not properly resourced and the committees' reports are not processed by the Municipal Council[56];

50.6 Serious and damning allegations exist against key office bearers[57];

50.7 Ditsobotla experiences community protests which result in closure of the Municipal Offices[58];

50.8 Employees are on strike in protest against the Municipal Manager[59];

50.9 Ditsobotla's financial position is dire:

50.9.1 The approved budget is not cash-backed[60];

50.9.2 Ditsobotla is "not financially viable"[61];

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54 FA, Paragraph [57], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 129.

55 FA, Paragraph [57], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 130.

56 FA, Paragraph [57], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 130.

57 FA, Paragraph [57], Paginated Page 37; Paragraph 5.1.14(a) of report at Paginated Page 130.

58 FA, Paragraph [58], Paginated Page 38; Paragraph 5.1.14(a) of report at Paginated Page 130.

59 FA, Paragraph [58], Paginated Page 38; Paragraph 5.1.14(a) of report at Paginated Page 130.

60 FA, Paragraph [59], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

61 FA, Paragraph [59], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

50.9.3 Ditsobotla fails to pay its creditors and fulfil other commitments[62];

50.9.4 There are serious cash flow challenges[63];

50.9.5 There is an ever-increasing creditor balance, in violation of section 65(2)(e) of the MFMA, which requires that "all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement"[64];

50.9.6 Ditsobotla owes Eskom R627 717 201, of which R607 004 585 (97%) is overdue[65];

50.9.7 Attorneys have been appointed to conduct a forensic investigation into the loss and embezzlement of integrated nation electrification plan ("INEP") funds[66];

50.9.8 Supply chain management receives no attention because the position of the supply chain management manager is vacant[67];

50.9.9 Ditsobotla does not run on a proper municipal IT system68;

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62 FA, Paragraph [59], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

63 FA, Paragraph [59], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

64 FA, Paragraph [60], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

65 FA, Paragraph [60], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

66 FA, Paragraph [60.1], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 130.

67 FA, Paragraph [60.2], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 131.

68 FA, Paragraph [60.3], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 131.

50.9.10 *Ditsobotla* has received three consecutive disclaimer audit opinions for the financial years 2016 / 2017 to 2019 / 2020[69].

50.10 Regarding Ditsobotla's service delivery:

50.10.1 The COGTA MEC reports that there are generally incidents of non-compliance with service delivery commitments by Ditsobotla[70];

50.10.2 Ditsobotla does not collect refuse[71];

50.10.3 Communities had to dispose of their own refuse which led to violent protests[72];

50.10.4 Access roads are not maintained[73];

50.10.5 Internal roads have deteriorated to a point where most tarred roads have informally turned into gravel roads[74].

51 Audit documents and findings for Ditsobotla:

51.1 Ditsobotla's annual financial statements demonstrate:

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69 FA, Paragraph [60.4], Paginated Page 38; Paragraph 5.1.14(b) of report at Paginated Page 131.

70 FA, Paragraph [61], Paginated Page 39; Paragraph 5.1.14(c) of report at Paginated Page 131.

71 FA, Paragraph [61], Paginated Page 39; Paragraph 5.1.14(c) of report at Paginated Page 131.

72 FA, Paragraph [61], Paginated Page 39; Paragraph 5.1.14(c) of report at Paginated Page 131.

73 FA, Paragraph [61], Paginated Page 39; Paragraph 5.1.14(c) of report at Paginated Page 131.

74 FA, Paragraph [61], Paginated Page 39; Paragraph 5.1.14(c) of report at Paginated Page 132.

51.1.1 "Fruitless and wasteful expenditure" increased 439% between year-end 2017 and year-end 2019, an increase on R125 338 759 in rand terms.

51.1.2 This is part of a significant downward trend, as fruitless and wasteful expenditure had increased by R24 250 084 between year-end 2016 and year-end 2017.

51.1.3 "Irregular spending" increased 738% between year-end 2017 and year-end 2019, an increase on R105 618 899 in rand terms[75].

51.2 Ditsobotla has failed to provide the Auditor-General with sufficient information to conduct the audit on its financial affairs required by Constitution[76] and the PAA[77] for five of six audit periods between 2014 and 2019[78].

51.3 Ditsobotla's audit report for financial year-end 2018[79] contains the following findings by the Auditor-General:

51.3.1 The Auditor-General could not express an opinion on Ditsobotla's financial statements for the period because of the significance of the matters described as the basis for the disclaimer of opinion section of the report, and the failure by

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75 FA, Paragraph [73.1], Paginated Page 42.

76 Section 183 of the Constitution.

77 Section 4(1) of the PAA.

78 FA, Paragraph [83], Paginated Page 46.

79 Annexure X6 at Paginated Page 220.

Ditsobotla to provide sufficient appropriate audit evidence to provide a basis for an audit opinion on its financial statements[80].

51.3.2 An adequate management, accounting and information system was not in place[81]

51.3.3 Ditsobotla's financial statements were not prepared by the municipality in accordance with section 122 of the MFMA and included material misstatements which were raised by the auditors but not adequately corrected[82].

51.3.4 Ditsobotla could not provide sufficient appropriate audit evidence in respect of almost every aspect of its:

(a) assets[83],

(b) liabilities[84],

(c) general expenses[85];

(d) contractual commitments[86];

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80 Paragraph 2 of X6, Paginated Page 220.

81 Paragraph 47 of X6, Paginated Page 226.

82 Paragraph 39 of X6, Paginated Page 226.

83 Paragraph 3 of X6, Paginated Page 220.

84 Paragraph 4 of X6, Paginated Page 220.

85 Paragraph 20 of X6, Paginated Page 223.

86 Paragraph 24 of X6, Paginated Page 223.

(e) debtor accounts[87];

(f) accounts receivable[88]; or

(g) creditor accounts[89].

51.3.5 Ditsobotla does not have an adequate system to account for its contingent liabilities as required by GRAP 19[90].

51.3.6 Ditsobotla could not provide sufficient appropriate audit evidence for cash and cash equivalents of R43 168 235[91].

51.3.7 Ditsobotla could not provide sufficient appropriate audit evidence that revenue from municipal service charges of R329 799 777[92].

51.3.8 Ditsobotla could not provide sufficient appropriate audit evidence that revenue from retail water service charges of R64 799 674[93].

51.3.9 Ditsobotla could not provide sufficient appropriate audit evidence for property rates collected of R56 084 797[94].

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87 Paragraph 5 of X6, Paginated Page 220.

88 Paragraph 8-10 of X6, Paginated Page 221.

89 Paragraph 23 of X6, Paginated Page 223.

90 Paragraph 22 of X6, Paginated Page 223.

91 Paragraph 7 of X6, Paginated Page 221.

92 Paragraph 15 of X6, Paginated Page 221.

93 Paragraph 16 of X6, Paginated Page 221.

94 Paragraph 18 of X6, Paginated Page 222.

51.3.10 Ditsobotla could not provide sufficient appropriate audit evidence for general expenses of R101 744 342[95].

51.3.11 Ditsobotla incurred unauthorised expenditure of R38 186 563, although the Auditor-General could not confirm that this was the full extent of unauthorised expenditure because Ditsobotla did not disclose its unauthorised expenditure as required by section 125 of the MFMA[96].

51.3.12 Ditsobotla spent R8 476 149 during the year under review in contravention with the supply chain management requirements but did not disclose any irregular expenditure as required to do by 125 of the MFMA[97].

51.3.13 Ditsobotla made payments of R53 620 717 during the year under review that were regarded as fruitless and wasteful expenditure, however no fruitless and wasteful expenditure was disclosed as required to do by 125 of the MFMA[98].

51.3.14 Ditsobotla failed to take reasonable steps to prevent unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure as required by section 62(1)(d) of the MFMA[99].

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95 Paragraph 20 of X6, Paginated Page 223.

96 Paragraph 26 of X6, Paginated Page 224.

97 Paragraph 27 of X6, Paginated Page 224.

98 Paragraph 28 of X6, Paginated Page 224.

99 Paragraph 48-50 of X6, Paginated Page 226.

51.3.15 Unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure was not investigated to determine if any person is liable for the expenditure, as required by section 32(2)(b) of the MFMA[100].

51.3.16 Allegations of financial misconduct laid against officials of the municipality were not investigated, as required by section 171 (4)(a) of the MFMA[101].

52 In July 2020, Sakeliga's attorneys addressed a request for access to information in terms of PAIA to Ditsobotla, for access to various municipal documents such as the Auditor-General's audit reports, management reports, annual performance reports, annual compliance reports, non-compliance recommendations and various others all of which related to the municipality[102].

53 Despite being compelled to provide the documentation sought in the request for information[103], Ditsobotla fails to provide the documents requested[104].

54 It is submitted that the failure and / or refusal by Ditsobotla to provide Sakeliga with standard, statutorily required documentation is further indicative of complete administrative collapse within the municipality[105].

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100 Paragraph 51-53 of X6, Paginated Page 226-7.

101 Paragraph 54 of X6, Paginated Page 227.

102 FA, Paragraph [90.2], Paginated Page 54; read with annexure X9 at Paginated Page 307.

103 Court order to compel attached as X10 at Paginated Page 315 and return of service of order attached as X11 at Paginated Page 316.

104 FA, Paragraph [90.6], Paginated Page 55.

105 FA, Paragraph [90.6], Paginated Page 55.

55 Sakeliga has further submitted evidence[106]:

55.1 which demonstrates that there has been no improvement in the maintenance of municipal roads and other infrastructure between the COGTA MEC's report, dated 24 August 2020, and 10 March 2021 when the photographs attached were taken;

55.2 which demonstrates that service delivery is practically non-existent in the municipality[107]; and

55.3 that businesses in the municipality are failing and either closing or relocating out of the municipality[108].

Naledi Local Municipality (Sixth Respondent)

56 In respect of Naledi, the COGTA report highlights the following concerns:

56.1 Naledi was placed under intervention / administration by the provincial government in terms of section 137 of the MFMA (i.e., a *discretionary* intervention)[109];

56.2 The provincial government withdrew the intervention after 6 months[110];

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106 Photo album X12 at Paginated Page 318.

107 FA, Paragraph [90.9-90.14], Paginated Page 56-58; read with supporting affidavits from residents attached as X15 and X16 at Paginated Page 338 and 346 respectively.

108 FA, Paragraph [90.15], Paginated Page 58; read with letters from local businesses attached as X13 and X14 at Paginated Page 335 and 337 respectively.

109 FA, Paragraph [63], Paginated Page 39; Paragraph 5.1.3(a) of report at Paginated Page 96.

110 FA, Paragraph [63], Paginated Page 39; Paragraph 5.1.3(a) of report at Paginated Page 96.

56.3 The intervention was withdrawn because the NCOP did not support the invocation of section 139(1)(b) of the Constitution, not because the intervention was either complete or successful[111];

56.4 Prior to the intervention by the provincial government, the executive committee and municipal council of Naledi were "not functional"[112];

56.5 Despite the achievement of certain tangible outcomes, post the intervention by the provincial government, Naledi has again started to experience political and administrative instability[113];

56.6 The position of the Municipal Manager and Chief Financial Officer remain vacant[114];

56.7 Disputes over the recruitment and appointment of the Municipal Manager created chaos in the municipal council and administration, resulting in the closure of the municipal offices for almost a period of three weeks, during which time the community couldn't access services[115].

56.8 Naledi's financial position is dire:

56.8.1 Poor audit outcomes are recurrent over the past seven years[116];

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111 Paragraph 5.1.3(a) of report at Paginated Page 96.

112 Paragraph 5.1.3(a) of report at Paginated Page 96.

113 FA, Paragraph [64], Paginated Page 39; Paragraph 5.1.3(a) of report at Paginated Page 97.

114 FA, Paragraph [64], Paginated Page 39; Paragraph 5.1.3(a) of report at Paginated Page 97.

115 FA, Paragraph [65], Paginated Page 40; Paragraph 5.1.3(a) of report at Paginated Page 97.

116 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 97.

56.8.2 The approved budget is not cash-backed[117];

56.8.3 Naledi is "not financially viable"[118];

56.8.4 Naledi fails to pay its creditors and fulfil other commitments[119];

56.8.5 Naledi fails to comply with section 65(2)(e) of the MFMA, which requires that "all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement"[120];

56.8.6 Information on debtors and creditors cannot be verified[121];

56.8.7 Naledi's total debt to creditors as at 20 January 2020 was R127 000 000, of which 97% was outstanding for more than 90 days[122];

56.8.8 Naledi is unable to implement credit control measures to recover outstanding debts from consumers, evident from the total outstanding debtors book of R423 000 000 at the end of January 2020[123].

56.9 Regarding Naledi's service delivery:

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117 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

118 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

119 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

120 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

121 Paragraph 5.1.3(b) of report at Paginated Page 98.

122 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

123 FA, Paragraph [66], Paginated Page 40; Paragraph 5.1.3(b) of report at Paginated Page 98.

56.9.1 Refuse removal not adequately performed[124];

56.9.2 Cleaning or the town and townships not adequately performed[125];

56.9.3 There are no landfill sites at either Stella or Rekgaratlhile townships[126];

56.9.4 Water supply is interrupted due to lack of maintenance and non-payment for water services[127];

56.9.5 Infrastructure is old and inadequate[128];

56.9.6 Poor maintenance results in sewage spillages[129].

57 Audit documents and findings for Naledi:

57.1 Naledi's annual financial statements demonstrate:

57.1.1 "Irregular expenditure" increased 3167% between year-end 2017 and year-end 2018, an increase on R65 771 303 in rand terms.

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124 FA, Paragraph [67], Paginated Page 40; Paragraph 5.1.3(c) of report at Paginated Page 98.

125 FA, Paragraph [67], Paginated Page 40; Paragraph 5.1.3(c) of report at Paginated Page 98.

126 FA, Paragraph [67], Paginated Page 40; Paragraph 5.1.3(c) of report at Paginated Page 98.

127 FA, Paragraph [67], Paginated Page 40; Paragraph 5.1.3(c) of report at Paginated Page 98.

128 FA, Paragraph [67], Paginated Page 40; Paragraph 5.1.3(c) of report at Paginated Page 98-9.

129 Paragraph 5.1.3(c) of report at Paginated Page 99.

57.1.2 "Unauthorised expenditure" increased 120% between year-end 2017 and year-end 2018, an increase on R33 730 849 in rand terms[130].

57.2 There is a clear and increasing decline in Naledi's ability to meet audit requirements, and Naledi failed to submit audit information to the Auditor-General for the year-end 2019 so as to conduct the audit on its financial affairs[131] required by Constitution[132] and the PAA[133].

57.3 Naledi's audit report for financial year-end 2018[134] contains the following findings by the Auditor-General:

57.3.1 The Auditor-General could not express an opinion on Naledi's financial statements for the period because of the significance of the matters described as the basis for the disclaimer of opinion section of the report, and the failure by Naledi to provide sufficient appropriate audit evidence to provide a basis for an audit opinion on its financial statements[135].

57.3.2 An adequate management, accounting and information system was not in place[136].

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130 FA, Paragraph [73.2], Paginated Page 43.

131 FA, Paragraph [83], Paginated Page 46.

132 Section 183 of the Constitution.

133 Section 4(1) of the PAA.

134 Annexure X8 at Paginated Page 295.

135 Paragraph 2 of X8, Paginated Page 295.

136 Paragraph 58 of X8, Paginated Page 303.

57.3.3 Naledi's financial statements were not prepared by the municipality in accordance with section 122 of the MFMA and included material misstatements which were raised by the auditors but not adequately corrected[137].

57.3.4 Naledi could not provide sufficient appropriate audit evidence in respect of almost every aspect of its:

(a) assets[138],

(b) liabilities[139],

(c) general expenses[140];

(d) contractual commitments[141];

(e) debtor accounts[142];

(f) accounts receivable[143]; or

(g) creditor accounts[144].

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137 Paragraph 52 of X8, Paginated Page 303.

138 Paragraph 3 of X8, Paginated Page 295.

139 Paragraph 3 of X8, Paginated Page 295.

140 Paragraph 23 of X8, Paginated Page 298.

141 Paragraph 20 of X8, Paginated Page 298.

142 Paragraph 7 of X8, Paginated Page 296.

143 Paragraph 5-6 of X8, Paginated Page 295-6.

144 Paragraph 9 of X8, Paginated Page 296.

57.3.5 *Ditsobotla* could not provide sufficient appropriate audit evidence for cash and cash equivalents of R43 168 235[145].

57.3.6 Naledi could not provide sufficient appropriate audit evidence that revenue from municipal service charges of R148 416 969[146].

57.3.7 Naledi did not provide any audit evidence for revenue from water or electricity charges as the municipality did not have an adequate system of internal control to account for these services charges and did not keep proper records[147].

57.3.8 Naledi could not provide sufficient appropriate audit evidence for property rates collected of R46 057 550[148].

57.3.9 Naledi could not provide sufficient appropriate audit evidence for general expenses of R17 966 478[149].

57.3.10 Naledi incurred unauthorised expenditure of R150 344 699, although the Auditor-General could not confirm that this was the full extent of unauthorised expenditure because Naledi did not disclose its unauthorised expenditure as required by section 125 of the MFMA and the municipality did not have an

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145 Paragraph 7 of X6, Paginated Page 221.

146 Paragraph 12 of X8, Paginated Page 297.

147 Paragraph 12 of X8, Paginated Page 297.

148 Paragraph 13 of X8, Paginated Page 297.

149 Paragraph 23 of X8, Paginated Page 298.

adequate system of internal control to account for unauthorised expenditure and did not keep proper records[150].

57.3.11 Naledi incurred irregular expenditure of R226 823 039, including R15 170 768 spent during the year under review in contravention with the supply chain management requirements but did not disclose any irregular expenditure as required to do by 125 of the MFMA. As the municipality did not quantify the full extent of the irregular expenditure, it was impracticable to determine the total irregular expenditure that should have been disclosed[151].

57.3.12 Naledi made payments of R126 676 809 during the year under review that were regarded as fruitless and wasteful expenditure, although the Auditor-General could not confirm that this was the full extent of fruitless and wasteful expenditure because Naledi did not have an adequate system of internal control to account for unauthorised expenditure and did not keep proper records[152].

57.3.13 Naledi failed to take reasonable steps to prevent unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure as required by section 62(1)(d) of the MFMA[153].

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150 Paragraph 27 of X8, Paginated Page 299.

151 Paragraph 29 of X8, Paginated Page 299-300.

152 Paragraph 28 of X8, Paginated Page 299.

153 Paragraph 59-61 of X8, Paginated Page 303.

57.3.14 Unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure was not investigated to determine if any person is liable for the expenditure, as required by section 32(2)(b) of the MFMA[154].

58 Sakeliga has further submitted evidence:

58.1 which demonstrates that there is no maintenance of municipal roads and other infrastructure[155]: and that service delivery is practically non-existent in the municipality[156]; and

58.2 that businesses in the municipality are failing and either closing or relocating out of the municipality[157].

59 Central to the collapse of service delivery in Naledi is its severe failings vis-à-vis Eskom:

59.1 It is common cause that Naledi is in arrears with its liabilities towards Eskom.

59.2 Naledi owes Eskom roughly R 290 000 000.00 as on 30 December 2019. That debt has increased since and was estimated at R390 000 000.00 when the founding affidavit was deposed to[158].

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154 Paragraph 77 of X8, Paginated Page 305.

155 Photo album X17 at Paginated Page 351.

156 FA, Paragraph [90.18-90.28], Paginated Page 59-64; read with supporting affidavit from resident attached as X20 at Paginated Page 369.

157 FA, Paragraph [90.29-30], Paginated Page 63-64; read with letters from attorney representing local businesses attached as X19 at Paginated Page 367.

158 FA, Paragraph [90.20], Paginated Page 60.

59.3 This is (shockingly) despite the fact that the majority of the local community in Naledi is on a pre-paid electricity system and Eskom supplies electricity to the township of Vryburg directly.

59.4 The irresistible conclusion is that Naledi's spiralling debt to Eskom is the result of its failure to pay collected funds over to Eskom.

59.5 This leads to the frequent termination of bulk electricity supply to Naledi by Eskom, leaving the municipality's businesses and residents without electricity for extended periods.

59.6 Local residents and businesses approached the High Court to interdict Eskom from terminating bulk electricity supply to Naledi due to the failure by the municipality to pay collected funds over to Eskom[159].

Conclusion on the factual satisfaction of the jurisdictional requirements

60 We submit that, based on the evidence advanced by Sakeliga and summarised above, this Court should find that:

60.1 Both Ditsobotla and Naledi are experiencing a crisis in their respective financial affairs.

60.2 The financial crisis, which both Ditsobotla and Naledi are experiencing, has resulted in a serious or persistent material breach of, both:

60.2.1 their obligations to provide basic services; and

60.2.2 their obligations to meet its financial commitments.

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159 FA, Paragraph [90.21], Paginated Page 61.

60.3 We submit that, as a factual proposition, this should be common cause.

60.4 It is beyond question that neither Ditsobotla nor Naledi provide basic services or meet their financial commitments.

61 In the result, it is submitted that the jurisdictional requirements for a *mandatory* intervention in terms of section 139(5) of the Constitution are met in respect to both Ditsobotla and Naledi.

62 We shall revert to the "highly" technical defences raised by the opposing respondents in this regard.

THE CASE FOR A SPECIAL MASTER

63 The main objection against the appointment of a special master found in the affidavits of the opposing respondents, seems to be that such a special master will effectively usurp the Constitutional powers allocated to the different spheres of government.

64 This objection is premised on an erroneous view of the function of a special master, we submit.

65 A special master is not appointed to substitute government and its officials of political office bearers, but to ensure that, for an interim period, order to bridge any legislative and democratic inefficiencies, and to ensure their powers are exercised properly.

66 The special master operates under the direct supervision as an extended arm of this Court.

67 We deal with the concept below.

68 Judicial appointment of special masters is a novel concept in South Africa.

69 However, in upholding a judgement of the Land Claims Court[160] in *Mwelase v Director-General, Department of Rural Development and Land Reform*[161] the Constitutional Court rubbished the argument that the concept is "an exotic or outlandish importation"[162] and endorsed the appointment of a special master as a remedy designed to fix "persistent institutional failings"[163].

70 The appointment of special masters is thus not argued for on the basis of comparable foreign jurisprudence and importation but, rather, on the basis of the doctrine of *stare decisis* applied to the *Mwelase* litigation and the conspectus of authority endorsing the court's obligation, under section 172 of the Constitution, to craft just and equitable relief in response to violations of and non-compliance with the Constitution.

71 In *Mwelase* I, Ncube AJ identified the following characteristics of a special master:

71.1 an independent person who is appointed by, and reports to, the court;

71.2 his or her duty is to assist the court;

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160 *Mwelase and Others v Director-General, Department of Rural development and Land Reform And Others* 2017 (4) SA 422 (LCC) per Ncube AJ ["*Mwelase* I"].

161 *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) per Cameron J ["*Mwelase* III"]

162 *Mwelase* III at [55] per Cameron J.

163 *Mwelase* III at [70] per Cameron J.

71.3 the special master is not an advocate for the claimants or for the government but an agent of the court and, as such, he or she is given limited decision-making powers; and

71.4 the special master provides additional resources to the court. The special master will bring skills that are chosen specifically for the case at hand, and can devote enough time to the litigation to become fully acquainted with the parties and extensive information involved[164].

72 In *Mwelase* III[165], Cameron J endorsed the aforesaid definitional criteria and emphasised the point that a special master remains an agent of the court, acting in extension of the court's own supervisory jurisdiction and as an extension of judicial independence, continually subject to court control and authority[166].

73 Cameron J also adds that:

> *"Special masters, often with expertise in specialist areas of government, may assist with either devising a remedial plan or implementing it. In implementing a remedy, the main task of a special master is to oversee and monitor — rather than usurping performance of executive functions, which is closer to the functions of other court-appointed officers (administrators or receivers, whose respective tasks may be to supplement or replace management of a government institution)[167]."*

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164 *Mwelase* I at [19] per Ncube AJ.

165 *Mwelase* III.

166 *Mwelase* III at [61] per Cameron J.

167 *Mwelase* III at [58] per Cameron J.

THE CASE FOR SPECIAL MASTERS IN LOCAL GOVERNMENT ADMINISTRATION

Constitutional and legislative expectation of local government structures

74 The Constitution is clear on the role of municipalities under our new constitutional order.

75 While section 40(1) establishes local government as "distinctive, interdependent and interrelated" within the three spheres of government, section 41(1) requires all spheres of government, *inter alia*, to provide effective, transparent, accountable and coherent government[168] and to be loyal to the Constitution, the Republic and its people[169].

76 Section 151(3) of the Constitution then recognises the autonomy of municipalities to govern the affairs of their own community at their "own initiative", subject to national and provincial legislation and, in accordance with section 41(1)(d), the provisions of the Constitution.

77 Section 152(1) of the Constitution declares the objects of local government, as the minimum standards expected of municipalities:

77.1 to provide democratic and accountable government for local communities[170];

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168 Section 41(1)(c) of the Constitution.

169 Section 41(1)(d) of the Constitution

170 Section 152(1)(a) of the Constitution.

77.2 to ensure the provision of services to communities in a sustainable manner[171];

77.3 to promote social and economic development[172];

77.4 to promote a safe and healthy environment[173]; and

77.5 to encourage the involvement of communities and community organisations in the matters of local government[174].

78 The constitutional objects declared for local government thus set the minimum expectations of local government.

79 A municipality is constitutionally obligated to strive, within its financial and administrative capacity, to achieve these objects[175] and must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community[176].

80 The objects of local government are further expanded upon and regulated through the powers and obligations arising from legislation such as, *inter alia*, the:

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171 Section 152(1)(b) of the Constitution.

172 Section 152(1)(c) of the Constitution.

173 Section 152(1)(d) of the Constitution.

174 Section 152(1)(e) of the Constitution.

175 Section 152(2) of the Constitution.

176 Section 153(a) of the Constitution.

80.1 Local Government: Municipal Structures Act 117 of 1998 ["Structures Act"];

80.2 Local Government: Municipal Systems Act 32 of 2000 ["Systems Act"];

80.3 Local Government: Municipal Finance Management Act 56 of 2003 ["MFMA"].

81 Therefore, while a municipality has original and constitutionally entrenched powers to give effect to these constitutional imperatives, it also derives powers from legislation and from its own laws[177].

82 The institutional nature and role of municipalities is thus clearly defined and there are ample authorities which emphasis the important role played by municipalities in our constitutional dispensation.

83 In *Afriforum v Minister of Trade and Industry*[178], Victor J examines the legislative vision for municipalities under the Constitution and observes that "...the role of municipalities in our society is in fact at the centre of the quality of life of every person who lives in an area designated as such and is also the fulcrum around which civil society gravitates."[179]

84 The legitimate expectation which the Constitution entitles South Africans to place on their municipalities is thus not to be understated.

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177 *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) at [60] per Moseneke J.

178 *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) per Victor J.

179 *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) at [10] per Victor J.

85 It is therefore apt that, in the recent decision of *MEC of Cooperative Governance and Traditional Affairs: Free State v The Maluti-a-Phofung Local Municipality*[180] , Opperman J observed that:

> *[3] "Local government is the sphere of government closest to the people. These organs of state and its officials are the sentinels of basic human rights such as electricity delivery, water for household use, sewage and sanitation, storm water systems, refuse removal, fire-fighting services and municipal health services.*
>
> *[4] Their duty to manage the budget and monies of the Municipality with the utmost integrity and honour is supreme.*
>
> *[5] If the conduct of the Municipality, the Municipal Manager, a manager(s) directly accountable to the Municipal Manager and the Municipal Council does not comply with their legislatively imposed obligations; they must be called to order.*[181]"

The underlying failures

86 Where municipalities fail to deliver on their constitutional and legislative duties in a sustained and systematic way, it becomes necessary to fashion remedies which will assist to curb those failings.

87 While the appointment of a special master has been ordered in a broad range of circumstances abroad, we are concerned here with crafting suitably just and equitable remedies to the persistent institutional failures in the systematic functioning of local government.

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180 *MEC of Cooperative Governance and Traditional Affairs: Free State v The Maluti-a-Phofung Local Municipality and Others* (23/2021) [2022] ZAFSHC 147 (28 April 2022) per Molitsoane J et Opperman J.

181 *MEC of Cooperative Governance and Traditional Affairs: Free State v The Maluti-a-Phofung Local Municipality and Others* (23/2021) [2022] ZAFSHC 147 (28 April 2022) at [3]-[5] per Opperman J.

88 In addressing institutional failures, the appointment of a special master is apt. As put by Cameron J in *Mwelase* III, the remedy:

> "...recognises our joint responsibility, as a country, for sustaining and growing and strengthening our institutions. And it acknowledges our judicial complicity in institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations."[182]

89 In the Mwelase litigation, the failed implementation of the Land Reform (Labour Tenants) Act[183] by the Department of Rural Development and Land Reform ["the RDLR"] was being challenged.

90 The Land Reform (Labour Tenants) Act was enacted in response to the constitutional imperative at section 25(6) of the Constitution to enact legislation for persons whose tenure of land was insecure as a result of past discriminatory laws or practices[184].

91 The Department was thus required to execute on both a constitutional and legislative mandate.

92 At its core, underlying the Mwelase litigation was the failure by the RDLR to process applications adequately, or at all, for awards in land to labour tenants over a period to 20 years[185]. The failure was institutional and systematic.

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182 *Mwelase* III at [70] per Cameron J.

183 Land Reform (Labour Tenants) Act 3 of 1996 (the Act).

184 *Mwelase* I at [1], per Ncube AJ.

185 *Mwelase* I at [4], per Ncube AJ.

93 In *Mwelase* I, Ncube AJ described the processing of labour tenant claims as being effectively neglected and in a chaotic state[186], with a backlog of some 10 914 claims in August 2016[187] shortly before the matter was heard.

94 In his majority judgment in Mwelase III, Cameron J described the underlying situation as a "colossal crisis" arising from the *"institutional incapacity of the Department to do what the statute and the Constitution require of it."*[188]

95 Cameron J describes a scenario, not dissimilar to the present matter, whereby:

> *"...over nearly two decades, and indisputably since 2006, 86 the Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done."*[189]

96 Similarly, it is clear that neither Ditsobotla nor Naledi are able to do what statute and the Constitution require of them. This has been set out above in some detail.

The judicial overreach argument

97 Although the argument in *Mwelase* III was initially framed in terms of whether the order in *Mwelase* I was 'a textbook case of judicial overreach'[190], it was ultimately

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186 *Mwelase* I at [6], per Ncube AJ.

187 *Mwelase* I at [25], per Ncube AJ.

188 *Mwelase* III at [41] per Cameron J.

189 *Mwelase* III at [40] per Cameron J.

190 *Mwelase* III at [3] per Cameron J.

conceded that, in principle, a court-appointed special master could be justified in appropriate circumstances[191].

98 To this end, it is through section 172 of the Constitution that the court is clothed with a discretion to make any order that is just and equitable when deciding a constitutional matter.

99 This remedial discretion is a discretion in the true sense and now undoubtedly includes the power to appoint a special master in appropriate circumstances[192].

100 We submit that the persistent failure of government to act decisively and effectively in respect of either of the affected municipalities warrants to adoption of a new approach.

101 Providing guidance on the exercise of remedial discretion, Kriegler J in *Fose v Minister of Safety & Security*[193] observes that "harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial"[194].

102 Kriegler J says further that, "exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source"[195].

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191 *Mwelase* III at [54] per Cameron J. However, the Department argued that the "level of violation and dysfunction here were not extreme enough" to justify the appointment of a special master in the circumstances.

192 *Mwelase* III at [67]-[71] per Cameron J.

193 *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC).

194 *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at [95] per Kriegler J.

195 *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at [96] per Kriegler J.

103 The suitability of appropriate relief "is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights"[196] with reference to the particular facts of the matter[197].

104 This approach to remedial discretion is a constitutional imperative and, as put by Cameron J in *Mwelase* III, the bogeyman of separation of powers concerns should not cause courts to shirk from this constitutional responsibility."[198]

105 In *Electoral Commission v Mhlope*[199] the Constitutional Court held that:

> *"The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it, as it is empowered to."*[200]

106 In rejecting the argument that the appointment of a special master amounts to judicial overreach infringing on the doctrine of the separation of powers, Cameron J in *Mwelase* III points to the following Constitutional Court authorities:

106.1 *Treatment Action Campaign* II[201] where the court held:

> *"The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The*

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196 *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at [97] per Kriegler J.

197 *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at [97] per Kriegler J.

198 *Mwelase* III at [51] per Cameron J.

199 *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC).

200 *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) at [83] per Madlanga J.

201 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) ["*Treatment Action Campaign* II"].

Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."[202]

106.2 *Doctors For Life*[203] where the court held:

"...while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."[204]

106.3 *Mohamed*[205] where the court held:

"To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights."[206]

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202 *Treatment Action Campaign* II at [99], per the Court.

203 *Doctors For Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) ["*Doctors For Life*"].

204 *Doctors For Life* at [200], per Ngcobo J.

205 *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) ["*Mohamed*"].

206 *Mohamed* at [71], per the Court.

107 The basis of the court's power to order the appointment of a special master in order to oversee the implementation of constitutional and legislative obligations by a delinquent organ of state is thus impeccably underpinned by our constitutional jurisprudence.

108 There is thus nothing untoward in the argument that it would be appropriate for a special master to oversee the section 139 intervention process in a municipality.

109 As Stretch J observed in *Unemployed People's Movement v Eastern Cape Premier and Others*[207] in respect of the appointment of administrators under section 139 interventions:

> *"In short, the Constitution has empowered courts to be the ultimate referees on whether the Constitution or any other law has been breached. Separation of powers and provisions intended to serve as checks and balances do not mean that the branches of government leave each other untouched. The judiciary is tasked with overseeing compliance with the law by all branches of the state, its organs and all inhabitants of the Republic. When the Constitution requires that the judiciary decide a particular controversy, it can never amount to overreaching. If it is trespass at all, it is one that the Constitution itself allows*[208]*."*

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207 Unemployed People's Movement v Eastern Cape Premier and Others 2020 (3) SA 562 (ECG) at [96] per Stretch J.

208 Unemployed People's Movement v Eastern Cape Premier and Others 2020 (3) SA 562 (ECG) at [96] per Stretch J.

THE CASE OF THE RESPONDENTS

110 The application is opposed by the COGTA MEC[209], the Finance MEC[210], the COGTA Minister[211], the Minister of Finance[212], Ditsobotla[213] and Naledi[214] (collectively "the respondents").

111 Although Eskom filed a notice of intention to oppose[215], it has filed an explanatory affidavit and does not actively oppose the relief sought.

112 The respondents raise nothing more than technical legal defences to the relief sought by Sakeliga.

113 There is no engagement with the facts or merits of the application.

114 Against the backdrop of the genuine need that exists, this approach is not only over-formalistic, but disappointing.

115 In *Kirland*[216], Cameron J restated the principle of the "model litigant" expectation applied to organs of state in the following terms:

> *"[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of*

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209 Notice to oppose at paginated page 504.

210 Notice to oppose at paginated page 504.

211 Notice to oppose at paginated page 504.

212 Notice to oppose at paginated page 507.

213 Notice to oppose at paginated page 520.

214 Notice to oppose at paginated page 510.

215 Notice to oppose at paginated page 526.

216 *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at [82].

litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

116 In *Njongi*[217] the Constitutional Court, per Yacoob J, cautioned that organs of state (in that case a municipality) should not adopt technical defences lightly and the decision to do so must be informed by the values of the Constitution[218].

117 In *AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others*[219] de Villiers AJ interpreted *Njongi* and the principle of the state as the model litigant to require that there is a heightened duty on an organ of state (in that case a municipality) to address the real issues raised by in the case by a ratepayer, honestly, fairly, and properly[220].

118 One could therefore rightly expect responsible organs of state to engage fully and properly with the real issue, being a constitutional crisis in the affected municipalities.

119 Be that as it may, much of the technical points raised, constitute an attack on the applicant's pre-amended notice of motion.[221]

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217 *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

218 *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at [78-[80].

219 *AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others* (32217/2019) [2021] ZAGPJHC 661 (9 November 2021).

220 *AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others* (32217/2019) [2021] ZAGPJHC 661 (9 November 2021) at [14].

221 Pre-amendment Notice of Motion at Paginated Pages 1 to 11.

120 The answering affidavits received from the respondents informed Sakeliga's amendment of its notice of motion, which has properly been effected.[222]

121 The respondents have made no consequential adjustments to their own case in response to the amendment.

First, second, third and seventh respondents' answering affidavit

122 The answering affidavit for the first, second, third and seventh respondents is deposed to by a certain Phihadu Ephraim Motoko ["Motoko"][223], the head of the Department of Cooperative Governance and Traditional Affairs in the North West Province.

123 As a mere side remark we mention that he also deposes to the affidavit for the seventh respondent, who is the Premier, as well as the third respondent, who is in national government, being the COGTA Minister.

124 The first issue raised by Motoko is that the relief, in the pre-amended notice of motion, sought is incompetent.

125 The main thrust of this contention is that Section 139 of the Constitution provides for the "*relevant provincial executive to implement mandatory interventions*"[224].

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222 Amended Notice of Motion at Paginated Pages 2188 to 2103.

223 AA, Paginated Page 567.

224 AA, Paragraph [35], Paginated Page 580.

126 Section 139 of the MFMA imposes an obligation on the "provincial executive" to implement a mandatory intervention if the municipality, as a result of a financial crisis in its affairs, is in serious or persistent material breach of its obligations[225].

127 It is then contended that, since Section 132 of the Constitution describes "*executive councils*" to be:

> *"1. The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature."*

the relief sought ought to have been directed at the "*relevant provincial executive*", since the first to third respondents do not have the powers, conferred upon them by legislation, to do that what had been set out in prayers 1 to 5 of the pre-amended notice of motion[226].

128 As such, Motoko contends that the relief ought to have been directed at the provincial council, (i.e., each member of the provincial executive council).

129 The effect of Sakeliga's subsequent amendment was to seek the relief against the Premier in his capacity as the head of the provincial council (or the relevant executive authority).

130 Flowing from the aforesaid, Motoko raises the non-joinder of the executive council as the second leg of his tedious, overly technical attack.

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225 AA Paragraph [36], Paginated Page 581.

226 AA Paragraph [27], Paginated Page 577.

131 However, we submit that these issues have been resolved by the amendment and take the matter no further.

132 While Motoko reserves the respondents' right to supplement their answering affidavit once an amendment, which was foreseen, would have been effected[227], since the amendment was effected in March 2022[228] no amended or supplementary answering affidavit was filed by these respondents and there was no objection to the amendment itself.

133 Insofar as argument on the non-joinder point may be still raised on the basis that each individual Member of the Executive Council of the Province is not joined, we submit that such contention would lack merit.

134 In *Fair Cake Property Developers (Pty) Ltd v Premier, Wester Cape*[229] the court dismissed a special plea of misjoinder of the Premier in a case concerning the conduct of an MEC in the execution of a function specifically assigned to the MEC by the Executive Authority of the Province. The court found that:

> *"The MEC acted as part of the government of the Province and it was therefore proper to cite the Premier in whom the Executive Authority of the Province is vested (s 125 of the Constitution; s 35 of the Constitution of the Western Cape 1 of 1998)."*

135 Further to the aforesaid, Motoko does not engage with the merits of the Sakeliga's case insofar as it relates to the collapse of governance within the affected municipalities.

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227 AA Paragraph [55], Paginated Page 588.

228 Filing Notice, Paginated Pages 2188 to 2191.

229 *Fair Cape Property Developers (Pty) Ltd v Premier, Western Cape 2002 (6) SA 108 (C).*

136 However, we submit that it would prove near impossible dispute the dire state of affairs in these municipalities in the light of the evidence presented in the founding affidavit.

The fourth respondent's answering affidavit

137 Prior to dealing in more detail with the Finance Minister's answering affidavit, it is important to note the admissions made by the Finance Minister which pertain *inter alia* to the Naledi and Ditsobotla Municipalities. We quote paragraphs 11.2 and 11.3 of the Finance Minister's affidavit:

> *"11.2 In the last decade, the performance of many municipalities has unfortunately become synonymous with failure which in turn threatens the legitimacy and credibility of both political and administrative leadership. These have been evident in the findings between the Auditor-General, the National Treasury and the Department of Cooperative Governance.*
>
> *11.3 The state of municipal finances is at a critical state and provincial and national government recognise that urgent and critical measures are required to ensure that there are sound and sustainable financial management processes as envisaged in the MFMA."*

138 Note the particular reference to "urgent" measures that are required.

139 These admissions are cold comfort when considered in the light of the patent lack of any meaningful interventions, whether discretionary or mandatory.

140 The Finance Minister raises two issues.

141 Firstly, that prayer 5 is premature, because it is only when provincial government fails to properly intervene that the national executive can step in.[230]

142 This argument is ostensibly premised on the contention that section 139(7) of the Constitution only becomes applicable when provincial government fails with its interventions.

143 This argument is wrong and misconstrues the relief sought.

144 Sakeliga seeks mandatory intervention by the provincial executive, which implicitly involves the statutorily required request to the Municipal Finance Recovery Service.

145 This last-mentioned process, of necessity, involves the Finance Minister, who must determine the reasons for the crisis in each of the affected municipalities and take the further steps, as envisaged in Section 139 of the MFMA.[231]

146 To the extent that any confusion may have existed, this has been clarified by means of the amendment.

147 Secondly, the Finance Minister objects to the appointment of the special master[232].

148 As we have demonstrated above, the appointment of a special master is justified precisely because government has failed to employ or effectively employ the

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230 AA, Paragraph [12.1], Paginated Page 618.

231 AA, Paragraph [20.1], Paginated Page 623.

232 AA, Paragraph [12.2], Paginated Page 618.

mechanism proposed by the Constitution to intervene in the dysfunctional municipalities alternatively, that drastic alternative steps are warranted.

149 What the Finance Minister then does is to set out the steps it alleged it has taken to ostensibly come to the rescue of Naledi and Ditsobotla[233].

150 It is astonishing that, having acknowledged the dire state of affairs in several municipalities, including Naledi and Ditsobotla, being prevalent and persistent for more than a decade, that Finance Minister's so-called solution is limited to the following in paragraph 28 of his answering affidavit:

> *"28. Subsequent to the MEC's cessions with all the identified municipalities including the fifth and sixth respondents, the Provincial Executive Council (PEC) will in due course make a decision to invoke Mandatory Intervention in terms of Section 139(5)(a)."*

151 This answer is entirely at odds with the required urgency referred to by the Finance Minister in paragraph 11 of his answering affidavit (*supra*).

152 It provides no solution.

The sixth respondent's answering affidavit

153 Naledi filed an answering affidavit in opposition to the relief sought by Sakeliga[234] deposed to by Modisenyane Thompson Segapo ["Segapo"] the Municipal Manager of Naledi[235].

154 In his answering affidavit, Segapo tellingly states the following:

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233 AA, Paragraphs [26]-[31], Paginated Page 625 to 629.

234 Paginated Page 1091.

235 AA, Paragraph [1], Paginated Page 1092.

> *"Whilst the applicant may be raising important public interest issues relating to the provision of basic services by the sixth respondent, the applicant's proposed solution to these issues cannot be countenanced for it is not constitutionally permissible to allow a private entity to take over governance and side-line those duly elected by community to govern*[236]*."*

155 While the aforesaid demonstrates Naledi's complete misunderstanding of the purpose and nature of the relief sought, it further demonstrates that Naledi's departure point is the absurd premise that ensuring the effectiveness of governance is not the business of the governed. This approach is plainly at odds with the Constitution.

156 Segapo raises five arguments on Naledi's behalf.

157 The **first** argument raised by Segapo, *in limine*, is that Sakeliga does not have the required *locus standi* to have brought the application.

158 This is mainly premised on the proposition:

158.1 that, upon receipt of the application, Naledi's representatives requested a list of the members of Sakeliga that reside within its jurisdiction;[237]and

158.2 that Sakeliga's legal representatives refused to provide the list[238].

159 This is effectively countered, both factually and legally, in Sakeliga's reply[239].

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236 AA, Paragraph [5], Paginated Page 1092.

237 AA, Paragraph [10], Paginated Page 1094.

238 AA, Paragraph [11], Paginated Page 1094

239 RA, Paragraphs [22]-[26], Paginated Pages 2027 to 2029.

160 However, as a starting point, Segapo concedes (*vide* paragraph 5 of his answering affidavit quoted above), that Sakeliga raises "important public interest issues relating to the provision of basic services by the sixth respondent".

161 Inexplicably, Segapo then claims to have "no doubt that this application is not brought in the interests of the community nor the public interest"[240].

162 Segapo claims that the application is not brought in terms of the provisions of section 38 of the constitution, because it allegedly does not relate to an infringement of the rights as enshrined in the Bill of Rights. The sixth respondent refers to the case of ***Kruger v President of the Republic of South Africa***[241], in an attempt to convince that the present application does not amount to constitutional litigation[242].

163 It is apparent that the present application only deals with Constitutional issues, in that the applicant seeks to enforce compliance with the relevant provisions of the Constitution.

164 The **second** argument raised by Segapo, *in limine*, is one of non-joinder of political parties[243].

165 He claims – with no actual evidence – that the "*majority*" of councillors are members of political parties and do not represent themselves. The allegation is

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240 AA, Paragraph [14], Paginated Page 1095.

241 2009 (1) SA 417 (CC)

242 AA, Paragraph [16], Paginated Page 1096.

243 AA, Paragraph [19], Paginated Page 1096.

that the appointment of a special master will strip these councillors of their constitutional powers.[244]

166 However, the contention is wrong and completely at odds with section 139(5)(b) of the Constitution and the MFMA, which oblige the provincial executive to dissolve the councils of the dysfunctional municipalities should they resist a mandatory intervention and should they fail to cooperate with the provincial executive in the intervention process.

167 The special master will not usurp the powers of any councillor or political party.

168 The special master will simply, and only for an interim period, take over specific administrative functions as an extended arm of this Court in implementing a turnaround strategy.

169 Therefore, on the contrary, the appointment of a special master is likely to aid the municipal council in avoiding dissolution – with the consequent stripping of powers – otherwise required by section 139(5)(b) of the Constitution in the event that the municipal council is resistant to the process.

170 The political parties have therefore no interest in this application.

171 None of the relief sought requires the dissolution of a municipal council or the disenfranchisement of any councillor, save to the extent that section 139(5)(b) of the Constitution may be required to be implemented.

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244 AA, Paragraph [26], Paginated Page 1099.

172 We also dealt with the proposition hereinbefore that the special master is a mere extension of the powers of this court and it is warranted where a constitutional crisis is evident.

173 This position was confirmed in the comparative analysis of this Court in the appeal matter of *Premier of the North West Province and Others v Kagisano Molopo Local Municipality and Others*, where the court found that

> *"The placing of the Provincial Government under administration, relevant to this appeal, is to ensure compliance with its constitutional mandate. This by no means implies or constitutes a complete takeover of the Provincial Government*[245]*."*

174 The full bench in *Kagisano* expressly found that administration of a sphere of government does not divest it of its constitutionally entrenched powers, subject of course to the provisions of the Constitution itself[246].

175 The effect of the relief sought by Sakeliga in this application accords with this interpretation.

176 The **third** argument raised by Segapo, is that the application has become moot or academic[247] on the basis that the application was launched prior to the municipal elections, which would have happened in October 2021.

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245 *Premier of the North West Province and Others v Kagisano Molopo Local Municipality and Others* (CIV APP FB 01/2020) [2022] ZANWHC 7 (10 March 2022) at [30].

246 *Premier of the North West Province and Others v Kagisano Molopo Local Municipality and Others* (CIV APP FB 01/2020) [2022] ZANWHC 7 (10 March 2022) at [32].

247 AA, Paragraph [29], Paginated Page 1100.

177 Despite the protracted history and systemic nature of the collapse in Naledi, Segapo actually suggests that the collapse of governance cannot be attributed to the council that will substitute the previous council, after the elections.

178 Logic dictates that Segapo's argument is overly simplistic. There are two submissions to be made in this regard:

178.1 First, and despite all hope to the contrary, the mere appointment of a new council to a municipality will not resuscitate the municipality struck by a total collapse of governance. Hope is not a strategy.

178.2 Second, and more fundamentally, a municipality consists of an administrative arm as well as a political arm. The municipality has evidently been plagued by political instability and its administrative arm has disintegrated. An election of new councillors does not resolve such issue. The intervention therefore remains necessary, primarily in respect of the administrative arm.

179 The **fourth** argument raised by Segapo, is that the relief sought is unconstitutional.[248]

180 This argument is premised on the following contentions:

180.1 that the appointment of a special master would be without a competitive bidding process as envisaged in Section 217 of the constitution[249] ["section 217 contention"];

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248 AA, Paragraph [41], Paginated Page 1103.

249 AA, Paragraph [35], Paginated Page 1101.

180.2 that the appointment of a special master by a court, as opposed to by the municipality itself, will be contrary to the principle of separation of powers[250] ["separation of powers contention"]

180.3 that the constitutional framework does not provide for the appointment of a special master, because, so it is alleged, the special master is intended to take over the duties of the municipal council as contemplated by Section 4 of the Systems Act without any lawful ground to do so[251] ["Constitutional framework argument"] and

180.4 that the proposed appointment of the special master is inimical to the principle of proportionality ["proportionality contention"].

181 Regarding the section 217 contention:

181.1 The notion that the appointment of a master offends section 217 of the Constitution is plainly inconsistent with the purpose of the appointment of such a special master.

181.2 The special master is appointed as an extended arm of this court to operate only for a limited period of time to resolve an existing constitutional crisis.

181.3 The special master has limited powers and functions and reports to this Court. We argued this aspect with reference to the case of *Mvelase* hereinabove.

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250 AA, Paragraph [36], Paginated Page 1102.

251 AA, Paragraph [37], Paginated Page 1102.

181.4 The special master is not a service delivery company or entity that provides services to government. It acts under the auspices of this Court and merely exists to resolve a constitutional crisis.

181.5 Were a special master to be appointed by following procurement processes as envisaged in section 217 of the Constitution and the MFMA, its appointment would be subject to the discretion of the collapsed municipalities.

181.6 The maintenance of that discretion would undermine the purpose of appointing such a special master. The point made in the application of the applicant is that there is a collapse of governance. This inevitably includes the collapse of proper procurement processes.

182 Regarding the separation of powers contention:

182.1 The appointment of a special master cannot operate contrary to the principle of separation of powers.

182.2 The appointment operates as a mechanism, in exceptional circumstances, where there is a constitutional crisis. The crisis exists precisely due to the non-compliance of the separate spheres of government to comply with their constitutional obligations.

182.3 It is true that the special master is intended to, for an interim period, take over certain administrative functions, which ought to be executed by the administrative arms of the respective municipalities. However, insofar as it takes over, to a limited extent, some duties of the municipal councils, it

does so, because they do not or cannot comply with their constitutional obligations.

183 Regarding the Constitutional framework contention:

183.1 We have demonstrated above that the Constitutional Court in *Mwelase v Director-General, Department of Rural Development and Land Reform*[252] endorsed the appointment of a special master as a constitutional remedy designed to fix "persistent institutional failings"[253].

184 Regarding the proportionality contention:

184.1 The appointment of a special master does also not constitute an overreach that offends the principle of proportional representation.

184.2 Where a proportionally elected municipal council is incompetent or incapacitated to comply with its constitutional duties, our courts are constitutional obliged to step in. This is confirmed in *Mwelase*.

184.3 The duty of this Court is to craft an effective remedy that resolves the dire need of the communities, neglected due to the collapse of the municipalities involved. Those municipal councils, elected, will remain intact unless they frustrate the process.

185 The **fifth** argument raised by Segapo, rather unconvincingly, is that the provincial executive has already intervened.[254]

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252 *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) per Cameron J ["*Mwelase* III"]

253 *Mwelase* III at [70] per Cameron J.

254 AA, Paragraphs [42]-[61], Paginated Pages 1103 – 1107.

186 Segapo says that:

186.1 there were numerous discretionary attempts to intervene by the provincial executive; and

186.2 these interventions were generally ineffective, with the appointed administrator and financial expert resigning their positions due to the "challenges" within the municipality[255]

but no mention is made of any mandatory intervention due to the acknowledged crisis.

187 In paragraph 59 of his affidavit, Segapo confirms that the North West Provincial Treasury, in a letter to Naledi on 23 June 2021, advised it that it conducted an assessment in line with Section 138 and 140 of the MFMA[256].

188 The letter confirms that Naledi was in serious breach of its financial commitments and that there was a serious financial crisis[257].

189 Despite stating that the provincial executive was to place the sixth respondent under administration no confirmation of a mandatory intervention is provided[258].

190 Segapo's affidavit all but confirms the need to place Naledi under mandatory administration and subject to the oversight of a special master.

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255 AA, Paragraph [45], Paginated Page 1104.

256 Paginated Page 1107.

257 AA, Paragraph [59], Paginated Page 1107.

258 AA, Paragraph [60], Paginated Page 1107.

COSTS

191 We submit that an order for Sakeliga's costs should follow on an attorney and client scale as sought in the amended notice of motion, including the costs of two counsel where so employed[259].

192 As we have demonstrated above, the respondents' opposition to this application has been premised largely on misconceived technical objections, with little substantive evidence produced in answer to the relief sought.

193 As organs of state, the respondents are bound to exercise a heightened duty to address the real issues raised by in the case by a ratepayer, honestly, fairly, and properly[260].

194 The respondents have failed to do so in a *bona fide* manner and have, thereby, necessitated the incursion of significant litigation costs by Sakeliga over issues which ought not to have been placed in dispute.

195 We submit that Sakeliga, an organisation litigation in the public interest, should not be out of pocket as a result of the respondents' obstructive and misconceived opposition to the application.

196 In the result, we submit that an order for costs on a scale as between attorney and client is warranted.

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259 Prayer 16, Paginated Page 2199.

260 *AMA Casa Props 129 (Pty) Limited v The City of Johannesburg and Others* (32217/2019) [2021] ZAGPJHC 661 (9 November 2021).

197 However, it is the well-established practise of this Court, cited with reference to the judgement in *Biowatch Trust*[261] not to award costs against unsuccessful litigants who have sought, in good faith, to vindicate constitutional rights.

198 We submit that, as stated at the outset, this application has been brought with the sole purpose to ensure effective and functional governance within local government in the North West Province.

199 This purpose undoubtedly falls within the contemplation of the principles set by *Biowatch Trust.*

200 We therefore submit that, in the event that this Court declines to grant the relief sought by Sakeliga, no order for costs should be made against it.

CONCLUSION

201 In the premises we submit that the relief as set out in the amended notice of motion is appropriate and stands to be granted.

202 Alternatively, the applicant approaches this court to seek relief that would be just and equitable and that will resolve the crisis within the affected municipalities.

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261 *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

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Cc:	Elbie Swanepoel; Labuschagne Attorneys
Subject:	Sakeliga NPC / Member of the Executive Council: North West Province: COGTA & Others (Case No: M311/2021)
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